STATE OF NEW YORK
SUPREME COURT ALBANY COUNTY

In the Matter of the Application of

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

Petitioners,

REPLY

for a Judgment Pursuant to CPLR Article 78

INDEX NO. 1682-12

-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 reply herein, by their attorneys, Caffry & Flower, allege as follows:

1. Petitioners make this reply pursuant to CPLR § 7804(d) to the objections in point of law, affirmative defenses, and new matter alleged in the answers of the Respondents herein, being the Objections in Point of Law, Answer to Amended Petition, and Return of respondents Adirondack Park Agency ("APA" or "Agency") and New York State Department of Environmental Conservation ("DEC") (collectively "State") dated July 5, 2012 ("State's

Answer"),[1] and the Objections in Point of Law and Verified Amended Answer of respondents 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 (collectively "Project Sponsors") dated July 9, 2012 ("Project Sponsors' Answer").

2. The following subjects are addressed in this Reply:

[1] The original Petition herein was filed on March 20, 2012. On June 18, 2012, pursuant to CPLR § 3025(a), Petitioners served an Amended Petition which added a Thirtieth Cause of Action, but did not otherwise change the contents, pagination or paragraph numbering of the Petition. All references herein to the "Petition" are to the Amended Petition, unless otherwise stated. Likewise, all references to the "Answer" or "Answers" of the Respondents are to their Amended Answers, unless otherwise stated.

PETITIONER SIERRA CLUB HAS STANDING

3. Petitioner Sierra Club has standing to sue in this matter. The Project Sponsors allege at Point 10 of their Objections in Point of Law (Project Sponsors' Answer pp. 17-19), and as their First Affirmative Defense (Project Sponsors' Answer ¶380), that Sierra Club lacks standing because, according to their contentions, the Atlantic Chapter of the Sierra Club is a separate entity from the national Sierra Club (Project Sponsors' Answer p. 17), Sierra Club did not participate in the adjudicatory hearing (Project Sponsors' Answer p. 17), and Sierra Club did not show how it, or its members, would be adversely affected by the APA's decision to approve the Adirondack Club and Resort ("ACR") project in the Town of Tupper Lake (the "Project") (Project Sponsors' Answer pp. 18-19).

4. Contrary to the Project Sponsors' assertions, there is only one Sierra Club, of which the Atlantic Chapter is a subunit. RD Aff. ¶7.[2]

5. Petitioner Sierra Club has standing to bring this Article 78 proceeding because protection of wild lands, such as the Adirondacks, is one of its core purposes, and the causes of action in the Petition are in alignment with Sierra Club's long history of advocacy in the Adirondack Park. RD Aff. ¶¶ 2, 5.

[2] Affidavit of Roger Downs, sworn to June 14, 2012 (hereinafter "RD Aff. _"), filed herewith.

See Matter of Save the Pine Bush, Inc. v. Common Council of City of Albany, 13 N.Y.3d 297, 301 (2009).[3]

6. Since as early as 1972, Sierra Club has been working to protect the wild, scenic and open space lands of the Adirondack Park. RD Aff. ¶9.

7. Sierra Club was a co-signatory on a letter dated January 8, 2007 that urged the APA to hold a "formal adjudicatory public hearing" on the ACR Project. R. 8168.

8. Later, Sierra Club provided written comments to the APA "support[ing] the core concept of revitalizing the Big Tupper ski area," but "oppos[ing] development in the proposed project lands classified as 'resource management' under the APA Act." A copy of Sierra Club's letter is attached to Roger Downs' affidavit as Exhibit D.

9. Sierra Club continues to be dedicated to protecting the public and private lands of the Adirondack Park for their natural resource values and for their use and enjoyment by Sierra Club's members. RD Aff. ¶2.

10. Two of Sierra Club's members are Petitioners in this matter. RD Aff. ¶¶ 3-4.

[3] Because the Project Sponsors complained that Petitioners "fail[ed] to offer any citations to their legal sources" (Answer ¶323), case law citations are provided herein for the consideration of the Court, and the convenience of the Respondents.

11. Both Phyllis B. Thompson and Robert Harrison own property adjacent to, or near, the ACR Project Site. RD Aff. ¶4; PT Aff. ¶2.[4] They were both granted party status in the APA adjudicatory hearing. Petition, ¶¶ 23, 25; R. 9872.

12. Petitioner Thompson's property is a rustic seasonal residence (with no electricity), which her family calls Camp Everwild. PT Aff. ¶¶ 2-4. The ACR Project Site adjoins Camp Everwild on the east, south, and west. PT Aff. ¶5.

13. Petitioner Harrison, and his wife Petitioner Leslie Harrison, are the owners of residential real property consisting of an island in Tupper Lake, which has a direct view of the ACR Project. Petition ¶24. They draw water from the lake for domestic use and regularly recreate on the lake. Petition ¶24. They also use the State Boat Launch for access to their property. R.[5] 9873; Petition ¶24.

14. Petitioners Thompson and Harrison have standing to sue because the adverse impacts that they will suffer if the ACR Project continues are different from the harm that the general public will suffer. PT Aff. ¶¶ 8-16; R. 9873. See Matter of Save the Pine Bush, Inc. v. Common Council of City of Albany, 13 N.Y.3d at 304-306.

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[4] Affidavit of Phyllis B. Thompson, sworn to June 14, 2012 (hereinafter "PT Aff. _") attached as Exhibit B to the Affidavit of Roger Downs.

[5] All references to the pages of the Bates-stamped Return filed by the State are referred to herein as "R. ___".

15. Therefore, given Sierra Club's purpose of protecting the Adirondack Park, and that two of its members have standing to sue, Sierra Club also has standing in this proceeding. See id.

16. Even if Sierra Club had not participated in the APA's review of the ACR Project, it would still have standing to challenge APA's approval of the Project because two of its members have standing. See Matter of International Assn. of Bridge, Structural & Ornamental Iron Workers, Local Union No. 6, AFL-CIO v. State of New York, 280 A.D.2d 713, 715-716 (3d Dept. 2001).

REPLY TO NEW MATTER ALLEGED IN THE ANSWERS

17. The Project Sponsors allege (Answer ¶5) that only 522 acres of the 6,235 acres of land comprising the ACR Project (the "Site") will be disturbed. However, the Project Sponsors ignore the impacts that the ACR Project will have on the allegedly "undeveloped" portions of the Project Site (Answer ¶5). The development on the ACR Project will break up, or "fragment", wildlife habitat across the entire Site. Tr. 954-955, 4098;[6] Dodson[7] PFT #1 and 3, pp. 6-8, following Tr. 994.[8] Fragmentation

[6] All references to the pages of the Transcript of the adjudicatory Hearing are referred to herein as "Tr. ___".

[7] Harry Dodson.

[8] References to the prefiled testimony of the witnesses in the adjudicatory hearing are generally abbreviated as "(Last Name) PFT #(Hearing Issue Number)", with reference to the Transcript page immediately preceding said prefiled testimony.

of wildlife habitat is an important consideration under the APA Act because it has serious "negative ecological and evolutionary consequences." Glennon/Kretser[9] PFT #1, p. 70, following Tr. 4487. See Tr. 867-868; R. 9270.

18. Fragmentation results in "decreased biotic integrity" due to the increased viability of invasive species, "edge effects, loss of core forest blocks, reduced habitat availability and suitability for some species, reduced connectivity, and degradation of ecological integrity of important features such as boreal wetlands." Glennon/Kretser PFT #1, p. 69, following Tr. 4487. See Tr. 4323-4324. For example, development on the ACR Project Site will fragment amphibians' habitat by cutting off access between their various critical habitat areas, particularly vernal pools and the surrounding uplands. Klemens[10] PFT, p. 11, following Tr. 1274; Klemens Supplemental PFT, pp. 1-2, following Tr. 3339.

19. The "overall layout of fragmentation on the site created by the distribution of the proposed uses, which snake all over the site . . . [is] sprawl on steroids." Tr. 1031-1032.

20. Therefore, the ACR Project will have an impact on far more acreage than the 522 acres of land on the Project Site that will be physically disturbed. See Tr. 1063.

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[9] Michale J. Glennon, Ph.D and Heidi E. Kretser, Ph.D.

[10] Michael Klemens, Ph.D.

21. The Project Sponsors infer (Answer ¶23) that respondent DEC did in fact participate in the adjudicatory hearing. However, the record shows that, while someone from DEC was occasionally in attendance at the hearing, DEC did not offer any witnesses or evidence, did not question any witnesses, and did not make an opening statement. Tr. 1-4487; R. 277-19834. Nor did DEC file a post-hearing brief or reply brief. R. 19835-21187.

THE APA ACT PLACES ENVIRONMENTAL CONCERNS ABOVE ECONOMIC BENEFITS AND DOES NOT ALLOW APA TO WEIGH AND BALANCE SUCH BENEFITS AGAINST ENVIRONMENTAL IMPACTS

22. When reviewing the Project, APA was required to place environmental concerns above all others. Association for the Protection of the Adirondacks v. Town Board of Town of Tupper Lake, 64 A.D.3d 825, 830 (3d Dept. 2009)(concurring opinion)(decision upheld rezoning of the ACR Project Site by the Town of Tupper Lake);[11] Petition ¶¶ 73-79; 575-582.

23. The Court's majority in that case held that:

> The APA is charged with the duty to ensure that certain projects within its jurisdiction "would not have an undue adverse impact upon the natural, scenic,

[11] The Project Sponsors allege (Answer ¶44) that ¶77 of the Petition references APA Act § 809(9), which is inapplicable herein because it relates to municipalities in the Adirondack Park which have APA approved local land use plans, which the Town of Tupper Lake does not have. Petitioners do not rely on this section of the APA Act in this proceeding. It only appears in the Petition as part of a quote from the decision of the Appellate Division in the Association v. Town of Tupper Lake case.

> aesthetic, ecological, wildlife, historic, recreational or open space resources of the park" (Executive Law § 809[9], [10][e]). This environmental mandate predated SEQRA and, as reflected in the APA's regulations, it is more protective of the environment [than SEQRA[12]]. (internal citations omitted) Id., at 826-827.

24. The concurrence in that case wrote that:

> [t]he APA, on the other hand, is not charged with such a balancing of goals and concerns but, rather, is required to ensure that certain projects within its jurisdiction "would not have an undue adverse impact upon the natural, scenic, aesthetic, ecological, wildlife, historic, recreational or open space resources of the park" (Executive Law § 809[9], [10][e]). Id., at 829-830 (concurring opinion).

25. Thus, the five member court was unanimous in finding that APA must place the environment first in reviewing the ACR application. Petition ¶¶ 73-79; 575-582.

26. Petitioners' Twenty-Sixth Cause of Action (Petition ¶¶ 73-84, 575-582) establishes that APA improperly engaged in weighing and balancing of the Project's alleged economic benefits against its adverse environmental impacts when making the decision on the ACR Project, so that the action must be annulled. This Reply further documents that APA engaged in such an improper analysis. See ¶¶ 362-369, infra.

27. The State's Answer argues (¶¶ 77(iii), 82, 98, 127, 208, 575) that in reviewing the Project, pursuant to APA Act § 809(10)(e),[13] the APA must take into account the Project's

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[12] State Environmental Quality Review Act, ECL Article 8.

[13] The Court's decision and the State's Answer both also cite APA Act § 809(9), which relates to APA decisions where the

potential economic benefits when deciding whether or not the Project would have an undue adverse effect on the natural and environmental resources of the Adirondack Park. In effect, the State argues that APA must offset a project's alleged financial benefits against its adverse environmental impacts.[14] It then alleges that the Third Department did not address this additional language of the APA Act in its decision in Association v. Town of Tupper Lake. Answer ¶¶ 77(iii), 82, 98, 127, 208, 575.

28. The making of this argument presumes that five justices of the Appellate Division read APA Act § 809(10)(e) and stopped partway through it, without reading the entire sentence. This proposition is unlikely, at best.

29. In addition, this argument is contrary to the clear wording and intent of the Court's decision. The majority opinion

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municipality has an approved local land use plan. Sections 809(9) and 809(10)(e) are almost identical, but only § 809(10)(e) applies to the present case.

[14] The pertinent part of APA Act § 809(10)(e) reads:

> 10. The agency shall not approve any project ... unless it first determines that such project meets the following criteria:
> ...
> 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.

contrasted the APA Act and SEQRA and found that APA's "environmental mandate" both predated SEQRA and was "more protective of the environment." Id., at 826-827. It specifically compared APA Act § 809(10)(e) and SEQRA, at ECL § 8-0109(1), when making this ruling.

30. Section 809(10)(e) requires a determination by APA 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 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.

The commercial and other such benefits of a project are clearly set apart from the rest of the review criteria in § 809(10)(e) by the word "or", and by their isolation in the separate clause of the sentence regarding "the ability of the public to provide supporting facilities and services", rather than being in the primary clause of the sentence that addresses the natural resources and similar ecological resources of the Adirondack Park.

31. SEQRA, by contrast, requires that:

> Agencies shall use all practicable means to realize the policies and goals set forth in this article, and shall act and choose alternatives which, consistent with social, economic and other essential considerations, to the maximum extent practicable, minimize or avoid adverse environmental effects, including effects revealed in the environmental impact statement process. ECL § 8-0109(1).

Unlike APA Act § 809(10)(e), this statutory language does not segregate the weighing of economic considerations in a way that limits it to only offsetting the action's burdens on the public. It requires that all actions must minimize "adverse environmental effects", but that this be done "consistent with social, economic and other essential considerations". ECL § 8-0109(1). There is no limitation on when this balancing must occur.

32. Thus, when the Court's majority found that the APA Act was "more protective of the environment" than SEQRA,[15] it necessarily had to take into account all of APA Act § 809(10)(e), including the wording about "taking into account the commercial, industrial, residential, recreational or other benefits that might be derived from the project", which the State's Answer (¶¶ 77(iii), 82, 127, 208, 575) claims was not addressed in the decision.

33. There is no other significant substantive difference between APA Act § 809(10)(e) and ECL § 8-0109(1). Unless the Court took into account APA Act § 809(10)(e)'s language about commercial benefits, and determined that it was intended only to affect APA's determinations regarding "the ability of the public to provide supporting facilities and services", and not to offset a project's "undue adverse impact" upon natural resources and similar ecological resources, the Court's entire finding, that

[15] Association, supra, at 827.

the APA Act "is more protective of the environment"[16] than SEQRA, would be meaningless. Unlike the State, Petitioners do not believe that the Appellate Division's finding was meaningless.[17]

34. The concurrence in Association v. Town of Tupper Lake agreed with the majority's interpretation of APA Act § 809(10)(e) and differed only from the majority on an issue not germane to the present proceeding. Its opinion expressly contrasted SEQRA and the APA Act, and then reached the same conclusion as the majority:

> That is, in the context of the rezoning here, respondent Town of Tupper Lake remained bound by "SEQRA['s] . . . substantive requirements . . . to 'act and choose alternatives which, consistent with social, economic and other essential considerations, to the maximum extent practicable, minimize or avoid adverse environmental effects' ". (citations omitted) ...
>
> The enactment of SEQRA represents a legislative attempt "to ensure that state and local agencies consider the environmental impact of their proposed actions [and] . . . forces agencies to 'strike a balance between social and economic goals and concerns about the environment' ". (citations omitted)
>
> The APA, on the other hand, is not charged with such a balancing of goals and concerns but, rather, is required to ensure that certain projects within its jurisdiction "would not have an undue adverse impact upon the natural, scenic, aesthetic, ecological, wildlife, historic, recreational or open space resources of the park" (Executive Law § 809 [9], [10] [e]). Clearly, by placing environmental concerns above

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[16] Id.

[17] APA's interpretation of the APA Act is due little deference by the courts. See Lewis Family Farm v. APA, 64 A.D.3d 1009, 1013 (3d Dept. 2009); Adirondack Mountain Club v. APA, 33 M.3d 383, 389-390 (Sup. Ct., Albany Co. 2011).

> all others, the APA's mandate is more protective of the environment than that embodied within SEQRA. Id., at 829-830. (emphasis added)

The concurrence specifically rejected the idea that the APA was "charged with such a balancing of goals and concerns". Id., at 829.

35. Notably, while the majority went out of its way to disagree with the concurrence on one issue, it did not express any disagreement regarding the primacy of environmental protection over economic benefits in the APA's decision-making process. Id., at 827, FN 2.

36. Therefore, the State's Answer (¶¶ 77(iii), 82, 97, 127, 208, 575) is wrong when it claims that the Court in Association v. Town of Tupper Lake failed to address all of APA Act § 809(10)(e). As a matter of law, APA is required to place environmental considerations above economic considerations. It may not weigh or balance economic benefits against adverse environmental impacts when it makes a determination pursuant to APA Act § 809(10)(e) as to whether a project will have undue adverse impacts on the natural resources of the Adirondack Park.

THE APPLICANT FAILED TO MEET ITS BURDEN OF PROOF

37. As set forth at ¶¶ 85-96 of the Petition, Preserve Associates, LLC ("Applicant")[18] had the burden of proof in the hearing to show that the Project meets the applicable criteria for approval under the APA Act and the Freshwater Wetlands Act. The State admits that this is true. State's Answer ¶¶ 85, 88, 93. The Petition as a whole demonstrates that the Applicant did not meet this burden.

38. A key, and perhaps unique, element of APA's hearing regulations is that while an applicant is expressly assigned the burden of proof, on any issue that is referred to an adjudicatory hearing, the application materials can not satisfy that burden. See 9 NYCRR § 580.11(b), § 580.14(b)(3), § 580.14(b)(6)(i); Petition ¶¶ 88-95. Instead, the application materials are defined by § 580.11(b), § 580.14(b)(3), and § 580.14(b)(6)(i) as mere "allegations", which must be proven by the applicant in the hearing by "competent evidence". 9 NYCRR § 580.14(b)(3).

39. The Respondents' answers fail to grasp the import of this regulatory provision. State's Answer ¶¶ 85-96; Project Sponsors' Answer ¶¶ 45-47. Instead, they argue that the decision must be made "upon the entire hearing record", or the "record as a whole". State's Answer ¶17; Project Sponsors' Answer ¶45(a).

[18] The Applicant is one of the respondent Project Sponsors herein.

40. This is true, so far as it goes, but it misconstrues the decision that must be made by APA, which, on the record as a whole, must determine whether or not the Applicant met its burden of proving the "allegations" of the application materials. Thus, unless those "allegations" have been proven by the Applicant in the hearing, the application must be denied. The APA's decision can not rely upon those application materials unless they have been so proven. 9 NYCRR § 580.11(b), § 580.14(b)(3), § 580.14(b)(6)(i); Petition ¶¶ 88-95. As set forth below within each of the pertinent sections, the Applicant completely failed to meet this burden.

41. The State's Answer (¶89) also states that "the project application and its associated materials are evidentiary exhibits and an integral part of the hearing record...". Again, this is true so far as it goes, but the APA's regulations expressly provide that they are mere "allegations", which must be proven by the applicant with "competent evidence". 9 NYCRR § 580.14(b)(3); Petition ¶¶ 88-93. Therefore, unless so proven at the hearing, these materials can not form the basis for APA's decision.

42. It is worth noting that the State's Answer does not go so far as to claim otherwise, or to claim that the Applicant did in fact meet its burden of proving these allegations as required by 9 NYCRR § 580.11(b), § 580.14(b)(3), § 580.14(b)(6)(i). See also Petition ¶¶ 88-93.

43. The Project Sponsor's Answer (¶45(b)) also alleges that the "weight of evidence produced during the adjudicatory hearing necessarily shifts the burden of proof...". There is no such provision in the APA Act, the APA's hearing regulations at 9 NYCRR Part 580, or the State Administrative Procedure Act ("SAPA"). Nor does the Answer cite any legal basis for this unfounded claim. No matter what evidence an applicant may introduce, the burden of proof does not shift to an application's opponents, to the APA Hearing Staff, or to any other party.

THE FIRST AND SECOND CAUSES OF ACTION STATE VALID CAUSES OF ACTION

44. The use of Cranberry Pond as a source of snowmaking water for the Project's Ski Area would not be "consistent with the land use and development plan" (APA Act § 809(10)(a)), would not "be compatible with" the land use area in which it is located" (APA Act § 809(10)(b)) [Moderate Intensity Use], and would "have an undue adverse impact" on the natural resources of the Park (APA Act § 809(10)(e)). Petition ¶140.

45. The Project Sponsors allege that the Petition's First and Second Causes of Action fail to state causes of action because the Project elements located on Moderate Intensity Use ("MIU") lands, such as the use of Cranberry Pond for snowmaking water for the Ski Area, were previously "deemed" by APA to be consistent with the Adirondack Land Use and Development Plan and

"compatible with the particular land use area, namely, the character description and purposes policies and objectives." Project Sponsors' Answer p. 2.[19]

46. However, the Project Sponsors' reliance on APA's February 15, 2007 Hearing Order ("2007 Hearing Order") (R. 9314-9326) is misplaced. Simply because the compatibility of certain portions of the ACR Project with the character description and purposes, policies and objectives of MIU lands (APA Act § 809(10)(b)) was "not subjected to adjudication" at the hearing (Project Sponsors' Answer p. 2), does not mean that this issue was previously resolved by the Agency in 2007 or that it can not be litigated now.

47. APA's 2007 Hearing Order stated that no further "testimony or evidence" on the ACR Project's compatibility under APA Act § 809(10)(b) in MIU areas was necessary. R. 9323. However, the 2007 Hearing Order merely limited the issues to be considered at the hearing, and it did not, and legally could not, constitute a final Agency decision regarding that issue, or any other issue. See ¶¶ 52-120, infra.

48. Furthermore, the extent of the Project's impacts to Cranberry Pond, located on MIU lands, was indeed a specific

[19] The State also alleges at ¶47 of the its Answer that "petitioners' additional issues must be dismissed because judicial review is limited to those issues that were adjudicated at the hearing." This claim is equally without merit. See ¶¶ 52-120, infra.

hearing issue (Hearing Issue #8). R. 9322. Accordingly, there was testimony (both live and pre-filed) regarding whether the use of Cranberry Pond for snowmaking water would have an "undue adverse impact" on the natural resources of the Park. APA Act § 809(10)(e). See ¶¶ 121-143, infra.

49. APA Staff members Daniel Spada ("Spada") and Shaun Lalonde ("Lalonde") testified that the relevant development considerations for Hearing Issue #8 included APA Act § 805(4)(a)(1), § 805(4)(a)(5), and § 805(4)(a)(5)(e). Spada PFT #8, p. 1, following Tr. 1991; Lalonde PFT #8, p. 1, following Tr. 2065. See APA Act § 809(10)(e).

50. APA Staff member Spada testified about the adverse impacts from the drawdown of water from Cranberry Pond for snowmaking. Tr. 1886-1889.

51. Therefore, the allegations in the First and Second Causes of Action, including those related to APA Act § 809(10)(a), APA Act § 809(10)(b), and APA Act § 809(10)(e), state valid claims against APA because the 2007 Hearing Order did not determine with finality the Project's compliance with APA Act § 809(10)(b), and there is no question that the Project's compliance with APA Act § 809(10)(a) and APA Act § 809(10)(e) was always at issue in the adjudicatory hearing, and in the APA board's final decision-making process.

PETITIONERS DID NOT FAIL TO EXHAUST THEIR ADMINISTRATIVE REMEDIES REGARDING IMPACTS TO WILDLIFE ON LANDS IN MODERATE INTENSITY USE AREAS

52. The Petitioners were not required to exhaust their administrative remedies regarding the Project's adverse impacts on wildlife on the lands on the Project Site which are designated as Moderate Intensity Use ("MIU") by the Adirondack Park Land Use and Development Plan ("APLUDP") pursuant to APA Act § 805. Even if they were required to, they did in fact do so.

53. The First, Second, and Fifth through Eighth Causes of Action of the Petition, and the record, unequivocally show that the Project will have an undue adverse impact on wildlife on the Project Site, and that the approval of the Project by APA did not comply with the APA Act due to such impacts. The fact that APA required an after-the-fact study of adverse impacts upon amphibians and their habitat shows that the APA lacked sufficient evidence to approve the Project. Petition pp. 27-36, 41-70.

54. In particular, the Petition proves that the use of Cranberry Pond for snowmaking water for the Project's Ski Area would not comply with the APA Act, that in both MIU areas and Resource Management ("RM") areas the Project would have an undue adverse impact upon amphibians and their habitat, and that it would significantly fragment the wildlife habitat on the Project Site. Therefore, the Project is not consistent with the APA

APLUDP, and is not compatible with the MIU[20] and RM areas,[21] as required by the APA Act. Petition pp. 27-36, 41-70.

55. In response to these irrefutable causes of action, the Respondents have thrown up a grab-bag of procedural defenses under the general rubric of failure to exhaust administrative remedies. These defenses are intended to prevent the Court from reaching the merits of these issues. None of these defenses have any merit, they should be dismissed, and the Court should address these causes of action on their merits.

56. The State alleges as its Objection in Point of Law E that the First, Second, and Fifth through Eighth Causes of Action of the Petition and all other allegations of the Petition related to portions of the Project located on MIU areas must be dismissed because Petitioners failed to raise these issues at the administrative level, and therefore failed to exhaust their administrative remedies. The State reiterates this claim at ¶¶ 47, 134, and 212 of its Answer. The State also claims that "judicial review is limited to those issues that were adjudicated at the hearing." State's Answer ¶47. None of these defenses are valid, and they should be rejected.

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[20] See Petition ¶¶ 130-131 for a description of the character, description and purposes of MIU lands, and the regulations applicable thereto.

[21] See Petition ¶¶ 66-72 for a description of the character, description and purposes of RM lands, and the regulations applicable thereto.

57. The Project Sponsors allege as Point 2 of their Objections in Point of Law that the First and Second Causes of Action, and all other causes of action and allegations related to MIU lands, must be dismissed because Petitioners failed to exhaust their administrative remedies with regard thereto. The Project Sponsors' Point 2 and Answer ¶93(i) further claim that in its 2007 Hearing Order (R. 9323), APA determined that the Project complied with the APA Act as to MIU areas, so that this issue can not be litigated now. Paragraph 95 of the Project Sponsors' Answer alleges that adverse impacts in MIU areas were not adjudicated, so that the "substantial evidence" standard does not apply to this issue. None of these defenses are valid, and they should be rejected.

The Scope of this Proceeding Is Not
Limited to the APA's 12 Hearing Issues

58. At their core, these defenses all appear to rely upon the mistaken idea that APA's final decision on the application was legally limited to the issues that were adjudicated in the hearing. See State's Answer Objection in Point of Law E and ¶47 and ¶134; Project Sponsors' Answer Point 2 and ¶93(i) and ¶95. The Respondents seem to believe that any other legal issues affecting APA's approval of the Project are not properly before the Court. To the contrary, as set forth below, APA was required to rule upon all aspects of the Project's compliance with the

applicable laws administered by APA, and any such issue is properly before the Court, regardless of whether or not APA explicitly ruled upon it in its January 31, 2012 Order ("Order") approving the ACR Project.

59. For all project applications that it reviews, APA must, *inter alia*, determine if a project creates an "undue adverse impact." APA Act § 809(10)(e). In evaluating whether a project creates an undue adverse impact, APA may or may not hold an adjudicatory hearing. See APA Act § 809(3)(d). If a hearing is held, the issues to be heard may be limited as appropriate. See 9 NYCRR §580.3. Regardless of whether a hearing is held or not, and regardless of the extent or depth of the issues examined in the hearing, APA must still make the undue adverse impact determination required of it by statute in order to properly approve a project. See APA Act § 809(10)(e).

60. Here, the 2007 Hearing Order (R. 9314) and 2010 Issues Ruling by the Hearing Officer (R. 12378-12428) did nothing more than refine the scope of the issues that would be more fully examined at the hearing. As stated by the 2007 Hearing Order, those interim Agency procedural decisions did not constitute an "approval or disapproval" of the Project. R. 9314. The limitation of the hearing to 12 discrete issues did not limit APA's responsibility to make a complete determination after carefully considering all of the relevant statutory factors, and

all of the development considerations, applicable to each land use area involved in this enormous project. See ¶¶ 44-51, supra.

These Defenses Are Entirely Inapplicable to the First and Second Causes of Action

61. The Respondents have alleged that their exhaustion of remedies defenses with regard to MIU lands bar litigation of six of Petitioners' causes of action. For two of these causes of action, these defenses are completely inapplicable, to the point of being frivolous.

62. The First and Second Causes of Action relate to the adverse impacts of the Project upon Cranberry Pond, particularly the proposed use of the pond as the source of snowmaking water for the Project's Ski Area. This question is completely within the scope of Hearing Issue #8 (R. 9322), which stated:

> Issue # 8. Are there alternatives to minimize interference with wetland values and functions including groundwater infiltration, wildlife habitat, stormwater control and other values, and the need for mitigation in the areas of the Cranberry Pond wetland complex, the marina and the base lodge footprint?
>
> With respect to Issue No. 8, the scope of wetland values that will be considered is intended to be broad. The scope of Issue No. 8 includes maintaining water quality standards (snow making), and a consideration of Read Road as an alternative to constructing the on-site wastewater treatment facility on Cranberry Pond. (emphasis added)

That issue was not limited in any way to RM lands. Indeed, since Cranberry Pond is in a MIU area (R. 10253), it is obvious that Hearing Issue #8 was intended to include MIU areas.

63. Petitioners did indeed raise these issues at the administrative level before the APA. See PROTECT's Post-Hearing Brief and Closing Statement, R. 20586-20591, and Reply Brief and Closing Statement, R. 21006-21007; Phyllis Thompson's Post-Hearing Brief, R. 20107, and Reply to Post-Hearing Briefs, R. 20650, 20655, 20656, 20663, 20675, 20676. Therefore, all of Respondents' various exhaustion of remedies defenses are totally inapplicable to the First and Second Causes of Action.

Petitioners Exhausted Their Remedies

64. Petitioners' Fifth to Eighth Causes of Action involve adverse impacts to wildlife in both MIU areas and RM areas. The Fifth and Sixth Causes of Action relate to adverse impacts to amphibians, primarily in MIU areas. The Seventh and Eighth Causes of Action relate primarily to wildlife habitat fragmentation in RM areas, but also include adverse impacts to amphibians in both land use areas. The Respondents' exhaustion defenses regarding MIU areas are completely erroneous as to all of these causes of action.

65. Contrary to Respondents' claims, Petitioners did in fact raise the issue of adverse impacts to wildlife in MIU areas at all available opportunities during the administrative process:

a. In its November 14, 2006 written comments to APA on the question of whether or not the application was complete, one of the predecessor organizations of Petitioner Protect the Adirondacks!, Inc. ("PROTECT"),[22] The Association for the Protection of the Adirondacks, Inc. ("The Association") requested a "comprehensive adjudicatory hearing process" (R. 7990) and argued that the application was incomplete with regard to:

> Overall project scope, scale and recognition of likely undue, adverse impacts inconsistent with the Adirondack Park Agency law, practice and primary purposes for resource management lands, moderate intensity use lands ... . R. 7991. (emphasis added)

b. In its January 10, 2007 written comments to APA on the question of whether or not an adjudicatory hearing was required for the Project, The Association again requested that a "full adjudicatory hearing" address:

> Overall project scope, scale and recognition of likely undue, adverse impacts inconsistent with the Adirondack Park Agency law, practice and primary purposes for resource management lands, moderate intensity use lands ... . R. 8282-8283. (emphasis added)

c. In its petition for party status in the adjudicatory hearing on the Project, PROTECT's predecessor organization

[22] During the pendency of the adjudicatory hearing process, The Association and Residents' Committee to Protect the Adirondacks, Inc. combined to form PROTECT. Petition ¶¶ 13, 16.

Residents' Committee for the Protection of the Adirondacks, Inc. ("RCPA"), stated that the Project was of interest to it for numerous reasons, including the

> ... 2. Likelihood of this project creating a precedent for future development of lands classified as Moderate Intensity under the APA Land Use and Development Plan. R. 9684. (emphasis added)

d. In its petition for party status in the adjudicatory hearing on the Project, The Association stated that, in addition to the Project violating the APA Act requirements for RM lands (R. 9630), the

> overall proposal would cause an 'undue adverse impact' on natural, scenic, aesthetic, ecological, wildlife, historic, recreational, and open space resources.' R. 9630 (emphasis added), quoting APA Act § 809(10)(e).

The term "overall", following so closely after the prior sentence that was limited to RM lands, clearly evinces an intent to raise the issue of impacts to other land use areas, such as MIU.

e. The Association's petition further raised the issue of the Project's "potential for undue adverse impacts",[23] including "wildlife habitat issues", without limiting that issue to RM lands. R. 9630.

f. In addition, in its comments at the April 18, 2007 legislative hearing on the Project, which comments were attached to and incorporated into its petition for party status (R. 9638-9641), The Association stated:

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[23] APA Act § 809(10)(e).

> We contend that the limits of the hearing order issues, must be broadened to require significant further wildlife species inventories and objective, professional research into the true on-site impacts to wildlife from road and lot fragmentation on both the resource management lands and across the entire project site ...". R. 9640. (emphasis added)

g. In its petition for party status in the adjudicatory hearing on the Project, the Natural Resources Defense Council ("NRDC"),[24] stated that:

> We will seek to address the serious need for further wildlife inventories and impact research on the Resource Management lands and all lands project wide. R. 9660 (emphasis in original).

h. In the hearing, there was extensive testimony about amphibians and their habitat needs on the Site, including in MIU areas. This included the following:

1) Testimony by Dr. Michael Klemens that in MIU and RM there is "critical upland habitat, [which is] the amount of habitat that is required to sustain the biome that live in the wetlands."

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[24] NRDC initially applied for and was granted party status in the hearing (R. 9871), and participated in the pre-hearing conferences. It later withdrew from the hearing process. However, up to that point, NRDC was represented in the proceeding by Senior Policy Analyst Charles M. ("Chuck") Clusen. R. 9660, 9661, 9664. At that time, Mr. Clusen was also a Vice-President and Trustee of petitioner PROTECT's predecessor organization, The Association. R. 9628. At the present time, Mr. Clusen is a member of petitioner PROTECT and is now a Co-Chairman its Board of Directors. Mr. Clusen also noted in NRDC's petition for party status that NRDC was working closely with PROTECT's predecessors RCPA and The Association. R. 9659. Likewise, NRDC's issues and positions were incorporated into The Association's petition for party status. R. 9269. Therefore, the fact that NRDC raised this issue five years ago may now be credited to petitioner PROTECT.

Tr. 3140. For amphibians, this critical habitat consists of land within 750 to 1000 feet of the wetlands. Tr. 1077. The Project's roads, buildings and associated development in both RM and MIU areas, have the potential to destroy critical upland habitat (Tr. 1081), and "cut[] off the amphibians from being able to" travel between the critical upland habitat and the wetlands. Tr. 1080; see Tr. 1064, 1067-1068.

2) Testimony by Dr. Michale Glennon and Dr. Heidi Kretser that it would be ideal to have information on amphibian species, their locations, habitats, and abundance, across the entire Project Site. Tr. 4445-4447. Additionally, it was their testimony that vernal pools, which are "areas where amphibians will congregate and mate" (Tr. 1637), are "key wildlife habitats." Tr. 4389.

3) Testimony by APA Hearing Staff biologist Spada that amphibians' habitat includes, but is not limited to, the zone within 750 feet of a wetland edge. Tr. 4045, 4048. This particular amphibian habitat is found on both RM and MIU areas on the Site (Tr. 4037), and mitigation could help reduce impacts throughout the Site (Tr. 4060-4061).

i. In the hearing, the Petitioners did not object to the APA Hearing Staff's introduction into evidence of Exhibit 244 (R. 19649, 21022), which is a map of "750 foot critical terrestrial

habitat" for amphibians on both MIU and RM areas of the Project Site. Tr. 4035-4038.

j. In its Post-Hearing Brief and Closing Statement, PROTECT argued that "[t]he project's upland developments and roads would disconnect amphibians from their critical wetland breeding areas." R. 20589. This point was made in the context of Hearing Issue #8, in which PROTECT argued that "There Would be Undue Adverse Impacts on the Cranberry Pond Wetland Complex, the Marina and the Base Lodge Footprint". R. 20589. These areas are all in MIU, and are not in RM. R. 2.

k. In its Reply Brief and Closing Statement, PROTECT made detailed arguments demonstrating that allowing the wildlife assessments to be done by the Applicant after-the-fact would not comply with the APA Act, and included in that Reply Brief a table of the components of the Project that would adversely impact the 750 foot wide "critical terrestrial habitat zone" for amphibians, which the APA staff had identified in the adjudicatory hearing. The Project components listed in that table included areas in both RM and MIU.[25] PROTECT pointed out that "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." R. 20991-20995, 21006-21007.

[25] See also Petition ¶¶ 182-184 and Project Sponsors' Answer ¶¶ 93(d) to 93(h).

l. PROTECT even went so far as to attach a copy of Exhibit 244 to its Reply Brief and Closing Statement as Attachment B thereto. R. 21022. PROTECT's Reply Brief specifically referred to the fact "that almost the entire project will be built in the critical wildlife habitat". R. 20994. This objection was not limited to the RM lands on the Site. R. 20991-20995, 21006-21007.

66. Petitioner Phyllis Thompson, Ph.D. also addressed these issues in her Post-Hearing Brief (R. 20107-20108) and her Reply to Post-Hearing Briefs (R. 20647, 20650, 20652, 206558, 20656, 20663, 20664, 20668, 20672, 20675).

67. Therefore, the record overwhelmingly shows that the Petitioners did in fact raise the issue of adverse impacts to wildlife, and the Project's compatibility, on MIU lands numerous times at the administrative level.

68. Because Petitioners PROTECT and Thompson raised this issue regarding MIU areas in their closing statements/briefs, pursuant to APA's hearing regulations at 9 NYCRR §580.14(b)(9)(iii) and § 580.18(c), those arguments should have been considered by APA as proposed findings of fact and conclusions of law, and APA should have ruled upon each of them.[26] Therefore, not only did the Petitioners raise this issue

[26] The State's Answer (¶589 and ¶590) basically admits ¶589 and ¶590 of the Petition, which allege that petitioners PROTECT and Thompson made proposed findings in their post-hearing briefs.

at the administrative level, APA should have responded directly to it in its final decision. See ¶¶ 370-394, infra. This, it utterly failed to do. See Order, R. 1-39.[27]

69. Having raised the issue of adverse impacts to wildlife on MIU lands at the administrative level, before, during, and after the adjudicatory hearing, the Petitioners exhausted their administrative remedies.

70. The Petitioners pursued all administrative procedures available to them under APA's regulations in order to stress the issue of the Project's lack of compatibility with the MIU land area's "character description and purposes, policies and objectives." APA Act §809(10)(b).

71. Moreover, in proceedings challenging a determination involving an administrative hearing, the concept of "failure to exhaust administrative remedies" applies only when there are administrative procedures to review the Agency's "final decision."

The State's Answer (¶588) also affirms that its making of findings in its final Order "constitutes a ruling on each of the findings proposed by the parties." Unfortunately, the APA failed and refused to make such rulings or findings on many of the issues presented by the Petitioners, including, but not limited to, those related to impacts on wildlife in the MIU areas.

[27] The Order (R. 22) refers to a "comprehensive amphibian survey and impact analysis". However, as shown by the Project permits, that survey is actually limited to only a few small areas in RM and avoids all such habitat in MIU areas. R. 96-97, 217-218, 236; Petition ¶¶ 189-200.

72. Since the Agency's "final decision" was its January 31, 2012 Order and there are no other APA procedures available to Petitioners for administrative review of the Order,[28] the defense of "failure to exhaust administrative remedies" is wholly inapplicable to this proceeding.

The Claims About Adverse Impacts to Amphibian Habitat are Based in Large Part on the APA Hearing Staff's Own Evidence

73. The Fifth to Eighth Causes of Action include allegations regarding the fallacy, relied upon in APA's decision, that after-the-fact studies of adverse impacts to amphibians and their habitat in MIU areas can mitigate the Project's impacts. Petition ¶¶ 165-284. These allegations are grounded in large part upon Hearing Exhibit 244 (R. 19649, 21022), which is a map of most of the Project Site that was produced by APA Staff biologist Spada, and introduced into evidence by the APA Hearing Staff. Tr. 4035-4038. The Applicant did not object to its introduction into evidence. Tr. 4038.

74. This map showed that extensive areas of both MIU and RM lands, including the majority of the MIU lands on the Site, were within a zone designated on the map as "750 foot critical

[28] After the final determination has been made, only the project sponsor may make a request "to the agency to reopen the hearing." 9 NYCRR 580.14(h)(2).

terrestrial habitat" for amphibians. R. 19649, 21022; Tr. 4035-4053.

75. In the post-hearing briefing, Petitioner PROTECT then showed in its Reply Brief and Closing Statement how this map demonstrated that the "the vast majority of the project will be built within the 750 foot wide 'critical terrestrial habitat zone'". R. 20993. Nevertheless, APA only addressed this issue as it related to RM lands, and ignored the potential adverse impacts of the Project on critical terrestrial habitat for amphibians in MIU areas. See Order, R. 33; Petition ¶¶ 186-223.

76. Thus, the Respondents are arguing that, although APA Hearing Staff brought this evidence (Exhibit 244, R. 21022) into the record, without objection from the Applicant, the APA Members should have ignored it, and that Petitioners are somehow barred from pointing out to the APA and the Court that it proves that the approval of the Project violates the APA Act. This argument is, at minimum, puzzling.

77. Moreover, APA was required to make its decision based on the entire record, not on select parts of it. "No decision, determination or order shall be made except upon consideration of the record as a whole and as supported by and in accordance with substantial evidence." 9 NYCRR § 580.15(a)(3).

78. In making its final decision, APA could not ignore competent relevant evidence such as Exhibit 244 (R. 19649, 21022)

merely because it did not fall within the scope of one of the adjudicated hearing issues. And, if it originally found in the 2007 Hearing Order (R. 9314-9326) that it had adequate evidence on a particular issue (see ¶47, supra), and additional relevant evidence came before it, it could not just ignore that evidence.

The Issues In This Proceeding Can
Not Be Limited To The Issues That
Were Tried in the Adjudicatory Hearing

79. The State alleges that the Petitioners can not litigate in this Article 78 proceeding any issue that was not adjudicated in the adjudicatory hearing. State's Answer ¶47. This argument is made in the context of the State's exhaustion of administrative remedies defense, although it may be more properly labeled as abandonment, or failure to preserve an issue for review. Regardless, this argument misconstrues the intent and effect of the hearing.

80. As set forth below, pursuant to APA Act § 809(3)(d), APA shall hold a hearing when it needs more information on substantive and significant issues before it makes a decision. A decision to go to hearing is not a final ruling on any of the determinations that APA must make.

81. In addition, even if APA's decision to not require adjudication of an issue were to be considered to be APA's final

ruling on that particular issue, the Petitioners would not have been required to litigate that issue at the time of the APA's interim decision.

82. Pursuant to APA Act § 809(3)(d), APA holds a hearing on a project when the public comments on the application:

> raise substantive and significant issues relating to any findings or determinations the agency is required to make pursuant to this section, including the reasonable likelihood that the project will be disapproved or can be approved only with major modifications because the project as proposed may not meet statutory or regulatory criteria or standards.

83. A determination to hold a hearing does not constitute a final determination on a project, but it is an agency decision to gather more information on certain "substantive and significant issues." APA Act § 809(3)(d). See R. 9244. The "information presented at a public hearing [provides] assistance to the Agency in its review" of a project. R. 9271 (APA Hearing Staff witness Mark Sengenberger).

84. The Agency is permitted to "limit the issues to be considered at the hearing" (9 NYCRR §580.3) in order to control the length of the hearing. See R. 9273 (former Agency Chairman Ross Whaley).

85. In the memorandum recommending that the Project proceed to a hearing, the Staff suggested "that the hearing officer conduct the hearing on an 'issue by issue' basis . . . so that

parties may participate in those issues in which they have an interest." R. 8800.

86. However, that does not mean that the Agency's ultimate consideration of the project is limited to the hearing issues only. Former Agency Chairman Whaley cautioned the Board members against "limiting the issues to the extent that after hearing the Board can't make a decision." R. 9273.

87. During the February 8, 2007 Regulatory Programs Committee meeting, Mr. Sengenberger of the APA Staff "noted that there was not unanimity of Agency staff on . . . which issues should go to hearing." R. 9272.

88. After a lengthy discussion by the Regulatory Programs Committee about which issues to send to adjudicatory hearing, Designee Hoffman "expressed reservations about issues being listed as non-issues that may end up confusing the final issues." R. 9284.

89. Eventually, ten issues were identified by the Agency Members. R. 9321-9323. Regardless of the Agency's limitation of the issues considered at the Hearing, the Agency still had to make the "findings or determinations required of [it] under APA Act § 805(4) and § 809(10)" before the Agency could approve or disapprove the Project. R. 9325.

90. Additionally, if "[a]t any time" prior to the Agency's final determination additional issues are brought to light, the

Agency "may request additional information from the project sponsor . . . with regard to any matter contained in the application . . . when such additional information is necessary for the agency to make any findings or determinations required by law." APA Act § 809(6)(c).[29] Here, the 2007 Hearing Order also allowed the ALJ to "add an issue . . . to ensure that the record covers substantive and significant issues relating to the findings or determinations required of the Agency under APA Act § 805(4) and § 809(10)." R. 9325, 9273.

91. The State itself concedes that:

> eleven issues were adjudicated at the hearing for the purpose of providing the Agency with additional information on those issues before making its decision on the ACR project. Answer ¶47.

92. This contradicts the claim that any issue not adjudicated was already decided before the hearing, or could not be later challenged in an Article 78 proceeding.

93. The 2007 Hearing Order was entitled "Notice of Agency Intent to Proceed to Public Hearing" (R. 9314-9326), and was merely an interim decision that would not have been subject to judicial review until a final decision was rendered. See SAPA § 301(2) (stating that the sufficiency of an agency's notice to proceed to an adjudicatory hearing "shall not be subject to

[29] A Project Sponsors' failure "to provide such information may be grounds for denial by the agency of the application." APA Act § 809(6)(c).

judicial review"). See also Carville v. Allen, 13 A.D.2d 866 (3d Dept. 1961)(Commissioner's interlocutory order not reviewable under Article 78 until after final decision is rendered).

94. Further, a challenge to the Agency's decision at that time would not have been ripe for judicial review because "further administrative action" could have resulted in denial of the application and the prevention of any harm to the Petitioners. See Matter of Adirondack Council v. Adirondack Park Agency, 92 A.D.3d 188, 191 (3d Dept. 2012).

95. Now that APA has made a final determination to approve the Project (R. 1-39), all legal and factual issues related to APA's approval of the Project are ripe for review. See ¶¶ 58-72, supra.

The Hearing Order Does Not Preclude the Litigation of Moderate Intensity Use Area Issues in this Proceeding

96. The Project Sponsors also argue (Answer ¶93(i)) that APA's 2007 decision to send the application to an adjudicatory hearing constituted a final decision on any issue that was not tried in the hearing, and that such issues can not be litigated now. In particular, they point (Answer ¶93(i)) to the following language in the 2007 Hearing Order:

> There are no issues of compliance of the project with the character description and the purposes, polices and objectives, compatible uses for ... MIU land use areas. R. 9323.

97. Even if this ruling in the 2007 Hearing Order had some sort of preclusive effect, it only relates to one of the five findings that APA must make under APA Act § 809(10) when making a decision on a project. These include: (a) consistency with the Land Use and Development Plan; (b) compatibility with the land use area in question; (c) consistency with the overall intensity guidelines; (d) compliance with the shoreline restrictions; and (e) that the project would not have an undue adverse impact on the resources of the Adirondack Park. See APA Act § 809(10).

98. The 2007 Hearing Order only precluded taking additional evidence regarding the compatibility of the Project with the "character description and the purposes, polices and objectives, compatible uses for ... Moderate Intensity Use land use areas" under APA Act § 809(10)(b). It did not preclude such testimony on the questions of consistency with the APLUDP under APA Act § 809(10)(a) or undue adverse impacts under APA Act § 809(10)(e). Even if, *arguendo*, it had a preclusive effect on § 809(10)(b), it did not mention APA Act § 809(10)(a) or § 809(10)(e), and so it had no such preclusive effect on these issues.

99. The Petition includes claims in each of the First, Second, and Fifth to Eighth Causes of Action that the Project is not consistent with the APLUDP under APA Act § 809(10)(a) and

will have undue adverse impacts under APA Act § 809(10)(e).[30] Therefore, even if the 2007 Hearing Order has some preclusive effect on review of the Project under APA Act § 809(10)(b), it has no such effect on the Project's review under APA Act § 809(10)(a) and § 809(10)(e).

100. Regardless of what the 2007 Hearing Order said, it can not short-circuit the process or deprive Petitioners of their day in court on these issues. Moreover, the Project Sponsors have totally misconstrued the meaning of this sentence of the 2007 Hearing Order. It was written in the context of a finding that "the following are issues for which no testimony or evidence is necessary". R. 9323. Thus, it was merely a finding that no testimony or evidence is necessary with regard to MIU areas and their compatibility under APA Act § 809(10)(b). It does not constitute a finding that the Project actually complies with the "character description and the purposes, polices and objectives, compatible uses for ... Moderate Intensity Use land use areas." R. 9323.

101. Moreover, the Order made extensive findings regarding MIU areas. The terms "Moderate Intensity Use" and "MIU" appear in the Order some 26 times. R. 1-39. Clearly, APA itself did not believe that MIU areas were excluded from its final decision-making process.

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[30] Petition ¶¶ 97-98, 118-119, 127-129, 136, 140, 207-298, 214, 216, 220, 224-225, 227-228, 239-240, 242, 256, 269, 279, 283.

102. Finally, as shown above (¶¶ 58-60, 79-95, supra), the 2007 Hearing Order was not a final Agency determination on the Project, in whole or in part, but was merely an interim decision made to facilitate information-gathering, and to control the length of the hearing.

103. As an interim decision, the 2007 Hearing Order has no preclusive effect on this Article 78 proceeding.

104. Even if APA's decision to not request additional evidence regarding the compatibility of the Project with the "character description and the purposes, polices and objectives, compatible uses for ... Moderate Intensity Use land use areas" were considered to be APA's final ruling on that particular issue, the Petitioners could not have litigated that issue at the time of the APA's interim decision. The issue would not have been ripe for judicial review because the Agency could have denied the application, which would have prevented any harm to the Petitioners. See Matter of Adirondack Council v. Adirondack Park Agency, 92 A.D.3d at 191; Carville v. Allen, 13 A.D.2d at 866.

105. Now that APA has made final determination to approve the Project (R. 1-39), Petitioners' causes of action related to APA's approval of the MIU aspects of the Project are ripe for review.

Petitioners Were Not Required to
Move to Expand the Hearing Issues to
Include Adverse Impacts to Wildlife
on Moderate Intensity Use Lands

106. The Project Sponsors also argue (Answer Point 2) that the Petitioners failed to exhaust their administrative remedies because they did not make a motion to expand the hearing issues to include impacts to wildlife in MIU Areas.

107. Even assuming for the sake of discussion that this alleged failure might ordinarily come under the exhaustion doctrine, on this particular issue, that remedy was not available to the Petitioners. The APA's 2007 Hearing Order which created the initial 10 hearing issues did give the Hearing Officer the power to expand the hearing issues. R. 9325. However, that same order also forbade him from adding any issue which was expressly excluded from the hearing by the 2007 Hearing Order. R. 9325.

108. Wildlife impacts on MIU lands were among the excluded issues. The APA's 2007 Hearing Order found that there were 11 "issues for which no testimony or evidence is necessary". R. 9323-9324. These included: (1) compliance with the APLUDP for MIU areas; (3) all wetlands on the site, with 3 exceptions; and (4) natural heritage features. R. 9323. Therefore, Petitioners were barred from trying to add this issue regarding MIU areas as an additional hearing issue, and there was no remedy to exhaust.

Many of the Project's Adverse Impacts on
Wildlife on Moderate Intensity Use Lands
Were Adjudicated as Part of the Hearing

109. Assuming for the sake of discussion that this Article 78 proceeding must be limited to issues that were adjudicated in the hearing, Respondents are incorrect when they argue that this prevents Petitioners from litigating the Project's adverse impacts to wildlife on MIU lands. These impacts were indeed tried in the hearing as part of Hearing Issue #8.

110. Hearing Issue #8, as clarified by the Hearing Officer in his Issues Ruling of November 16, 2010 (R. 12380) stated:

> Issue # 8. Are there alternatives to minimize interference with wetland values and functions including groundwater infiltration, wildlife habitat, stormwater control and other values, and the need for mitigation in the areas of the Cranberry Pond wetland complex, the marina and the base lodge footprint?
>
> With respect to Issue No. 8, the scope of wetland values that will be considered is intended to be broad. The scope of Issue No. 8 includes maintaining water quality standards (snow making), and a consideration of Read Road as an alternative to constructing the on-site wastewater treatment facility on Cranberry Pond. (emphasis added)

111. This issue was not limited to RM lands and did not exclude lands designated as MIU. The "Cranberry Pond wetland complex, the marina and the base lodge footprint" are all located on MIU lands. R. 10253.

112. Additionally, all of the following components of the Project are located in MIU lands:

> A portion of the ski center (R. 2; Tr. 3946); Tupper Lake View South (R. 3); Tupper Lake View North (R. 4); Western Great Camp Lots 11 and 15 (R. 4); two of the West Face Expansion lots and 18 quadplexes (R. 4); West Face Inn & restaurant (R. 4); West Slopeside (R. 4); Sugarloaf North

(R. 5); Sugarloaf East (R. 5); the 8 "artist cabins" (R. 5); East Village (R. 5); Cranberry Village (R. 5); 43 (of the 44) lots of Lake Simond View (R. 5); and Small Eastern Great Camp Lots 27 and 28 (R. 5).

113. The testimony regarding the Project's adverse impacts on wildlife applies to the entire Project Site, including the MIU areas. Some of this testimony is as follows:

a. The Project will cause wildlife mortality, habitat changes affecting movement and dispersal patterns, increased fragmentation of wildlife habitat and mortality of wildlife (amphibians, deer, bear, martens), severe impact from domestic pets. See Spada PFT #1, pp. 3-7, following Tr. 4213; Klemens PFT, pp. 10, 17, following Tr. 1274.

b. The impact to wildlife from the Project's development includes the footprint of the structures as well as an associated "zone of impact" around the structures in which the biological community (plants and animals) is affected by the development. The amount of wildlife that is adversely impacted by the Project is considerably more than what the Applicant projected. Spada PFT #1, pp. 12-13, following Tr. 4213; see Tr. 1066-1068, 3186-3187, 3209.

c. The Applicant never provided the wildlife impact assessment for the entire Project Site that the APA Hearing Staff was seeking. See Tr. 711-712, 776, 861-862, 1616, 3677-3678, 3756-3757, 4071-4072.

d. The Project Site includes far more diversity of wildlife species (e.g., amphibians and birds) than was documented by the Applicant. See Tr. 3761, 4051-4052, 4074; Klemens PFT, pp. 6-7, following Tr. 1274; Thompson PFT, pp. 19-20, following Tr. 4487.

114. There was also testimony about wildlife impacts to specific MIU areas within the Project Site:

a. The impacts to the Cranberry Pond wetland complex, the marina and base lodge area are shown at ¶¶ 121-162, infra.

b. Many of the Project's components located in MIU lands impact amphibians' "critical upland habitat". R. 21022; see Petition ¶¶ 182-184; Reply ¶67(h), supra.

c. There is a "heavily used amphibian migratory corridor" in the midst of the proposed Sugar Loaf East townhouses, a "concentration of amphibian breeding" in the middle of the East Village townhouses, and an area of amphibian concentration near the Lake Simond View homes. Klemens Supplemental PFT, p. 2, following Tr. 3339; see Tr. 3135-3136.

d. The density of units in West Face Expansion "pretty well blocks out that area as far as being of utility for wildlife habitat." Tr. 4099.

115. The Petition [¶¶ 177-185] identifies that about half of the acreage, three-quarters of the residential units, and almost all of the commercial development of the Project are in MIU areas. See also Exhibit 244, R. 21022. This analysis is basically confirmed in the Project Sponsors' Answer. Answer ¶¶ 93(d) to 93(h). Of these, most of the residential and commercial areas in MIU are located in the immediate vicinity of the "the Cranberry Pond wetland complex, the marina and the base lodge footprint". See Exhibit 244, R. 21022.

116. The hearing testimony regarding the Project's adverse impacts on wildlife was in large part devoted to impacts to amphibians which use these wetlands and the likelihood that the Project would fragment their habitat, by disconnecting their upland habitat from the wetlands which they use on a seasonal basis. Tr. 1065-1068, 4264, 4368, 4435-4436; Glennon/Kretser PFT, pp. 13-14, 21-22, 43-44, 60-61, following Tr. 4487.

117. Therefore, it is incorrect for the Respondents to argue that the Project's adverse impact on wildlife in MIU areas was not a hearing issue and was not adjudicated in the hearing.

The Substantial Evidence
Standard Applies to This Issue

118. Paragraph 95 of the Project Sponsors' Answer alleges that adverse impacts in MIU areas were not adjudicated, so that the "substantial evidence" standard does not apply to this issue. Petitioners' First, Fifth and Seventh Causes of Action all demonstrate that there was not substantial evidence to support APA's decision with regard to the Project's adverse impacts on amphibians and their habitat in both RM and MIU areas.

119. It is correct that CPLR § 7803(4) only applies the "substantial evidence" standard to cases when "a determination [was] made as a result of a hearing held, and at which evidence was taken ...". However, as shown above, evidence was indeed taken at the adjudicatory hearing with regard to adverse impacts to wildlife, in particular amphibians, in MIU Areas. Therefore, this defense is completely meritless. Moreover, even if it was correct, it would not affect the Second, Sixth, and Eighth Causes of Action which establish that the APA's decision on such issues was arbitrary and capricious and affected by error of law, nor would it affect those parts of the First, Fifth, and Seventh Causes of Action that involve RM areas.

120. For all of the foregoing reasons, none of the Petitioners' causes of action should be dismissed, in whole or in part, for failure to exhaust administrative remedies.

REPLY TO NEW MATTER ALLEGED IN THE ANSWERS ON THE FIRST AND SECOND CAUSES OF ACTION: THE USE OF CRANBERRY POND FOR SKI AREA SNOWMAKING WOULD HAVE AN UNDUE ADVERSE IMPACT

121. Although the impacts of using Cranberry Pond as a source of snowmaking water for the ACR Project's Ski Area was a key part of Hearing Issue #8 in the adjudicatory hearing, APA did not make a determination on this issue. In fact, it found that it could not make the required findings on the current record, and thus ordered that an after-the-fact study be done. Therefore, APA could not have made the determination that the adverse impacts of such use were not "undue adverse impact[s]". APA Act §809(10)(e). To compound this error, APA allowed the Project Sponsors to go ahead with these water withdrawals for at least two years, despite lacking the evidence necessary to determine what the impacts would be during that period.

122. Based upon the testimony as to the number and severity of the potential adverse impacts, APA should have determined that the use of Cranberry Pond would not be "consistent with the land use and development plan" (APA Act § 809(10)(a)), would not "be compatible with" the land use area in which it is located [Moderate Intensity Use](APA Act § 809(10)(b)), and would "have an undue adverse impact" on the natural resources of the Park (APA Act § 809(10)(e)).

123. The State alleges that the determinations made by APA were "legal conclusions" made by the Agency Members. State's Answer ¶97.[31] As set forth below, the Agency Members' legal conclusions were not supported by substantial evidence, were arbitrary and capricious, and should be annulled.

124. The Project Sponsors allege that the Agency did make certain "determinations with regard to wetlands." Project Sponsors' Answer ¶¶ 49-50.[32] Indeed, APA found in its final Order that "Tupper Lake represents a more reliable long-term source of water [than Cranberry Pond] that minimizes impacts to wetlands, fish, wildlife and other biota." R. 0024. However, by its own admission, APA lacked the evidence to make any determinations as to these impacts. Order, R. 33; Petition ¶116.

125. Contrary to the allegations in ¶55 of the Project Sponsors' Answer, Cranberry Pond is a "pristine," "relatively undisturbed" body of water with "very high quality water." Tr. 1857, 1860, 1866; R. 9246. Cranberry Pond's water level is affected by the strength of the beaver dam on the Pond. Project

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[31]The Petitioners' response to the State's (Answer ¶¶ 132-134) and the Project Sponsors' (Answer ¶71(a)) allegations regarding Petitioners' failure to exhaust administrative remedies for the Petition's First and Second Causes of Action is set forth at ¶¶ 61-63, supra.

[32] The Project Sponsors' allegations (Project Sponsors' Answer ¶53) regarding wildlife in general are inapplicable because they do not address this specific issue. Furthermore, it is irrelevant that the Project Sponsors or the APA staff analyzed the APA Act's Development Considerations (Project Sponsors' Answer ¶¶ 69, 71(c)) because it is the Agency Members who are required to make a determination based upon the development considerations.

Sponsors' Answer ¶55; Tr. 1819-1820, 1827, 1891; Spada PFT #8, p. 2, following Tr. 1991; R. 24, 9259.

126. APA's own witness, Mr. Spada, testified that "it is unclear whether and to what extent wetland impacts will occur at Cranberry Pond due to water extraction". State's Answer ¶112; Spada PFT #8, p. 6, following Tr. 1991. APA's staff engineer, Mr. LaLonde, testified that "I don't know what the impacts will be from water withdrawal rates. So we don't know at this time, and that would be the purpose of any monitoring program." Tr. 2033.

127. Contrary to the Project Sponsors' claims in ¶58 of their Answer, the prefiled testimony of the Applicant's witness Kevin Franke shows that, based upon historical withdrawal data, snowmaking operations from the ACR Project could withdraw as much as 2,400,000 gallons per day from Cranberry Pond. Franke PFT #8, p. 12, Exhibit 4 (Table 6), following Tr. 1991. It is clear that the "volume of water in Cranberry Pond would be reduced from snowmaking operations." R. 33.

128. Despite the Project Sponsors' claims (Answer ¶51(b)) that it "perform[ed] numerous studies/analyses on the impacts of using Cranberry Pond for snowmaking," APA found that the impact of said reduction in the volume of water in Cranberry Pond "to fish, wildlife and other biota within Cranberry Pond and to the value and benefits of existing wetlands associated with the pond has not been determined." R. 0033. Inexplicably, APA concluded that the process of "identifying and monitoring impacts to

wetlands, fish, wildlife and other biota within Cranberry Pond and associated wetlands" (R. 34) could take place later, after the water levels had already been lowered for two or more years. R. 34; APA Project Permit 2005-100.2, Ski Area and Resort Permit ("Ski Area Permit"), R. 49. See also Petition ¶¶ 97-164.

129. There was testimony that the potential adverse impacts from lowering the level of water in Cranberry Pond as a result of using it for snowmaking water were numerous. Tr. 1163-1164 (Klemens, 4/27/11); 1794-1795 (Franke, 5/3/11); 1844, 1849, 1887-1889 (Spada, 5/3/11); 1930-1931 (Glennon, 5/3/11), 2026-2028 (LaLonde, 5/4/11); Klemens PFT, p. 18, following Tr. 1274,; Spada PFT #8, p. 6, following Tr. 1991; LaLonde PFT #8, p. 10, following Tr. 2065; Reply ¶152, infra.[33]

130. Although the words "food chain" do not appear at that spot in the transcript (Project Sponsors' Answer ¶60(b)), the water withdrawals would affect the food chain because these would be an adverse impact to aquatic invertebrates, which would in turn adversely impact Rusty Blackbirds and other bird species that feed on those aquatic invertebrates. Tr. 1930-1931 (Glennon, 5/3/11); see Tr. 1005.[34]

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[33] These citations correct any errors that may have been in the citations in Petition ¶113, as identified in the Project Sponsors' Answer ¶60(a).

[34] These effects will be compounded by the fact that the effluent from the Project's community wastewater treatment plant would flow into Cranberry Pond, as conceded by the Project Sponsors (Answer ¶60(c)). See Order R. 10; 9 NYCRR § 578.8(g).

131. As a result of these potential, unknown, adverse impacts, APA found that the use of Cranberry Pond as a source of snowmaking water "should be temporary."[35] R. 34, 9202, 9258-9259; see State's Answer ¶117.

132. Despite this finding, APA's approval allows the use of Cranberry Pond to continue indefinitely, albeit through a new or amended permit. Ski Area Permit, R. 49. Further, APA's approval allows the water withdrawals to last for two years before it can stop them, and even then the permit states that "the Agency may require cessation of water withdrawal" only if "such withdrawal is substantially impairing wetland functions." Ski Area Permit, R. 49.[36]

133. APA Act §#809(10)(e) requires, and the Project Sponsors have conceded, that "the test for compliance with APA regulatory requirements is . . . 'undue adverse impact'" (Project Sponsors' Answer ¶51(a)). The test is not whether the activity "is substantially impairing wetland functions." Ski Area Permit, R. 49. Yet, APA only found that "the use of Cranberry Pond for snowmaking should be temporary" (R. 34), and did not make a finding on whether or not the use of Cranberry Pond would create an undue adverse impact.

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[35] The Project Sponsors correctly note that the Order does not state directly that the use of Cranberry Pond "must only be temporary." Answer ¶63.

[36] The Project Sponsors' reliance (Answer ¶65) on a hypothetical cease and desist order to stop snowmaking water withdrawals in the event of a problem in the first two years is misplaced because the activity will actually be in compliance with the permit issued. Ski Area Permit, R. 49.

134. The Order undeniably states that the impact to "Cranberry Pond and to the value and benefits of existing wetlands associated with the pond has not been determined." R. 33; Tr. 2033 (as referenced by Project Sponsors' Answer ¶61). Moreover, despite having submitted its application in 2005, the Applicant never conducted any monitoring on Cranberry Pond during the intervening seven years. Tr. 1845. Therefore, because a determination as to the undue adverse impacts of this activity could not be made, the application should have been denied.

135. The Project Sponsors point to a prior permit "requiring data collection" (Answer ¶51(c)) on the use of Cranberry Pond for snowmaking as a precedent for the after-the-fact study of impacts. However, the prior permit required only collection of data on the "extent of drawdown" of water from Cranberry Pond (Tr. 1828-1829) and did not require a "biological survey and impact analysis" as is required now. Ski Area Permit, R. 49. If the prior permit did require biological monitoring, it was never conducted. Tr. 1796-1797, 1802-1803, 1855. The approval of after-the-fact studies like the prior "non-permit permit" is exactly the type of precedent that this proceeding seeks to overcome.

136. The Project Sponsors' reliance (Answer ¶68) on 9 NYCRR § 572.19 as a mechanism to provide the public with an opportunity to comment on the after-the-fact studies is misplaced. That section specifically allows the APA's deputy director-regulatory programs to issue an amended permit without providing an

opportunity for public comment. See 9 NYCRR § 572.19(b). Even if the public is given an opportunity to comment in the future, that is not the same as the public being able to conduct discovery, conduct cross-examination of the studies' authors, and present rebuttal testimony, as would have been permitted under 9 NYCRR § 580.14 if the studies had been conducted before the hearing, rather than after it. Petition ¶126.

137. Further, while monitoring a project and collecting data on its compliance with permit conditions and requirements may be allegedly "commonplace" (Project Sponsors' Answer ¶7b(a)), requiring surveys and analysis of a project in order to establish the project's permit conditions and requirements is completely backwards. Tr. 1069-1072, 1091-1092, 1144-1146, 1188-1189, 3141-3142, 3177, 3219. Here, the "non-permit permit," requires a "quantitative biological survey and impact analysis" so that a new permit, with "limits on water withdrawal" from Cranberry Pond, can be issued at later date. Ski Area Permit, R. 49. APA's backwards manner of approving this Project should be annulled.

138. Rather than condition its approval of the ACR Project on the use of an alternative, "more reliable long-term source of water that minimizes impacts to wetlands, fish, wildlife and other biota," APA was persuaded by the Project Sponsors' assertions that it should be allowed "to use Cranberry Pond as the source of water for snowmaking because the costs associated with using Tupper Lake would be significantly higher." R. 23-24.

Contrary to the Project Sponsors' assertions (Answer ¶64(b)), the Agency has provided no other explanation of its approval of the use of Cranberry Pond for snowmaking.

139. This consideration of the financial impact on the Project Sponsors of using this alternative is wholly improper under the APA Act. See ¶¶ 22-36, supra.

140. Even with conditions, there would still be adverse impacts from the ACR Project. See APA Staff Brief, R. 19880, 19997. This is a perfect example of a project that causes undue adverse impacts and should have been denied.

141. While Petitioners acknowledge that APA did review some of the wildlife and wetland impacts on the Site, and that APA is not required to review every single conceivable environmental impact, the impact to Cranberry Pond from using it for snowmaking water was an obvious and significant impact that APA expressly recognized, yet chose to ignore.

142. Therefore, the Agency Members' legal decision allowing the use of Cranberry Pond for snowmaking was: (1) arbitrary and capricious because it is contrary to the Members' explicit findings that they do not know what the Project's impacts to Cranberry Pond will be (R. 33) and that Cranberry Pond is not a reliable source of water for snowmaking (R. 24); and (2) not supported by substantial evidence because there is no quantitative or scientific basis in the record for concluding that the adverse impacts would not be undue.

143. Finally, attempting to buttress the Agency Members' decision with after-the-fact studies of the Project's impact on Cranberry Pond constitutes defective, insufficient and impermissible evaluation and consideration of the Project's impacts. Again, the Agency Members' decision should be annulled because it was arbitrary, capricious and unsupported by substantial evidence.

REPLY TO NEW MATTER ALLEGED IN THE ANSWERS ON THE THIRD AND FOURTH CAUSES OF ACTION: THE USE OF CRANBERRY POND FOR SNOWMAKING WOULD VIOLATE THE FRESHWATER WETLANDS ACT

144. As set forth in the Third and Fourth Causes of Action, APA completely failed to make the determinations required of it under the Freshwater Wetlands Act ("FWA"). Moreover, the use of Cranberry Pond for snowmaking would violate the FWA because this use would result in impermissible and unreasonable degradation of Cranberry Pond and its associated wetland values and functions. Petition ¶¶ 108-164.

145. The State alleges that the determination made by APA under the FWA "is a legal conclusion to be made by the Agency members upon their review of the complete record." State's Answer ¶146. The State also alleges that APA's decision was "rationally based on substantial evidence in the hearing record." State's Answer ¶96 (as referenced in ¶158 of the State's Answer). The Project Sponsors allege that APA determined that the ACR

Project "complies with the applicable approvable criteria." Project Sponsors' Answer ¶79.[37]

146. However, as set forth below, and despite the State's assertions regarding the sufficiency of the Record (State's Answer ¶158), nothing alleged in the application materials,[38] or presented by the Project Sponsors or the APA staff at the hearing, provided a basis for making the required findings under the FWA. Therefore, the Agency Members' legal conclusions are not supported by substantial evidence, are arbitrary and capricious, and should be annulled. See Petition, ¶¶ 143-164.

147. APA should not have issued a permit for the ACR Project unless it made certain "findings" about the Project's impacts on Cranberry Pond and its associated wetland values. See 9 NYCRR § 578.10.[39] It is axiomatic that the Agency must first determine which wetland rating applies to Cranberry Pond so as to enable the Agency to review the relevant criteria and make the required findings. See 9 NYCRR § 578.10.

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[37] The Project Sponsors also argue that Petitioners did not produce a witness at the hearing to testify about the impacts to wetland functions and benefits. Answer ¶79(e). There was lengthy testimony presented by other hearing parties, including APA staff, regarding the impacts to wetlands and their associated functions and values, and in no way was it the Petitioners' burden to present additional testimony. See ¶43, supra.

[38] The Applicant failed to prove the matters alleged in its application. See Petition ¶¶ 85-96.

[39] The Project Sponsors' allegations (Project Sponsors' Answer ¶79(a), (b) and (c); ¶83) regarding general wetland impacts on the Site are inapplicable because they do not address this specific issue.

148. Footnote 19 of the Petition stated that APA's Order and Permits did not make any findings about the wetland rating of Cranberry Pond. Petition, ¶145, FN 19.[40] The State "[a]dmit[s] the allegations in ¶145 of the petition and footnote 19." Answer ¶145. Therefore, APA failed to comply with 9 NYCRR § 578.10.

149. In addition, it is uncontested that APA did not determine what the impacts would be to Cranberry Pond or to the values and benefits of existing wetlands associated with Cranberry Pond. State's Answer ¶148; Project Sponsors' Answer ¶¶ 50, 79; see Tr. 1848-1849, 1860, 1863-1864; Spada, PFT #8, p. 6, following Tr. 1991; Petition ¶148 (quoting ¶154 of the Order: the "impact . . . to fish, wildlife and other biota within Cranberry Pond and to the value and benefits of existing wetlands associated with the pond has not been determined"). Therefore, APA failed to comply with its FWA regulations.

150. Cranberry Pond is a "pristine," "relatively undisturbed" body of water with "very high quality water." Tr. 1857, 1860, 1866; R. 9246.

151. Snowmaking operations from the ACR Project could withdraw as much as 2,400,000 gallons per day from Cranberry Pond. Franke PFT #8, p. 12, following Tr. 1991.

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[40] It was mentioned during APA's February 9, 2007 Regulatory Programs Committee meeting that the "Cranberry Pond area is a Class '1'" wetland (R. 9262), not Class '2' as was assumed for purposes of the Petition (Petition ¶145).

152. The potential adverse impacts from lowering the level of water in Cranberry Pond as a result of using it for snowmaking water include high mortality of turtles, frogs, and other amphibians, decreased downstream flows, changes in plant composition, increased invasive species survival, increased water temperatures, and the total elimination of associated wetlands. Tr. 1163-1164 (Klemens, 4/27/11), 1794-1795 (Franke, 5/3/11), 1844, 1849, 1887-1889 (Spada, 5/3/11), 1930-1931 (Glennon, 5/3/11), 2026-2028 (LaLonde, 5/4/11); Klemens PFT, p. 18, following Tr. 1274; Spada PFT #8, p. 6, following Tr. 1991; LaLonde, PFT #8, p. 10, following Tr. 2065; Reply ¶129, supra.[41] See 9 NYCRR § 578.8(a).

153. These potential impacts show that the use of Cranberry Pond for snowmaking water for the ACR Project would be incompatible "with preservation of the entire wetland" and would result in "degradation" and a loss in "part of the wetland or its associated values." 9 NYCRR § 578.10(a)(1). Therefore, APA's approval of the use of Cranberry Pond as a source for snowmaking water violated its FWA regulations.

154. The Project Sponsors admit that APA Staff witness Spada testified that "[i]t is unclear whether and to what extent wetland impacts will occur at Cranberry Pond due to water extraction" for snowmaking purposes. Answer ¶79; see Tr. 1889, 2033; LaLonde PFT #8, p. 10, following Tr. 2065.

[41] These citations correct any errors that may have been in the citations in Petition ¶113, as identified in Project Sponsors' Answer ¶60(a).

155. As a result, the Project Sponsors could not have rationally proposed mitigation of impacts that are still unknown. Further, the Project Sponsors' alleged mitigation measures, consisting of new compensatory wetlands for the 1.47 acres of wetlands filled by the Project's land-clearing and construction activities elsewhere on the Site (Answer ¶79(a),(b), and (c); ¶¶ 83, 85), have nothing to do with mitigating the impacts resulting from withdrawing water from Cranberry Pond for snowmaking purposes. See Tr. 1138; 1860-1862; Ski Area Permit, R. 47.

156. Without having made any explicit findings about the wetland rating of Cranberry Pond, or about the ACR Project's impacts on Cranberry Pond or its associated wetland values, it is impossible for the Court to determine how the Agency Members came to any conclusion regarding the Project's compliance with the FWA regulations. See Matter of Barry v. O'Connell, 303 N.Y. 46, 51 (1951).

157. Therefore, the Third and Fourth Causes of Action should be granted, and APA's approval of the ACR Project should be annulled. See Koelbl v. Whalen, 63 A.D.2d 408, 413 (3d Dept. 1978), lv denied 46 N.Y.2d 706 (1978).

158. Finally, contrary to the Project Sponsors' assertions (Answer ¶¶ 79(b), 85), APA's issuance of the permit while requiring the Project Sponsors to "survey" the impacts resulting from the use of Cranberry Pond for snowmaking purposes demonstrates the arbitrariness of APA's decision. Order, R. 34; Ski Area Permit, R. 49.

159. APA's "non-permit permit," which allows the Project Sponsors to undertake the regulated activity and then afterwards allows APA to possibly assess the impacts of that activity and possibly require the Project Sponsors to institute mitigation measures, is an impermissible postponement of the review of the impacts resulting from the use of Cranberry Pond for snowmaking.

160. APA is required to assess the "potential for adverse impact . . . before" it approves a project. APA Act § 805(4) (emphasis added).

161. Additionally, the plan to conduct an after-the-fact "quantitative biological survey and impact analysis," set forth in the "non-permit permit" issued to the Project Sponsors by APA (Ski Area Permit, R. 49), deprives all of the hearing parties of their right to review said analysis, comment on it, conduct discovery regarding it, conduct cross-examination of its authors, and present rebuttal testimony, as would have been permitted under 9 NYCRR § 580.14 if the analysis had been conducted before the hearing, rather than after it.

162. Therefore, APA's decision to approve the ACR Project was arbitrary, capricious, and not supported by substantial evidence, the Petition's Third and Fourth Causes of Action should be granted, and the Order and Permits issued by APA should be annulled.

REPLY TO NEW MATTER ALLEGED IN THE ANSWERS
ON THE FIFTH AND SIXTH CAUSES OF ACTION:
THE PROJECT WILL HAVE UNDUE ADVERSE IMPACTS
ON AMPHIBIANS IN BOTH RESOURCE MANAGEMENT
AND MODERATE INTENSITY USE AREAS ON THE SITE

163. As set forth in the Fifth and Sixth Causes of Action (Petition ¶¶ 165-233), the Order and Permits should be annulled because:

(a) APA ordered the Applicant to do after-the-fact studies on adverse impacts to amphibians, yet limited those studies to Resource Management ("RM") lands, despite the fact that most of these impacts would occur in Moderate Intensity Use ("MIU") areas;

(b) the fact that APA ordered the after-the-fact studies shows that it recognized the potential for undue adverse impacts, but it nevertheless approved the Project without having the necessary evidence as to the severity of those impacts and the necessary means to avoid or mitigate them;

(c) APA, in advance, limited the types of potential mitigation measures for these impacts that could be imposed after-the-fact, despite not yet having before it the results of the studies that were intended to identify the appropriate mitigation measures; and

(d) APA prevented the hearing parties, whose witnesses had first identified the need for additional study and protection of amphibian habitat, from having an opportunity to review these after-the-fact studies and to adjudicate whether, and how, the

results might or might not allow APA and the Applicant to satisfy the requirements of the APA Act.

There Was No Rational Basis for Limiting
the After-the-Fact Studies of Critical Habitat
for Amphibians to Resource Management Areas

164. The Project Sponsors allege (Answer ¶105, Points of Law 1, 2, 3), in responding to Petition ¶¶ 211-214, that, i*nter alia*, the Petition fails to state a cause of action. This argument is incorrect.

a. Petition ¶¶ 211-214 state:

> 211. Further, pursuant to APA Act § 805(3)(d), Moderate Intensity Use areas "provide for development opportunities in areas where development will not significantly harm the relatively tolerant physical and biological resources."
>
> 212. Since the impacts of the Project on amphibian life and upland amphibian habitat are unknown, the APA could not have determined that the Project "will not significantly harm" amphibians and their habitat. APA Act § 805(3)(d).
>
> 213. Moreover, the findings that were made by APA regarding amphibians establish that the Project would not be compatible with the Resource Management and Moderate Intensity Use land use areas, in violation of APA Act § 809(10)(b), and that the application should have been denied.
>
> 214. Because the Project will have undue adverse impacts on amphibians, in violation of APA Act § 809(10)(e), is not consistent with the Resource Management and Moderate Intensity Use land use areas as required by APA Act § 809(10)(b), and is not consistent with the Adirondack Park Land Use and Development Plan, in violation of APA Act § 809(10)(a), the application should have been denied.

165. APA found that a further study of amphibians, their habitat, and necessary measures to mitigate impacts on them was

required to be conducted after its approval of the Project. R. 21-22, 33-34; West Face Expansion subdivision (Permit 2005-100.13), R. 236, the Small Western Great Camp Lots (Permit 2005-100.12), R. 217-218, and the Small Eastern Great Camp Lots (Permit 2005-100.4), R. 96-97; Petition ¶189. But without any rational basis for doing so, APA limited such studies to RM lands, and did not require any such studies on MIU lands (R. 21-22, 33-34, West Face Expansion subdivision (Permit 2005-100.13), R. 236, the Small Western Great Camp Lots (Permit 2005-100.12), R. 217-218, and the Small Eastern Great Camp Lots (Permit 2005-100.4), R. 96-97; Petition ¶189). It did so despite the fact that the majority of the affected habitat is located in Moderate Intensity Use areas (Petition ¶¶ 180-185; Project Sponsors' Answer ¶¶ 93(d) to 93(h); Exhibit 244, R. 19649, 21022).[42] This,

[42] The Project Sponsors admit (Answer ¶93(d)) that the majority of the "750 foot critical terrestrial habitat" area for amphibians is located in MIU areas. The Project Sponsors' Answer at ¶¶ 93 (e) to (i) nicely identifies the affected areas in MIU, confirming Petitioners' analysis at Petition ¶¶ 180-185.

The Answer (¶93(h)) concludes that 87% (546/626) of the residential units in the 750 foot critical terrestrial habitat area are located in MIU areas, but provides no rational basis for excluding those areas from the studies that are being required by APA in order "to identify protected species and to determine migration routes [that] will ensure that best management practices and low cost mitigation techniques will be employed to reduce impacts to amphibian populations". R. 33. See also Petition ¶¶ 186-223.

Instead, the sites of only 13% (80/626) of the units, those located in RM (Project Sponsors' Answer (¶93(h)), will be studied prior to construction, so as to avoid undue adverse impacts to amphibians. The other 87% will not be studied.

alone, requires that APA's approval of the Project be annulled. Petition ¶¶ 165-233.

166. The only argument made by the Respondents in their Answers against requiring such studies on all affected land use areas, including MIU, is that the APA had already decided before the hearing that there was no need for any additional evidence on impacts to wildlife on MIU lands. State's Answer, p. 2, ¶E; Project Sponsors' Answer, pp. 1-3, ¶¶ 86, 93, 95.

167. In effect, the Respondents have no excuse on the merits for APA's failure to apply this requirement uniformly, and are relying upon various technicalities to avoid having to address the merits of the issue. However, as set forth above at ¶¶ 73-105 and ¶¶ 109-117, these arguments are not legitimate bases for treating RM and MIU areas differently on this question, and for ignoring evidence produced during the hearing by independent witnesses and APA's own staff, which evidence proves that there will be undue adverse impacts on amphibians.

168. The differences in the statutory "character descriptions and purposes, policies and objectives" (APA Act §809(10)(b)) for RM and MIU[43] do not justify treating the two land use areas differently with regard to these after-the-fact studies. See State's Answer, p. 2, ¶E; Project Sponsors' Answer pp. 1-3, ¶¶ 86, 93, 95. APA Act § 809(10)(b) does require that APA find that the "project would be compatible with the character

[43] Compare APA Act § 805(3)(g) (Resource Management) and APA Act § 805(3)(d) (Moderate Intensity Use).

descriptions and purposes, policies and objectives of the and use area wherein it is proposed to be located." In making this finding, any differences between the two land use areas might be relevant in some cases, but those differences are not germane herein.

169. Moreover, in order to approve any application, APA must also make a finding as to whether the "project would have an undue adverse impact upon the ... resources of the park...". APA Act § 809(10)(e). This criterion does not differentiate between the 6 land use areas created under the Adirondack Park Land Use and Development Plan. See APA Act § 805. Thus, in making the required finding on "undue adverse impact", APA can not differentiate between Resource Management and Moderate Intensity Use areas. Therefore, there was no rational basis for not also requiring after-the-fact studies in Moderate Intensity Use areas.

The Necessity of Conducting After-the-Fact Studies of Critical Amphibian Habitat Demonstrates that the Applicant Did Not Meet its Burden of Proof and the Application Should Have Been Denied by APA

170. The Project Sponsors argue (Answer ¶¶ 73(a), 73(b), 101) that after-the-fact studies are "commonplace" and are not grounds for annulling the Order. To the contrary, the fact that APA found it necessary to impose conditions requiring that such studies be done shows that the Applicant did not meet its burden of proof.

171. As set forth above at ¶¶ 37-43, an applicant has the burden of proof in an APA application and hearing process. The

Applicant herein was required to prove that the Project would not have an undue adverse impact on wildlife and its habitat. As described below, and at Petition ¶¶ 230-236, the Applicant ignored multiple requests to provide the necessary data, including data regarding the protection of amphibians and their habitat, such as vernal pools. R. 3386, 6242, 7096, 8808, 9319; Tr. 712, 732, 733, 776, 872, 1615, 1616, 3677-3678, 3756.

172. The testimony presented at the hearing showed that gathering adequate data on amphibians was critical because amphibians "serve as the base of the food chain [and] have important ecological functions and functions that maintain the balance and ecological connections within the forest ecosystem." Tr. 1005; see Tr. 1847-1848; 3172-3173.

173. Additionally, more than a cursory review is necessary because amphibians "have complex habitat requirements." Tr. 1005.

174. Moreover, the testimony showed that the Project would impact amphibians' habitat throughout the Project Site, on MIU areas and on RM areas. Tr. 1039 ("all around [the subdivisions] you have wetlands"), 3135-3136 ("one night's worth of work" identifying amphibian species demonstrated "the richness and diversity of the site that has yet been unstudied"), 3162-3164 (wood frogs heard "off the roads"); see ¶ 113, supra.

175. APA recognized that it lacked the necessary data to make a ruling that the Project would not have an undue adverse impact on these natural resources, and ordered that such studies

be done after-the-fact. R. 21-22, 33-34; West Face Expansion subdivision (Permit 2005-100.13), R. 236, the Small Western Great Camp Lots (Permit 2005-100.12), R. 217-218, and the Small Eastern Great Camp Lots (Permit 2005-100.4), R. 96-97; Petition ¶189. However, without having the necessary data before it at the time of its decision, APA's decision was not supported by substantial evidence, was arbitrary and capricious, and should be annulled.

The Imposing of Permit Conditions Requiring Certain Minimal Mitigation Measures to Protect Amphibians Does Not Obviate the Need for Studies of Critical Amphibian Habitat on the Entire Site Prior to the Commencement of Construction

176. The Project Sponsors allege (Answer ¶104), in responding to Petition ¶¶ 209-210, "that the application and final Order are replete with mitigative measures designed to project wildlife and wildlife habitat such as" (a) deed restrictions on RM lands; (b) limiting development on Great Camp lots to 3 acres each; and (c) particular requirements for the construction of roads, curbs, bridges, and the like, to protect amphibians and fish. See also Project Sponsors' Answer ¶93(c).

177. Petition ¶¶ 209-210 state:

> 209. Pursuant to APA Act § 805(3)(g), a basic purpose of Resource Management areas is to "protect the delicate physical and biological resources."
>
> 210. The Project's impacts to amphibians, their upland habitat, and vernal pools in Resource Management areas are not known, but it is certain that, when it comes to amphibians and their habitat, the Project has not been designed so as to "protect the [Site's] delicate physical and biological resources." APA Act § 805(3)(g).

178. The Project Sponsors' citing of these purported mitigation measures to the Court is misleading, at best. The deed restrictions (Answer ¶104(a)) and 3 acre building envelopes (Answer ¶104(b)) in question only protect RM lands, so they do nothing to protect amphibian habitat in MIU areas, where the majority of these impacts will occur.[44] See ¶ 165, supra. In addition, despite these deed covenants and building envelope limits, APA found that studies to identify additional mitigation measures on Resource Management areas were required. R. 21-22, 33-34. Therefore, the existence of these first two sets of restrictions has already been deemed by APA to be inadequate to protect amphibian habitat on Resource Management lands. R. 21-22, 33-34.

179. The fact that these mitigation measures do not apply to MIU areas is even more reason to require the additional habitat studies in MIU areas, yet this was not done.

180. As for the curbs, roads and the like (Project Sponsors' Answer ¶104(c)), these conditions do apply in both RM and MIU areas. R. 33; Tr. 3615-3616. However, Dr. Michael Klemens testified that even with these conditions in place, amphibian mortality "risks become higher" as the intensity of the travel trips on the Site's roads increases. Tr. 1186. Amphibian

[44] About 7 of the Great Camp lots are in MIU areas, in whole or in part, and are included in the 750 foot critical terrestrial habitat area for amphibians, in whole or in part. Petition ¶¶ 182-185; Project Sponsors' Answer ¶¶ 93(d) to (h). These 7 lots may gain some marginal protection from the 3 acre limitation. However, up to 21 acres of critical terrestrial habitat for amphibians could be cleared on these 7 lots.

movement is also impeded by the development on the Project Site. Tr. 3186-3187. Moreover, without "a comprehensive species list at the very minimum," it is difficult to properly "employ[] any kind of physical mitigation measure." Tr. 4060; see Tr. 4072-4073.

181. Accordingly, APA ordered that further studies were needed, at least in RM areas. See R. 21-22, 33-34.

182. Also, these design elements for curbs and roads are already part of the Project (R. 33; Tr. 3615-3616), but APA still found that studies to identify additional mitigation measures were required, at least in RM areas. Therefore, the Project Sponsors' argument "that the application and final Order are replete with mitigative measures" (Answer ¶104) does not cure APA's failure to require that amphibian habitat studies be performed on both RM and MIU lands, and that those studies be done before the approval of the Project, not after-the-fact.

Reply to Additional New Matter

183. The record demonstrates that the Applicant failed and refused to conduct an inventory of the wildlife species on the project site, as requested by the APA Staff multiple times. Petition ¶¶ 165, 230-237. R. 3386, 6242, 7096, 8808, 9319; Tr. 712, 732, 733, 776, 872, 1615, 1616, 3677-3678, 3756. The Project Sponsors allege (Answer ¶86) that the APA board "specifically rejected staff's recommendation" to require such an inventory. This wishful thinking is not correct, and the

Applicant can not justify its failure to provide essential data to the APA by its misreading of the record.

184. The Applicant's refusal to do proper wildlife inventory and assessment studies during the pre-hearing stage was one of the reasons why the APA Staff recommended to the Agency Members that a public hearing be held.

a. In its January 31, 2007 memo which recommended that the APA require a hearing for the Project, the APA Staff stated:

> D) <u>The project may have an undue adverse impact upon the natural, scenic, aesthetic, ecological, historic, recreational or open space resources of the Park.</u>
>
> 1) Adjudication is warranted to resolve a number of issues with respect to whether the Great Camp lots will have adverse impacts on Park natural and ecological resources, including:
>
> a) whether the access roads, driveways and camp development areas result in adverse fragmentation of the wildlife habitat of species known to exist on the project site; ...
>
> 2. The wildlife functional assessment failed to provide a detailed species inventory and was not conducted over a number of days nor during different seasons. It did not identify vernal pools and amphibian crossing locations.
>
> Consequently, lack of information makes it difficult to assess possible habitat fragmentation and potential wildlife impacts or to determine potential localized changes in animal species composition, diversity and functional organization from the development and any changes to the biotic integrity of the site and adjacent properties. R. 8807-8808. (emphasis in original)

b. On February 6, 2007, the Applicant's attorney wrote to the APA objecting to many aspects of the hearing recommendation, including particularly, the recommended wildlife studies. R. 9158-9161.

c. On February 7-9, 2007, the APA Staff presented to the APA Members its recommendations for issues to be included in the hearing, including those related to "incomplete biological survey data" and "existing data sources only partially accessed". R. 9214, 9263, 9264, 9270, 9284, 9287.

d. Rather than rejecting the Staff's recommendation, the comments of the Agency board on this subject supported the Staff's position. R. 9284.

> Mr. Spada stated the Agency Staff required a wildlife functional assessment. He noted that it is not an easy task and that the consultant did a good job describing the existing conditions on the site including forestry activities and hunting....He stated that there has been no formal wildlife data collection and that existing wildlife data sources have not all been utilized. He showed a map of the ecological impact zones for the current and proposed activities on the site. He stated there has been no alternatives analysis to reduce the size or create overlap of impact zones. Designee Buchanan stated that there really needs to be more assessment and more on-site evaluation especially regarding conflict with bear, deer, and domestic animals and how to avoid situations. Designee Buchanan asked about migration routes on the site. Mr. Spada stated that he defers to DEC on migration. R. 9263. (emphasis added)
>
> ...
>
> Designee Buchanan asked about the need for an impact analysis on wildlife use or habitat. It was noted that there are sources of information that the applicant did not tap that would provide a more complete record including the breeding bird atlas and that habitat fragmentation is one of the concerns. Staff has attempted to work with the sponsor to get that information, but parties to a hearing could testify and provide more information. It was stated that

> the issue is covered only for the Resource Management portion of the site. R. 9264. (emphasis added)

e. The APA then adopted the Staff's draft hearing order, with certain clarifications. R. 9298. At no time did the APA Members reject, either expressly or impliedly, the Staff's recommendation that additional wildlife studies were needed. See R. 9213-9300.

f. The 2007 Hearing Order framed this issue as follows:

> **Issue #1.** Is the natural resource protection (including visual, forest resource, habitat and other natural resource considerations) implicit in Resource Management land use area adequately protected [§805(3)(g)(2)]; are the proposed great camp lots "substantial acreage...on carefully and well designed sites?" Are there alternatives, and if so, what are the relative impacts on these resources?

This issue specifically referred to "natural resource protection (including ... habitat and other natural resource considerations)" (R. 9321), which is consistent with the Staff's recommendation.

g. The fact that the 2007 Hearing Order merely summarized the legal issue to be adjudicated and did not repeat the Staff's entire recommendation verbatim does not mean, by any stretch of the imagination, that the APA board "specifically rejected staff's recommendation to expand the wildlife functional assessment on a 'detailed species inventory'...". Project Sponsors' Answer ¶86(b). Instead, the 2007 Hearing Order was an endorsement of the Staff's position, one that the Applicant chose to ignore.

h. The Project Sponsors' refusal to accept the APA staff's request for proper wildlife studies, and its efforts (Answer ¶86(b)) to blame that failure on the APA, created a significant hole in the record, one that requires that the approval of the Project be annulled.

185. The State (Answer ¶175) and the Project Sponsors (Answer ¶89) allege that APA's guidance document entitled "Development in the Adirondack Park" ("DAP") does not use the terms "vernal pools" and "pools",[45] which are used in Petition ¶175. That is technically correct. However, Petition ¶175 did not say that the DAP uses this term. Moreover, the record proves that vernal pools are a "key wildlife habitat", as that term is used in APA Act § 805(4)(a)(5)(c) and in the DAP, so the fact that the DAP does not use "vernal pools" is irrelevant.

a. As set forth at Petition ¶¶ 165-175, "vernal pools" are ephemeral wetlands [Tr. 4390] that provide key wildlife habitat, particularly for amphibians. Petition ¶175 states that:

> Vernal pools are "a key wildlife habitat", within the scope of DC (a)(5)(c), because they "provide valuable food, shelter, water and rearing areas for a variety of wildlife species, some of which live primarily within the [pool] itself and others which depend upon the [pool] during certain periods of their life cycle." DAP, p. 16A.

b. Protection of vernal pools is important for the determinations that APA must make regarding the Project's undue adverse impacts to wildlife and habitat. The APA's failure to

[45] The pertinent portions of the DAP are set forth in the Supplemental Return as Item A.

take them into account, in all land use areas, in its decision-making, demonstrates that it failed to comply with the APA Act.

c. One reason why the APA Staff recommended in its January 31, 2007 memo that the APA board require that a hearing be held was the lack of information in the application regarding vernal pools and amphibian crossing locations. See R. 8808.

d. In reviewing a project, the APA must take into account the "development considerations" set forth in APA Act § 805(4). One of those is "critical resource areas". APA Act § 805(4)(a)(5). Among the listed critical resource areas is "key wildlife habitats". APA Act § 805(4)(a)(5)(c). Another relevant development consideration is "fish and wildlife". APA Act § 805(4)(a)(6)(a).

e. The DAP describes in more detail each of the development considerations listed in APA Act § 805(4) that must be considered by APA in its decision-making. Its "objectives and guidelines incorporate specific requirements of the Adirondack Park Agency Act ... as well as general planning recommendations." DAP p. iv, Supplemental Return, Item A.

f. Section 16A of the DAP defines and describes the development considerations for "terrestrial wildlife", and states that the applicable guideline is to "preserve key wildlife habitats, such as ... important vegetation transition areas." DAP p. 16A-1, Supplemental Return, Item A. The DAP also states that "effective animal protection hinges upon the preservation of ... key wildlife habitats ..." which include "major vegetation

transition zones (ecotones)". It goes on to describe the importance of these ecotones. DAP p. 16A-2, Supplemental Return, Item A.

g. Although the term "vernal pools" is not used in the quoted DAP definition of "key wildlife habitat", Dr. Michale Glennon, Ph.D., testified that they are "ecotones" and "key wildlife habitat". Tr. 4389.

h. APA Staff witness Mark Sengenberger testified that vernal pools were "sensitive natural resources" and that the Applicant had not provided any information on them to the APA. He also endorsed Dr. Klemens' testimony on this subject. Tr. 1633.

i. Therefore, the fact that the DAP does not use the term "vernal pools" (State's Answer ¶175 and Project Sponsors' Answer ¶89) is irrelevant, because the unanimous testimony of the witnesses was that they are "critical wildlife habitat", which is protected under both the DAP and the APA Act.

j. Despite this, APA approved the Project, without any data on their location having been provided by the Applicant. Tr. 1633, 1888. Thus, without this information, APA could not properly take into account the Project's impacts on key wildlife habitats under APA Act § 805(4)(a)(5)(c) and could not make a rational determination about the Project's undue adverse impacts under APA Act § 809(10)(e).

186. The State (Answer ¶176) and the Project Sponsors (Answer ¶89), in response to Petition ¶176, allege that APA Staff

witness Daniel Spada did not refer to "critical upland habitat" for amphibians in his testimony at Tr. 1882-1883. This is technically correct, but that does not change the import of Mr. Spada's testimony.

a. What he actually said at Tr. 1882-1883 is:

> Q. ... Dr. Klemens testified, and I quote, avoidance of wetlands, but leaving minimal upland habitats beyond the one-hundred-foot buffer is tantamount to reducing most of the wetlands capacity to sustain many species of wildlife, end quote. Do you agree with that statement?
>
> A. As a general statement, yes. Tr. 1882-1883.

b. In addition, Mr. Spada had produced Exhibit 244 (R. 19649, 21022),[46] which is a map of the Site showing the "750 foot critical terrestrial habitat" for amphibians. (emphasis added) Mr. Spada testified, when asked about whether or not he agreed with Dr. Klemens on the need to protect an area of habitat from 100 to 750 feet "from the wetland into the upland area" (emphasis added), that he did in general agree with Dr. Klemens on this. Tr. 1882-1886.

c. Mr. Spada had previously testified with regard to Exhibit 244, that:

> A. These zones, the one hundred foot buffer and the seven hundred fifty foot buffer, comport with the literature out there that describes the critical habitat area for amphibians. It doesn't include all of the habitat that amphibians may occupy. It includes critical habitat for a bulk of amphibians. And so this [Exhibit 244] helps to analyze the impacts to those organism which spend at least a portion of their life

[46] Mr. Spada testified about the creation and meaning of Exhibit 244 at Tr. 4035 to 4048 and it was admitted into evidence at Tr. 4038.

> cycle -- and a critical portion of their life cycle. It goes back to wetland protection, protecting the value and function of fresh water wetlands. Tr. 4048. (emphasis added)

d. Therefore, while he technically did not say "critical upland habitat" at Tr. 1882-1883, the distinction is not relevant. "Upland habitat" and "terrestrial habitat" are essentially the same thing. Both are areas of land which are not in the water.

e. More importantly, Mr. Spada did agree that the upland habitat up to 750 feet from the wetlands, which he himself had called "critical terrestrial habitat" in Exhibit 244 [R. 19649, 21022], needed to be protected in order to avoid "reducing most of the wetlands capacity to sustain many species of wildlife". Tr. 1882-1886.

f. The Order and Permits clearly do not protect this critical habitat, except for a few isolated areas of RM land (Petition ¶¶ 179-195), and so "most of the wetlands capacity to sustain many species of wildlife" will be reduced by the Project. See Tr. 1882-1883.

187. The Project Sponsors also allege (Answer ¶91) that Staff witness Mr. Spada did not testify to what Petition ¶177 says he did. This allegation is wrong.

a. Petition ¶177 states:

> 177. Spada also testified that the instances where the Project's development happened to avoid some portions of the critical upland habitat zone were "inadvertent." Tr. 1872.

b. What Mr. Spada said was:

> ... we did not recognize those upland areas of amphibian habitat as important spots initially, for other reasons, we were able to have most of the development located in places that I believe answer some -- not all, but some portion of Dr. Klemens' concerns. Tr. 1871.
>
> ... it is a level of protection, inadvertent or otherwise, for those upland areas that amphibians use. T. 1872. (emphasis added)

c. Therefore, Petition ¶177 accurately describes Mr. Spada's testimony and the Project Sponsors' claim in Answer ¶91 that he did not testify as described in the Petition is wrong. Nor did the Project Sponsors provide in Answer ¶91 any affirmative argument to demonstrate that they had in fact undertaken any inventory of amphibians and their habitat, or taken any purposeful measures designed to protect them.

188. The Project Sponsors allege (Answer ¶93), in response to Petition ¶¶ 179-185, that the adjudicatory hearing issue regarding wildlife habitat was limited to RM areas. As set forth above at ¶¶ 96-105, this is false.

189. The Project Sponsors rely (Answer ¶93(c)) upon APA's requirement for the future identification of "low-cost mitigation techniques [that] will be employed to reduce impacts to amphibian populations". There is no rational basis in the record for this limitation on the potential future mitigation measures to be employed. No evidence supports the idea that low-cost measures, alone, will be adequate to ensure that any "adverse impacts" are not "undue", as required by APA Act § 809(10)(e).

190. The Project Sponsors allege (Answer ¶101), in response to Petition ¶206, "that this amphibian survey and any subsequent

analysis are public records available to the public under multiple New York disclosure laws and rules."[47] This is allegation is completely non-responsive to Petition ¶206.

a. Even if the amphibian survey was "available to the public" (Project Sponsors' Answer ¶101), that would not cure the fact that the hearing parties would be deprived of their right to review them, comment on them, conduct discovery regarding them, conduct cross-examination of their authors, and present rebuttal testimony, as would have been permitted under 9 NYCRR § 580.14 if they had been conducted before the hearing, rather than after it. Petition ¶206.

b. Any decision made by APA on implementing the results of these studies would be made by the APA staff, out of the public view. As shown by the hearing record, the adjudicatory hearing process allowed the parties the opportunity, on cross-examination of the Applicant's witnesses, to expose the holes in the Applicant's proof and the duplicity in its witnesses' testimony. See e.g. Tr. 185-198 (Project will overwhelm capacity of State Boat Launch), Tr. 2427-2451 (projected real estate sales figures were created out of thin air by the Applicant, with no supporting data, and were mysteriously inflated from 2005 to 2010, despite the Great Recession and the real estate market crashing in that time frame), Tr. 3647-3695 (establishing that Applicant's consultants testified falsely when they claimed that the level of

[47] It is unclear what laws, other than the Freedom of Information Law, the "multiple New York disclosure laws and rules" being referred to are.

wildlife inventory and analysis work was essentially similar for the Project and for the very similar Belleayre Mountain project that they also worked on). Conducting the wildlife studies after the fact would eliminate the possibility of exposing the truth in such a hearing, as was done many times in the 2011 adjudicatory hearing.

191. The Project Sponsors allege (Answer ¶110), in response to Petition ¶221, that "'the study of impacts on Cranberry Pond' is limited by 'APA Project Findings and Order No. 2005-100' to monitoring water withdrawals from snowmaking for up to 5 years since all of Cranberry Pond and its immediate environs are in the moderate intensity land use classification". This argument is wrong, irrelevant, and based on a wildly flawed reading of the permit in question.

a. Petition ¶221 states:

> 221. Requiring that the study of the impacts on Cranberry Pond be done only after the Project was approved is an impermissible postponement of the APA's review of the Project's environmental impacts.

b. This discussion in Petition ¶221 about the study of the impacts of snowmaking water withdrawal from Cranberry Pond on, *inter alia*, wildlife, including amphibians, is part of the proof that APA recognized that there were unmeasured adverse impacts, yet failed to require the proper studies before approving the Project, instead issuing a non-permit permit that allowed the Project sponsors to do the studies after the fact. Petition ¶221 is followed by:

> 222. Relying upon a contingency plan for future mitigation of amphibian impacts is improper.
>
> 223. Therefore, APA's decision to approve the Project was arbitrary and capricious and affected by error of law, and the Order and Permits should be annulled.

c. Thus, the point being made at Petition ¶¶ 221-223 is that allowing the amphibian surveys and the Cranberry Pond water withdrawal study to be done after the fact was arbitrary and capricious in light of the fact that APA obviously knew that there was not yet sufficient evidence in the record to allow it to properly protect amphibians and their habitat, as required by the APA Act, yet it approved the Project anyway.

d. The Ski Area Permit requires the Project Sponsors to do an after-the-fact study of the impacts of snowmaking water withdrawal on Cranberry Pond and the associated wetlands complex. This study must include, *inter alia*, "a quantitative biological survey and impact analysis" including "a pre-drawdown and post-drawdown inventory of ... amphibians...". R. 49. This study "shall be multi-season, occurring over a minimum of two years." R. 49.

e. Paragraph 32 of the Ski Area Permit also provides that:

> The authorized withdrawal of water from Cranberry Pond for snowmaking shall be limited to five consecutive years from such initial date unless otherwise approved by a new or amended Agency permit. R. 49.

f. The Project Sponsors' response to Petition ¶221 at Answer ¶110 completely misreads the Ski Area Permit:

(1) The study of impacts on Cranberry Pond is not required by the "APA Project Findings and Order No. 2005-100", as alleged.

It is required by the Ski Area Permit. Compare R. 33-34 to R. 49.

(2) The study is not limited to five years, as alleged. It is required to occur over a period of at least two years, and has no maximum length. R. 49.

(3) The five year limit is, instead, a limit on the number of years that the Project Sponsors can use Cranberry Pond for the withdrawal of water for snowmaking, unless APA amends the permit or issues a new one. R. 49.

(4) The study is not "limited ... to monitoring water withdrawals from snowmaking", as alleged. It goes far beyond mere "monitoring" of water withdrawals. It must also include a "quantitative biological survey and impact analysis" and an "inventory of wetland vegetation, fish, amphibians, furbearers and other biota", and assess "the impact of water withdrawals for snowmaking on the pond and associated wetlands, wildlife, and other biota." R. 49. That this type of study is being mandated by APA clearly shows the fallacy inherent in allowing the Project Sponsors to adversely impact the pond, the wetlands, and the wildlife, including amphibians, for two to five years. See Petition ¶¶ 97-142.

(5) The alleged five year limit has nothing to do with the fact that the pond is in a MIU area, as alleged. There is nothing in either the Ski Area Permit [R. 49] or the Order [R. 33-34] that connects either the time-frame for the study or the cap on the allowable number of years of water withdrawals to the

particular land use area in which the pond is located. Nor would there be any reason to do so. Adverse impacts to wetlands and wildlife are considerations that APA must take into account regardless of the land use area in question. See Petition ¶¶ 127-129.

(6) The fact that the pond is in a MIU area is completely irrelevant to the merits of the Sixth Cause of Action. As set forth above at ¶¶ 52-120, Petitioners are not barred by the doctrine of exhaustion of administrative remedies, or any of the other defenses propounded by the Respondents, from litigating these impacts merely because the lands in question are in a Moderate Intensity Use area.

g. Therefore, the Project Sponsors' attempt (Answer ¶110) to use erroneous and incorrect arguments to distract attention from the merits of the issue of the obvious error by APA in approving a non-permit permit for the Project, in reliance on a partial after-the-fact study of amphibians, is unavailing. The Answer completely missed the point, which is that, having recognized that it lacked enough information to determine whether or not there would be undue adverse impacts on amphibians, and ordering such an after-the-fact study, APA had no rational basis to limit that study to Resource Management areas only, or for its decision to approve the Project. See Petition ¶¶ 97-233.

192. The Project Sponsors allege (Answer ¶111) that "the term contingency plan as used in [Petition ¶222] **appears nowhere**

in the hearing record." (emphasis in original) This claim is baffling.

a. What Petition ¶222 says is:

> 222. Relying upon a contingency plan for future mitigation of amphibian impacts is improper.

b. The term "contingency plan" is previously used at Petition ¶201:

> The Order (p. 33) references mitigation measures that can be employed, but relying upon this contingency plan, after the Project has already been approved, improperly defers consideration of the mitigation measures and denies the hearing parties an opportunity to provide input as to whether or not the mitigation would be appropriate or acceptable and to test the study in an adjudicatory process.

c. Thus, the reference to a "contingency plan" in Petition ¶222 is based on the Petition's prior description of the after-the-fact mitigation measures.

d. Neither Petition ¶201 or Petition ¶222 has quotation marks around the term "contingency plan" and neither paragraph alleges that it is used anywhere in the Order or elsewhere in the hearing record, as claimed in the Answer. The term appears as Petitioners' description of what is in the Order, not as a quote from it. Therefore, it is not clear why the Project Sponsors' Answer objects to the use of this term.

e. What is important about this plan is that APA recognized that the currently proposed mitigation measures for adverse impacts to amphibians were inadequate, and ordered a (partial) study to identify additional such measures, in hopes that it would provide additional mitigation. Such a contingency plan for mitigation does not comply with the law. In order for APA to

determine that the Project is compatible with the MIU and RM areas (APA Act § 809(10)(b)), and that the Project would not have an undue adverse impact on amphibians (APA Act § 809(10)(e)), it had to know, at the time that it voted, what those mitigation measures would be, including, but not limited to, the relocation or elimination of neighborhoods within the Project, if necessary.

193. In conclusion, APA, in its zeal to approve the Project, issued a non-permit permit which allowed the Applicant to rebuff the APA's own prior requests for proper studies of the Project's impacts on amphibians and their habitats, including vernal pools, ignored its own Staff's key hearing exhibit (Exhibit 244, R. 19649, 21022), and instead decided that ordering after-the-fact studies of these impacts on only a small fraction of the affected area, with a severely limited range of permissible post-study mitigation, would satisfy its "environmental mandate" to ensure that the Project would not have an undue adverse impact on the natural resources of the Adirondack Park. See Association v. Town of Tupper Lake, 64 A.D.3d at 827. This result should be annulled.

REPLY TO NEW MATTER ALLEGED IN THE ANSWERS ON THE SEVENTH AND EIGHTH CAUSES OF ACTION: THE APPROVAL OF THE PROJECT, DESPITE APA'S RECOGNITION OF THE NEED FOR ADDITIONAL STUDIES OF WILDLIFE IMPACTS, SHOULD BE ANNULLED

194. The Seventh and Eighth Causes of Action (Petition ¶¶ 224-284) demonstrate that the Applicant failed to meets its burden[48] of proving that the Project would not "have an undue adverse impact" on the wildlife and wildlife habitat resources of the Adirondack Park (APA Act § 809(10)(e)), that the Project would be "consistent with the land use and development plan" (APA Act § 809(10)(a)), and would "be compatible with" the land use areas (Moderate Intensity Use and Resource Management) in which it would be located (APA Act § 809(10)(b)). Petitioners' argument is not merely that the opposing experts were far more qualified and gave better testimony than the Applicant's witnesses. The Applicant actually presented no testimony on these issues that was not already in the application materials, therefore failing to even attempt to meet its burden of proof.[49]

195. The Project Sponsors claim (Answer ¶112) that they did meet their burden of proof by providing 12 allegedly expert witnesses. However, this claim is wrong because:

a. Only two of those witnesses testified on the issues set forth in the Seventh and Eighth Causes of Action, involving Hearing Issues #1 and #8. The remaining ten witnesses listed in

[48] See ¶¶ 37-43, supra.

[49] Id.

¶112(a) of the Project Sponsors' Answer testified on other hearing issues.

b. The Applicant's witnesses on Hearing Issue #1, Messrs. Anthony and Franke, in their prefiled testimony and live testimony, did not add anything new that was not already in the application materials. They had no new studies, no new inventory of wildlife species, no new analysis, no new supporting data or other information, and nothing new at all to add. Tr. 3480-3948; Anthony PFT #1, following Tr. 3697, and Anthony/Franke Supplemental PFT #1, following Tr. 3697.

c. The Applicant's witness on Hearing Issue #8, Mr. Franke, in his prefiled testimony and live testimony, did not add anything new that was not already in the application materials. During the Hearing, Mr. Franke relied on the Applicant's 2005 and 2006 submittals (Tr. 1735-1808; Franke PFT # 8, following Tr. 1991) even though the Agency had determined in 2007 that this information was lacking with respect to wildlife impacts (R. 8808, 9263-9264, 9284). Mr. Franke admits that he never updated the inadequate wildlife species information (for amphibians, birds, fish, or mammals) provided for the Cranberry Pond area. Tr. 1768-1769; See Tr. 3785-3789.

d. Even after the Hearing, APA Staff acknowledged that there was "a deficiency in the project application and review process with respect to the protection of biological resources." R. 19987-19988. One of APA Staff's Draft Orders following the

Hearing also stated that a "comprehensive biological inventory of the project site was not conducted, so it is not possible to make specific findings concerning impacts to habitats from the proposed project or to identify the presence or location of specific areas on the project site what would be prioritized for protection." R. 22322.

e. Therefore, the Applicant failed to meet its burden of proving the allegations of the application materials. See ¶¶ 37-43, supra. Moreover, the Applicant failed to address the significant deficiencies in the record on these issues that APA had identified when it sent the project to hearing, in an effort to gain more information about these issues. See Petition ¶¶ 224-284; ¶¶ 79-91 supra.

f. By contrast, other parties presented extensive testimony by well-qualified experts, and one lay witness, that identified numerous additional wildlife species on the Project Site, and identified the potential for undue adverse impacts to wildlife and its habitat. Petition ¶¶ 239-256; ¶113 supra.

g. The Project Sponsors and the State admit that the Applicant did not present any rebuttal testimony after this extensive testimony was given. Petition ¶¶ 245, 249, 253; Project Sponsors' Answer ¶¶ 121, 125, 127; State's Answer ¶¶ 245, 249, 253.

h. In addition to the lack of general wildlife impact inventories and assessments discussed above, the fact that APA's

final decision required not just one, but two, separate after-the-fact studies of the Project's potential adverse impacts on wildlife also establishes beyond any possible doubt that the Applicant did not meet its burden of proof and that the Agency lacked substantial evidence to support its decision to approve the Project.

i. The two studies that must be performed after-the-fact are:

(1) A two-year study to determine the Project's impacts to Cranberry Pond and its wildlife, particularly from water withdrawals for snowmaking for the Ski Area, (R. 34 Ski Area Permit R. 49; Petition ¶¶ 100-142; ¶128, supra];

(2) A study of the Project's potential adverse impacts on amphibians and their habitat on the site, and of potential mitigation measures for these impacts (R. 21-22, 33-34; West Face Expansion subdivision (Permit 2005-100.13), R.236, the Small Western Great Camp Lots (Permit 2005-100.12), R. 217-218, and the Small Eastern Great Camp Lots (Permit 2005-100.4), R. 96-97; Petition ¶¶ 186-223; ¶¶ 163-175, supra].

196. Having acknowledged that the impacts from the use of Cranberry Pond for snowmaking and the impacts on amphibians are areas of significant concern worth further study, and having conceded lack of knowledge of these impacts at the time that it approved the Project, APA's decision approving the Project and requiring studies on these impacts after the Project was approved

is wholly inadequate and demonstrates that APA failed to properly consider the impacts of the Project or properly analyze the tentative plans for mitigation measures. Therefore, APA's decision is arbitrary and capricious, unsupported by substantial evidence, and should be annulled.

APA Improperly Relied Upon Its Alleged
"Guidelines for Biological Surveys"
and Other Unpublished Procedures

197. APA improperly based its findings regarding the evaluation of wildlife and wildlife habitat, and the Project's adverse impacts thereon, on its purported "Guidelines for Biological Surveys" (hereinafter the "Guidelines").[50] This alone is reversible error because APA's reliance thereon in its decision was a violation of the following laws and regulations:

a. SAPA § 202-e;

b. 19 NYCRR § 265.1;

c. APA Act § 809(14);

d. 9 NYCRR § 580.15(b)(2);

e. SAPA § 306;

f. 9 NYCRR § 580.15(a)(3;

g. SAPA § 302.

198. The Order included the following paragraphs among its so-called "Findings of Fact":

[50] The Guidelines are in the record at R. 22034-22038.

78. Site investigations to evaluate wildlife and wildlife habitat on the project site followed standard Agency guidelines and procedures. In addition to reviewing historical records for threatened and endangered species, qualitative biological surveys including onsite visual assessments as defined in Agency guidance "Guidelines for Biological Surveys" were completed during site visits. Other than identifying the deer wintering yard as a "key wildlife habitat," no other wildlife habitat was identified as containing threatened, endangered or species of special concern on the project site. [sic] R. 21. (emphasis added)

152. Requiring a comprehensive amphibian survey on certain R[esource] M[anagement] lands to identify protected species and to determine migration routes will ensure that best management practices and low cost mitigation techniques will be employed to reduce impacts to amphibian populations in R[esource] M[anagement]. The absence of curbs, avoidance of wetlands, and maintenance of a 100-foot buffer from wetlands in the project design will also limit impacts to amphibians throughout the project site, consistent with Agency guidelines and procedures. R. 33. (emphasis added)

199. The Order relied upon the Guidelines, even though this document was never discussed during the Hearing or the post-hearing briefing (Petition ¶¶ 274-275). The Agency Members never heard of this document until January 18, 2012, a mere two days before the decision was made (George Aff. ¶¶ 52-53),[51] and it was not discussed by them until January 19th, the day before the decision was made. George Aff. ¶¶ 67-70.

[51] Since the State refused to provide a transcript of the Agency meetings, portions of the relevant Agency meetings have been transcribed by attorney Ellen Egan George and are provided in her affidavit sworn to June 7, 2012 (hereinafter "George Aff. __"), which is being filed simultaneously herewith.

200. The Petition demonstrates at ¶¶ 273-276 that APA relied upon these Guidelines in making its decision, despite the fact that they were not in the hearing record, were not testified about, were not used by the Applicant's consultants in preparing the application, were not vouched for by any expert witness, and no witness relied upon them in rendering their expert opinions. Nor did the APA Staff apply them during the application process leading up to the hearing. The Petition also proves that these Guidelines were not available to the public, let alone the hearing parties, during the hearing process. Nothing in the 22,000+ page record filed by the State contradicts these facts.

The Guidelines Were Unknown
to the Public and Not Made
Available Under SAPA § 202-e

201. In its Answer (¶274(iv)), the State admits that the Guidelines were not in the hearing record, were not promulgated as a rule, and are not on the APA's website. However, it also claimed that "the Guidelines are generally available to the public". Answer ¶274(iv).

202. It is theoretically possible that some member of the public might somehow learn of the existence of the Guidelines, and then obtain them under the Freedom of Information Law. However, as shown by the Petition, none of the hearing parties or APA Hearing Staff knew of their existence. If nobody knows that

they exist, they would not know to ask for them. Therefore, the State's claim is specious.

203. Moreover, SAPA § 202-e provides specific requirements for making "guidance documents" such as the Guidelines available to the public. APA has utterly failed to comply with those legal requirements.

204. Pursuant to SAPA § 202-e(5), the Secretary of State has adopted regulations to implement the statute. The regulations define a "guidance document" as follows:

> (a) A *guidance document* means any guideline, memorandum or similar document prepared by an agency that provides general information or guidance to assist regulated parties in complying with any statute, rule or other legal requirement, but shall not include documents that concern only the internal management of the agency. 19 NYCRR § 265.1(a). (emphasis added)

The APA Guidelines which are at issue herein obviously fall within this definition and are subject to SAPA § 202-e.

205. Section 202-e requires, among other things, that each year every state agency must cause to be published in the *State Register* "a list of all guidance documents on which the agency currently relies" and provide information on how copies thereof may be obtained. SAPA § 202-e(1). Section 202-e(2) provides an exemption procedure for agencies that publish the full text of all such guidance documents on their website. This exemption requires that the Secretary of State publish a notice identifying any such website in the *State Register*. Section 202-e(4)

requires that every five years each agency shall conduct a public process to review and update its guidance documents. Section 202-e was adopted by the Legislature in 2004, and became effective on June 6, 2005.

206. APA did not comply with any of these requirements of SAPA. Counsel for the Petitioners have reviewed the *State Register* from 2005 to date and found that no list of APA's guidance documents was published during that time, as required by SAPA § 202-e(1). This same review of the *State Register* also found that no notice was published pursuant to SAPA § 202-e(2) regarding APA's website or the granting to APA of any exemption from the requirements of SAPA § 202-e(1). Nor is there any evidence that APA has conducted the required 5 year review of its guidance documents under SAPA § 202-e(4).[52]

207. As set forth at Petition ¶274, the Guidelines are not available on APA's website. The pertinent web pages from APA's website filed herewith as Item C of the Supplemental Return. They show that while various other guidance documents are available on that website, the Guidelines at issue herein are not. The State's Answer (¶274(iv)) admits this.[53]

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[52] APA's failures also violated SAPA's implementing regulations at 19 NYCRR § 265.1.

[53] It is noteworthy that, during the APA's deliberations, the APA Executive Staff produced a question and answer document for the Agency Members, in response to questions posed by the Members during the initial meeting in November 2011. R. 21683.

208. Thus, APA has utterly and completely failed to comply with the requirements of SAPA § 202-e and 19 NYCRR § 265.1 for making the Guidelines available to the public. For all of the foregoing reasons, it was reversible error for APA to rely on the Guidelines in its decision on this application.

The Guidelines Were
Not Legally Adopted

209. In their Answer, the Project Sponsors allege that APA was entitled to rely upon the Guidelines because they are "a guidance document duly adopted by the Agency". Answer ¶¶ 140(a), 140(b). However, there is no proof in the record that the Guidelines were ever duly adopted by the APA.

210. The Guidelines were not adopted in the manner required by APA Act § 809(14), which provides in part that:

That document, dated December 7, 2011, and prepared by the APA Executive Staff, states in regard to the APA guidance document entitled "Development in the Adirondack Park" ("DAP"):

> 75. Does DAP have the force of law?
>
> Development in the Adirondack Park is recognized as an advisory publication by Agency Rules and Regulations, 9 NYCRR 574.2. It is "Guidance," not a "Regulation," both of which are recognized by the State Administrative Procedures [sic] Act. Guidance does not need to go through a formal SAPA rule adoption procedure, but guidance which may affect the public must be generally available to the public with information on the Agency web site. (emphasis added)

R. 21713 - While the DAP is duly available on the APA website (Item C of the Supplemental Return), and was duly approved by the APA (9 NYCRR § 574.2), the Guidelines at issue herein are not.

> 14. The agency may, after public hearing, adopt, and have authority to amend or repeal, rules and regulations, consistent with the provisions of this section, to govern its project review procedures and to provide further guidance to potential project sponsors through further definition of the development considerations as they would apply to specific classes of projects in specific physical and biological conditions.

211. APA relied upon the Guidelines "to govern [APA's] project review procedures and to provide further guidance to potential project sponsors through further definition of the development considerations as they would apply to specific classes of projects in specific physical and biological conditions" (emphasis added), so they fall within the scope of APA Act § 809(14).

212. There is no evidence that the procedures required by APA Act § 809(14) for the adoption of such "further guidance" were ever complied with. Therefore, the Guidelines are not applicable to this or any other application and may not be relied upon by the Agency.

The Parties Had No Prior Notice of the Guidelines

213. The Project Sponsors (Answer ¶139(b)) also attempt to mislead the Court into thinking that the parties were given notice in the APA Hearing Staff's Reply Brief of the Agency's intent to rely on the Guidelines. The Answer states that "Agency

'guidelines' are mentioned in APA Hearing Staff's Reply Brief at pp. 13-14." This is grossly misleading.

214. The Hearing Staff's Reply Brief does not mention guidelines on page 13, but page 14 states that "APA hearing staff followed Agency guidelines for protecting open space." A footnote then references "Exhibit 242." R. 21037-21038. Exhibit 242 (R. 19643-19646) is the section of the DAP entitled "Open Space", which was introduced into evidence in the hearing. It is an entirely separate document from the Guidelines that the APA Executive Staff pulled out of nowhere on the eve of the Agency's decision, long after any party would have had a chance to review it and respond to it.

215. Not only that, the DAP has an entirely different section on "Terrestrial Wildlife" (R. 22014-22016). Therefore, the reference in the Hearing Staff's Reply Brief to Exhibit 242 gave no notice whatsoever to any party that the Executive Staff might conjure up the Guidelines which are now at issue. Even if the Hearing Staff's Reply Brief had referred to the Guidelines, the reply briefs were the parties' final opportunities to file anything with the Agency before the record was closed, so that the parties could not have responded to the use of the Guidelines at that time.

216. Therefore, the Hearing Staff's reference to Exhibit 242 does not justify the Agency's illegal reliance on the Guidelines.

APA Could Not, and Did Not,
Take Official Notice of the Guidelines

217. The Project Sponsors inconsistently argue that the Agency did not have to follow the requisite procedures for taking "official notice" of the Guidelines because they do not come within the scope of the types of things to which those rules apply, and are "...a guidance document duly adopted by the Agency..." (Answer ¶140(a)), yet they also claim that the Agency was entitled to take official notice of the Guidelines. Answer ¶140(b). Neither argument is correct.

218. The Guidelines are subject to the rules governing the taking of official notice because, as set forth above, they were not properly adopted and made available to the public as official APA guidance.

219. There is no question that the applicable rules for the taking of official notice were not followed. 9 NYCRR § 580.15(b) provides:

> (b) *Official notice.* (l) Official notice may be taken by the hearing officer or agency:
>
> (i) of such facts which are so generally known or of such common notoriety that they cannot reasonably be the subject of dispute; or

(ii) of specific facts and propositions of generalized knowledge which are capable of immediate and accurate determination by resort to easily accessible sources of indisputable accuracy; or

(iii) of generally recognized technical or scientific facts within the agency's specialized knowledge.

(2) Parties shall be notified of any facts as to which official notice is proposed to be taken and afforded an opportunity to dispute the facts or their materiality.

220. Assuming for the sake of discussion that the Guidelines fall within one of the three categories set forth in 9 NYCRR § 580.15(b)(1)(i) to (b)(1)(iii), the parties received no notice of the Agency's intent to take official notice of the Guidelines, as required by 9 NYCRR § 580.15(b)(2). Therefore, the Agency could not take official notice of the Guidelines.

221. The Agency's reliance on this document also violated SAPA § 306, which provides in pertinent part:

2. All evidence, including records and documents in the possession of the agency of which it desires to avail itself, shall be offered and made a part of the record, and all such documentary evidence may be received in the form of copies or excerpts, or by incorporation by reference. In case of incorporation by reference, the materials so incorporated shall be available for examination by the parties before being received in evidence. ...

4. Official notice may be taken of all facts of which judicial notice could be taken and of other facts within the specialized knowledge of the agency. When official notice is taken of a material fact not appearing in the evidence in the record and of which judicial notice could not be taken, every party shall be given notice thereof and shall on timely request be afforded an opportunity prior to decision to dispute the fact or its materiality. (emphasis added)

222. The Guidelines were not made available to the parties beforehand, and they had no opportunity to dispute the use of the document, as required by SAPA. Therefore, the Agency could not take official notice of the Guidelines, or rely upon them in its decision-making.

223. The Agency's reliance on the Guidelines is also reversible error because the Guidelines were outside of the record.[54] 9 NYCRR § 580.15(a)(3) provides:

> (3) No decision, determination or order shall be made except upon consideration of the record as a whole and as supported by and in accordance with substantial evidence.

224. 9 NYCRR § 580.14(g)(2) defines the contents of the "official record":

> (2) The official record of the hearing shall be filed with the agency and shall include: ...
>
> (vi) a statement of matters officially noticed;

225. However, the Guidelines (R. 22034-22038) were not introduced into evidence,[55] and were not part of the official record filed with the Agency by the Hearing Officer (R. 277-

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[54] There was extensive testimony about the DAP, but, unlike the wildlife Guidelines, that guidance document is formally recognized in the APA's regulations at 9 NYCRR § 574.2.

[55] The Agency also relied upon a document entitled "Compensatory Wetland Mitigation Guidelines" (R. 22018-22033) in its findings. R. 21. Again, there is no evidence that this document was properly promulgated, it was not introduced into evidence in the hearing, and the proper procedures for taking official notice of it were not followed. This, too, was reversible error.

21187; Tr. 1-4487), so this document could not be considered by the Agency in its decision-making.

226. The Agency's reliance on this document also violates SAPA § 302, which provides in pertinent part:

> 1. The record in an adjudicatory proceeding shall include: ... (c) a statement of matters officially noticed except matters so obvious that a statement of them would serve no useful purpose; ...
>
> 3. Findings of fact shall be based exclusively on the evidence and on matters officially noticed. (emphasis added)

227. Therefore, the Agency committed reversible error because its decision was based (R. 21, 33) on a document that was outside the record.

228. While a hearing officer [or an agency or a court] may take official notice of duly promulgated regulations, Wilco Properties v. NYSDEC, 39 A.D.2d 6, 9 (3d Dept. 1972), an agency may not take official notice of documents outside of the record. Beverly Farms v. Dyson, 53 A.D.2d 720, 721 (3d Dept. 1976). When an agency does so, it is "improper and prejudicial" and its decision must be annulled. Id.

229. The Project Sponsors (Answer ¶139(a)) also claim that APA could legally rely upon vaguely defined "other Agency practice" in making its decision. Indeed, the Order states that the Applicant "followed standard Agency guidelines and procedures" (R. 21) and was "consistent with Agency guidelines and procedures." R. 33 (emphasis added). However, APA is

entitled to little deference from the courts when it relies upon unwritten polices and procedures that have not been through the rulemaking process. Zelanis v. APA, 27 M.3d 1229(A) (Sup. Ct. Essex Co. 2010).

230. In this case, the Guidelines were not duly promulgated regulations, and were not even made available to the public as SAPA requires for guidance documents. In addition, the alleged "standard ... procedures" (R. 21) relied upon in the Order are never defined or set forth in the Order, or elsewhere in the record. In such a case, they may not be considered by the Court. Id. Therefore, the Petitioners were prejudiced. This, alone, is grounds for granting the Seventh and Eighth Causes of Action. APA's decision was arbitrary and capricious, and affected by error of law, and the Order and Permits must be annulled.

Reply to Other New Matter in the Answers

231. Paragraph 230 of the Petition discusses the lack of wildlife investigative fieldwork by the Applicant's so-called experts, and cites to their cross-examination at Tr. 3677-3678 to support that point. Paragraph 230 reads:

> 230. The Applicant's witnesses admitted that they did no specific fieldwork to locate wildlife species on the Project Site. Tr. 3677-78, 3756. The only evidence that they presented was a list of eighteen animal species that was the result of casual observations that were made while they were on the property for other reasons. Tr. 3757.

The Project Sponsors' Answer (¶114(a)) to paragraph 230 brings up an unrelated issue regarding the Belleayre Resort project that was also discussed at those same transcript pages. Not only is that answer not germane to that paragraph of the Petition, it is wrong:

a. The Applicant's witnesses claimed to have experience working on "very similar type" projects, including one called "Belleayre Resort", in the Catskills. Tr. 3648. They also claimed that these projects, including Belleayre Resort, "all have similar components to the Adirondack Club and Resort project, as well as require the same site analysis and design and [permitting] approaches required by the A.P.A.".[56] Tr. 3650. They further admitted that "for all of these projects, we were required to prepare detailed inventories of the existing sites". Tr. 3650.

b. On cross-examination, these witnesses were asked to review the SEQRA scoping document for the Belleayre Resort project, which outlined the necessary studies for the supplemental environmental impact statement for that project (R. 19540-19562; Hearing Exhibit 234), which they were preparing. Tr. 3647-3695. A detailed review of that document by opposing counsel and the witnesses showed that, in fact, none of things

[56] This testimony by the Applicant's own witness (Tr. 3650-3651) also contradicts the Project Sponsors' claim (Answer ¶114(a)) that this subject is not relevant because the Belleayre Resort project is not subject to APA jurisdiction.

that they had done for the Belleayre Resort project had been done for the ACR Project. Tr. 3670, 3677-3683. They initially claimed to have done "the same site analysis and design" (Tr. 3650) on both projects, and "for these projects we have essentially prepared similar permit application information reports on ... wildlife" (Tr. 3652). However, as they testified at Tr. 3670:

> Q. Gentlemen, was the level of analysis of wildlife and habitat analysis and field studies done for the A.C.R. project the same as it was for the Belleayre project that you have worked on? Yes or no?
>
> A. (Mr. Franke) No.

c. It is irrelevant that the Belleayre Resort project is not subject to APA jurisdiction. Project Sponsors' Answer ¶114(a). The line of cross-examination at Tr. 3647-3695, and Tr. 3670 in particular, shows that the Applicant's witnesses had lied when they said that they had done "the same site analysis and design" (Tr. 3650) and "essentially prepared similar permit application information reports on ... wildlife" (Tr. 3652) on both projects, and so none of their testimony was in the least bit credible.

d. This cross-examination also showed that, despite the witnesses' attempt to blame APA for their failure to do proper wildlife studies, they knew full well how to do them properly, having been simultaneously engaged in doing that very thing in

another part of the state. Tr. 3670, 3673-3675, 3677-3683; 3689-3695.

e. Finally, it is worth noting that the Belleayre Resort SEQRA scoping document used in cross-examination was admitted into evidence by the Hearing Officer (Tr. 3695; Exhibit 234; R. 19540-19562), despite the Applicant's counsel making the very same objections regarding the lack of APA jurisdiction over that project. Tr. 3652-3654, 3657-3670, 3689-3695. The Applicant did not appeal that ruling to the APA Members.

232. The Project Sponsors allege (Answer ¶115, p. 59) that the Agency did not accept the Staff's recommendation to include the need for better wildlife data in the 2007 Hearing Order. This is basically the same argument that it makes at Answer ¶86, which has been thoroughly rebutted at ¶¶ 183-184, supra. Even the quotations from Agency meeting minutes that the Answer cites (¶115, pp. 57-58), contradict their argument. These quotations demonstrate that the Agency and its Staff were on the same page on this question.

233. The Project Sponsors admit (Answer ¶121) that they presented no rebuttal testimony for the testimony of Drs. Glennon and Kretser. They argue instead that they cross-examined these witnesses and addressed their testimony in the Applicant's brief. While the Applicant was free to make whatever arguments it wanted to in its brief, that does nothing to meet its burden of proof.

234. The Project Sponsors (Answer ¶126) attack the testimony of Petitioner Phyllis Thompson, who testified that "[t]here is a diversity of [bird] species and in many cases an abundance of numbers of individual species that I have seen over a lengthy period of time. I have observed a total number of 84 species, probably a few more." Thompson PFT, p. 12, following Tr. 4487. She provided two lists of these species which she had identified on or near the Project Site (R. 19792-19827) and identified at least 10 of these species as having been identified by Audubon New York as being "at risk". Thompson PFT, pp. 13-14, following Tr. 4487; R. 19828-19834. She also described the diverse habitat needs of many of these species. See Thompson PFT, pp. 12-18, 20-21, following Tr. 4487.

a. Although she testified as a non-expert witness, her testimony was supported by expert witnesses who testified. In addition, as her testimony and the attached exhibits showed, data from "citizen scientists" like her is often used by experts in performing significant wildlife studies. Thompson PFT, pp. 6-10, following Tr. 4487; R. 19744-19791.

b. The Answer (¶126(b)) challenges, in bold print no less, the statement in the Petition that Dr. Thompson has almost 50 years of birding experience on or near the Project Site. As set forth in her prefiled testimony (Thompson PFT, p. 2, following Tr. 4487) she has been visiting the vicinity since about 1953 and became a birder in 1969. 2012 minus 1953 = 59 and 2012 minus

1969 = 43. She also testified that "I've been a feeder watcher for about 58 years". Thompson PFT. p 10, following Tr. 4487. Thus, the reason for this attack on a lay witness, in bold print, is unclear.

c. The Answer (¶126(b)) oddly questions her credibility as a witness because no party chose to cross-examine her. It is equally likely that no party cross-examined her because her prefiled testimony (Thompson PFT, following Tr. 4487) was unassailable and there were no potentially fruitful areas for cross-examination. It is also possible that, because she was the last witness heard in a 19 day hearing (Tr. 4449-4464), the participants just wanted to finish up and go home.

d. More importantly, the testimony of Spada, Klemens and Franke, who did testify as experts, all supports her testimony.

(1) APA Staff witness Dan Spada said that he accepted and endorsed the species information she provided. See Tr. 3962, 4190.

(2) Wildlife expert Dr. Klemens said "that there would be a robust bird population" on the Site. Tr. 1160.

(3) The Applicant's witness, Mr. Franke, said that Dr. Thompson's PFT "contained a lot of information about avian wildlife." Tr. 3789.

e. What Dr. Thompson's testimony showed was that the Project Site is home to about 84 species of birds, even though the Applicant's alleged experts only found about a dozen species.

Tr. 3761; Thompson PFT, pp. 19-20, following Tr. 4487. This shows that: the site is biologically rich; the Applicant did a very poor job of inventorying the Site; and that there are many, many bird species whose habitat needs should have been assessed, but were not, due to the lack of information in the record.

f. Her testimony also showed that the Site includes at least 10 species that have been identified as being "at risk", despite the Applicant's and the State's claims that there are no protected species on the Site. R. 21.

235. The Project Sponsors (Answer ¶130) provide a long litany of the testimony of APA Staff witness Mark Sengenberger. However, none of this contradicts his cited testimony in Petition ¶¶ 258-260, which affirms that the Applicant knew that the application was deficient with regard to the subject of impacts to wildlife and its habitat, yet it failed and refused to provide any additional information.

236. The Project Sponsors allege (Answer ¶¶ 131-132) that the deed restrictions that they propose to impose on some of the Resource Management lands on the Site will prevent adverse impacts to wildlife and wildlife habitat. In reality, these deed covenants will change little, if anything, about these impacts.

a. This argument ignores the fact that despite this offer, APA found a need to require further studies of amphibians and their habitat. See ¶¶ 163-175, supra; R. 21-22, 33-34; see also Ski Area (Permit 2005-100.1), R. 49, the Small Eastern Great Camp

Lots (Permit 2005-100.4), R. 96-97, the Small Western Great Camp Lots (Permit 2005-100.12), R. 217-218, West Face Expansion subdivision (Permit 2005-100.13), R. 236; Petition ¶189. If the deed covenants would have prevented these impacts, there would have been no need for this study.

b. This argument ignores the potential adverse impacts of the Project on Cranberry Pond and its wildlife (¶¶ 121-162, supra), and on amphibians and their habitat on MIU areas (¶¶ 163-193, supra). The deed restrictions only apply to certain RM lands. R. 9. However, Cranberry Pond is located in a MIU area (R. 10253), and the vast majority of the "critical terrestrial habitat" for amphibians is located in MIU. See ¶¶ 165, supra.

c. This argument also ignores the fact that the lands in question could not be further developed, with or without the deed restrictions. Under the APA Act's "overall intensity guidelines" (APA Act § 805(3)), all of the density ("principal building opportunities") in RM on the Project Site has already been allocated. R. 23, 33, 38.[57] Thus, even without the deed restrictions, the lands in question could not be further subdivided.

[57] Of the 111 principal building opportunities in RM allowed on the Site under the overall intensity guidelines, 83 are allocated to lots created by the Order and Permits. R. 23. The remaining 28 will be allocated to a 34 acre lot near the Ski Area. R. 23, 33, 38, 19895, 20059, 20081. Thus, there are no unallocated principal building opportunities in RM, and the deed covenants do nothing.

d. For all of these reasons, the deed restrictions are just a smokescreen, with no real benefit for the protection of the resources of the Adirondack Park.

237. The State alleges (Answer ¶273) that the final Order [R. 1-39] was prepared by the Agency Members. This claim is completely contradicted by the facts.

a. The Order and draft permits were written by the Agency's Executive Staff, as shown by the following statements made by the Staff to the Members during their deliberations:

> [APA Associate Counsel Sarah] REYNOLDS: A "little nervous" because we are working off the staff draft. "There aren't many places to fit this specific discussion in." December 16, 2011; 02:57. George Aff. ¶213.
>
> [APA Executive Director Terry] MARTINO: ... The order on conditions discussed in December is presented today in a final determination with 14 permits, assembled using the revised hearing staff draft, taking into account issues over the last two months. The substance of the draft is the same as the October staff draft order. January 18, 2012; 00:21. George Aff. ¶230.
>
> REYNOLDS: Banta wrote this added paragraph. Reads: "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." January 19, 2012; 02:15. George Aff. ¶235.
>
> REYNOLDS: "This paragraph was not in the draft order, in the versions that came to you last week, but was in the front of every permit." Banta thought it makes a lot more sense to just have it in the order and not in the permits. "So, rather than having 14 individual 10 year time periods for those individual projects to become in existence, there's now one. . . . January 19, 2012; 02:16. George Aff. ¶237.

b. The cover memos from the Executive Staff to the Agency Members also show that the draft order and permits were prepared by the Staff, and not by the Members. R. 21747, 22005. In fact, the January 11, 2012 version of the final Order is prominently labeled "Staff Draft Not Approved by Agency". R. 21754.

c. Therefore, the record shows that the Order was not prepared by the Members, but was instead fed to them by the Executive Staff.

238. The Seventh and Eighth Causes of Action should be granted. The APA Staff, the APA board, and the Applicant, all knew before the hearing that the wildlife assessments of the Project Site were inadequate to allow APA to meet its statutory duties. No new data was provided by the Applicant during the hearing. Instead of denying the application, as the law required, APA improperly papered over this failure with an illegal reliance on some so-called guidelines and two after-the-fact studies. This action was arbitrary and capricious, and lacked substantial evidence to support it. Therefore, the Order and Permits should be annulled.

REPLY TO NEW MATTER ALLEGED IN THE ANSWERS ON THE NINTH THROUGH SIXTEENTH CAUSES OF ACTION: THE PROJECT'S RESIDENTIAL DEVELOPMENT ON RESOURCE MANAGEMENT LANDS VIOLATES THE APA ACT

239. The Ninth through Sixteenth Causes of Action demonstrate that the Order and Permits must be annulled because:

a. The smaller Great Camp lots on Resource Management ("RM") lands will not be in "small clusters" as required by APA Act § 805(3)(g) (Ninth and Tenth Causes of Action, Petition ¶¶ 295-320);

b. The large Great Camp lots on RM lands will not be on "substantial acreages" as required by APA Act § 805(3)(g) (Eleventh and Twelfth Causes of Action, Petition ¶¶ 321-334);

c. Many of the Great Camp lots on RM lands are not on "carefully selected and well designed sites" as required by APA Act § 805(3)(g)(2) (Thirteenth and Fourteenth Causes of Action, Petition ¶¶ 335-350); and

d. The 80 residential structures proposed for the RM lands are not compatible with "the character description and purposes, policies and objectives of the" RM classification (Fifteenth and Sixteenth Causes of Action, Petition ¶¶ 351-421).

240. The Respondents allege that the Petition's Ninth through Sixteenth Causes of Action fail to state a cause of action. State's Answer, Point A, p. 1; Project Sponsors' Answer,

Points 3 and 4, pp. 4-9). However, these causes of action assert that the Agency approved the Project in violation of the applicable statutory criteria. See Petition ¶¶ 285-421. Therefore, Petitioners have stated valid causes of action against the Agency.

241. The Project Sponsors allege that APA is "not mandated" (Answer, p. 8) to follow the language found in APA Act § 805(3)(g)(2) which only allows "residential development on substantial acreages or in small clusters on carefully selected and well designed sites" when it is located in RM areas. Contrary to the Project Sponsors' wishful thinking, this statutory requirement for residential development in RM areas is not optional and must be satisfied before a project can be approved. See APA Act § 809(10)(b).

242. As stated in the Project Sponsors' Answer, Point 4, p. 7, the statutory provisions for Rural Use ("RU") land areas and RM land areas include similar language regarding residential development, but with one key difference.

243. For RU areas, APA Act § 805(3)(f)(2) states:

> Residential development and related development and uses should occur on large lots or in relatively small clusters on carefully selected and well designed sites. This will provide for further diversity in residential and related development opportunities in the park. (emphasis added)

244. However, for RM areas, APA Act § 805(3)(g)(2) states:

> Finally, resource management areas will allow for residential development on substantial acreages or in

> small clusters on carefully selected and well designed sites. (emphasis added)

245. The statute uses the mandatory word "will" only for RM land areas, and uses the precatory word "should" for RU land use areas, creating a clear distinction between the two types of land use areas, and showing that "substantial acreages" or "small clusters" (§ 805(3)(g)(2)) are mandatory in RM, but that "large lots" or "relatively small clusters" are optional in RU (§ 805(3)(f)(2)). See also *McKinney's New York Statutes*, § 177. Therefore, the Legislature clearly intended for substantial acreages and/or small clusters to be mandatory in RM areas, and not optional.

246. The Project Sponsors also argue that the following language in APA Act § 805(3)(f)(2) regarding RU lands:

> This will provide for further diversity in residential and related development opportunities in the park

"through principles of statutory construction, is also applicable to this similar passage for Resource Management lands". Answer Point 4, p. 8. The Answer then argues that this also means that "substantial acreages" or "small clusters" in RM are supposed to provide "further diversity in subdivision and land development" and are not mandatory. Id. However, the Answer does not say what alleged "principles of statutory construction" would allow language found in one section of the APA Act (§ 805(3)(f)(2)) to be applied to a separate section (§ 805(3)(g)(2)) where that language does not appear.

247. To the contrary, instead supporting of the fanciful argument proffered by the Project Sponsors, the fact that "further diversity" of residential development types is encouraged in RU, but not in RM, supports the point that residential development in RM may only be approved if it is in "substantial acreages" or "small clusters", and other, more "diverse" options, such as those proposed by the Project Sponsors and approved by the APA, are not permitted in RM.

248. As for the other 4 land use areas in the APA Act, none of them have this type of limitation on residential development. See APA Act § 805(3)(c)(2), § 805(3)(d)(2), § 805(3)(e)(2), § 805(3)(h)(2). This supports the point that residential development is intended to be highly restricted in RM areas.

249. It is also significant that single family residences are a "secondary use" in RM (APA Act § 805(3)(g)(2)), but are a "compatible use" in Hamlet, MIU, Low Intensity Use, and RU areas. APA Act § 805(3)(c)(2); § 805(3)(d)(2); § 805(3)(e)(2); § 805(3)(f)(2). Residential uses are not on either list in Industrial Use areas. APA Act § 805(3)(h)(2). Thus, residential uses are intended to be far more restricted in RM than any of the other land use areas, other than in Industrial Use areas.

250. To the extent that the State argues that "substantial acreages" or "small clusters" are not a statutory mandate for RM lands (Answer ¶¶ 288, 292, 295, 308, 310, 311, 335), its

misguided interpretation of the plain statutory language should be afforded no deference by the Court.

The Small Great Camp Lots
Are Not in Small Clusters

251. The Respondents admit that the Small Eastern and Small Western Great Camp lots average about 26.5 acres and about 26.2 acres, respectively. Project Sponsors' Answer ¶145; State's Answer ¶285.

252. As concluded by the APA Hearing Staff, these lot sizes "do not comprise 'substantial acreage.'" R. 19989.[58]

253. Since the small Great Camps are not located on "substantial acreages," they instead must be in "small clusters" in order to satisfy APA Act § 805(3)(g)(2).

254. Contrary to the Project Sponsors' assertion (Answer ¶162), the requirement for residential development in RM areas to be either "on substantial acreages or in small clusters" is directly linked to reducing adverse impacts to wildlife and the Park's other resources, including its open space resources. APA Act § 805(3)(g)(2); see APA Act § 805(3)(g)(1); APA Act § 805(3)(f)(1) (stating that "resource management areas provide

[58] Although APA Act § 805(3)(g)(2) does not use the word "lot" (Project Sponsors' Answer ¶159), reading the Act as a whole, APA Act § 805(3)(g)(2) means that proposed lots in a subdivision must be on substantial acreages, or, for proposed lots that are not each located on substantial acreages, the proposed lots in a subdivision must be in a "small cluster." See APA Act § 802(63); APA Act § 805(3)(f)(2).

the essential open space atmosphere that characterizes the park").

255. Two groupings of 14 houses and 13 houses spread out over 371 acres and 341 acres, respectively, do not comprise "small clusters." APA Act § 805(3)(g)(2); see Petition ¶¶ 295-320. Indeed, the APA Staff's Closing Statement agreed that, "in staff's opinion" (R. 19989), the small Great Camp lots are not in "small clusters." APA Act § 805(3)(g)(2); see Tr. 4099-4100 (the "impact zones" of the small Great Camp lots "have not been collapsed [or] overlapped to the greatest extent possible").

256. Therefore, since the small Great Camp lots are not on "substantial acreages" or in "small clusters," they are not compatible with the "purposes, policies and objectives" of RM lands. APA Act § 805(3)(g)(2); APA Act § 809(10)(b). As a result, as demonstrated by the Petition's Ninth and Tenth Causes of Action, APA's approval of the Project was not supported by substantial evidence, was arbitrary and capricious, affected by error of law, and should be annulled.

The Large Great Camp Lots Are
Not on Substantial Acreages

257. The eight so-called Large Great Camps range in size from 111 to 1,211 acres. Petition ¶285.

258. These lots are certainly not in a small cluster - they occupy a total of 2,684 acres - and they are not located on "substantial acreages." APA Act § 805(3)(g)(2).

259. The Project Sponsors (Answer ¶173) correctly note an error in the Petition's citation to Tr. 818 at Petition ¶324. This was not testimony by Harry Dodson, but was a statement from an APA Staff memorandum that was admitted as Exhibit 130 (R. 18909-18911). That does not change in any way the evidence in the Hearing Record that shows "traditionally great camps . . . encompass thousands of acres." Tr. 818; see Dodson PFT # 1 & 3, p. 5-7, following 994; R. 18910; Tr. 877, 981-982.

260. Here, even the largest Great Camp lot does not come close to "thousands of acres." Tr. 818. Therefore, these lots are not on "substantial acreages" as is customary for Great Camps in the Adirondack Park. APA Act § 805(3)(g)(2).

261. Therefore, the large Great Camp lots are not compatible with the "purposes, policies and objectives" of RM lands. APA Act § 805(3)(g)(2); APA Act § 809(10)(b). As a result, as demonstrated by the Petition's Eleventh and Twelfth Causes of Action, APA's approval of the Project was not supported by substantial evidence, was arbitrary and capricious, affected by error of law, and should be annulled.

Many of the Great Camp Lots Are
Not on Carefully and Well Designed Sites

262. Although the Project Sponsor complains that the phrase "carefully selected and well designed sites" has not been defined (Answer, ¶152), all of the 80 residences in RM, whether they are on substantial acreages or in small clusters, must be located on "carefully selected and well designed sites." APA Act § 805(3)(g)(2).

263. Additionally, although the State denies it (Answer ¶¶ 292, 335), this is a statutory requirement that applies to all residential development in RM. As the APA Hearing Staff argued, and the Hearing Officer ruled, this requirement applies equally to "substantial acreages" and "small clusters" R. 22552-22553. APA Act § 805(3)(g)(2). As stated above, the State's incorrect interpretation of plain statutory language should be afforded no deference by the Court.

264. The State admits (Answer ¶336) that APA's Hearing Staff found that many of the Great Camp Lots "do not comply with the APA's regulations and/or do not have an approved water supply or septic system plan." Petition ¶336; see Tr. 4100-4101 (stating that Lot E is "particularly problematic" due to questionable septic system placement and the driveway traverses steep slopes and wetlands), 4102-4104 (stating concerns about steep slopes, bedrock, and sewage pumping distances); LaLonde PFT #1, pp. 24-25, 29, following Tr. 4213.

265. The Project Sponsors assert that the Order does not characterize these violations as "defects." Answer ¶183. Nevertheless, these violations of APA regulations demonstrate that the affected lots are not on "carefully selected and well-designed sites." APA Act § 805(3)(g)(2); see Petition ¶336-343; Tr. 817 (one of the "most important elements in permitting residential subdivision on resource management is . . . finding suitable locations for septic systems").

266. Therefore, those Great Camp lots that violate "APA's regulations and/or do not have an approved water supply or septic system plan" (Petition ¶336), are not compatible with the "purposes, policies and objectives" of RM lands. APA Act § 805(3)(g)(2); APA Act § 809(10)(b). As a result, as demonstrated by the Petition's Thirteenth and Fourteenth Causes of Action, APA's approval of the Project was not supported by substantial evidence, was arbitrary and capricious, affected by error of law, and should be annulled.

The Project as a Whole is Not Compatible With RM

267. The single family residences proposed on RM lands are only "secondary uses" for RM areas, and the Applicant failed to prove that these residences were each compatible with the area "depending upon their particular location and impact upon nearby uses." APA Act § 805(3)(a); see Petition ¶¶ 351-421.

268. The Project Sponsors claim that "Petitioners are manufacturing a distinction" between primary and secondary uses and that "no such distinction exists in the statute." Answer, p. 5. However, the distinction highlighted by the Petition (¶¶ 395-404) - between the list of "primary uses" and the list of "secondary uses" - is laid out in the statute and was drawn by the Legislature, not by the Petitioners. APA Act § 805(3)(g)(4).

269. If the Legislature did not intend for there to be a distinction between the two classifications - "primary uses" and "secondary uses" - it would have made only a single list of "compatible uses." APA Act § 805(3)(g)(4). Instead, the Legislature made two classifications and the statute explicitly states that "primary uses . . . are those uses generally considered compatible," while "secondary uses . . . are those which are generally compatible . . . depending upon their particular location and impact upon nearby uses and conformity with the overall intensity guideline." APA Act § 805(3)(a) (emphasis added).

270. The Applicant failed to meet its burden of proving that the proposed 80 single family dwellings, which are "secondary uses" in RM areas, are "compatible with the character description and purposes, policies and objectives" of Resource Management areas, taking into consideration each residence's "particular location and impact upon nearby uses and conformity

with the overall intensity guideline." APA Act § 805(3)(a); APA Act § 809(10)(b); see APA Act § 805(3)(g).

271. As shown above, and in the Petition (¶¶ 285-421), the Applicant could not have met its burden because these 80 residences, as currently designed, are not "compatible with the character description and purposes, policies and objectives" of RM areas (e.g., the small Great Camp lots and the large Great Camp lots are not "on substantial acreages or in small clusters," and many of the Great Camp lots are not on "well designed sites"). APA Act § 809(10)(b); APA Act § 805(3)(g)(2).

272. Moreover, the Project Sponsors' reliance (Answer ¶188) upon conditions in the Order "to protect wildlife, ensure some forest management, and to permanently protect" some of the Site from development is misplaced.

273. Conditions to study the wildlife after the Project has been approved will not protect the wildlife, or critical wildlife habitats, or the Site's other physical and biological resources from the impacts of the already-approved Project. See APA Act § 805(3)(g)(1), (2); Petition ¶¶ 361-363, 407; Reply ¶¶ 121-143, 163-193, supra; see also Glennon/Kretser PFT #1, following Tr. 4487; Tr. 1188-1189, 3141-3142, 3176-3177.

274. Conditions in APA's Order related to forest management do not "manage and enhance" (APA Act § 805(3)(g)(1)) the Site's forest resources, which have been under active forest management by the long-time landowner, respondent Oval Wood Dish. R. 32,

Tr. 863, 1095, 1097-1098, 1631. Instead, the State admits that implementation of the so-called "comprehensive forest management plan," which only applies to some of the lots (R. 19), will be completely "voluntary" (Answer ¶¶ 383, 384) by the various and disjointed lot owners. See Petition ¶¶ 375-394. This is a reduction, not an enhancement, of "proper and economic management" of the Site's forest resources. APA Act § 805(3)(g)(2); see Tr. 868-870, 1097-1098, 1630-1631, 4093-4094.

275. Finally, conditions to permanently protect some of the lands do nothing to pro-actively protect the Site's open space resources. See APA Act § 805(3)(g)(1); Petition ¶¶ 408-421; Reply ¶236, supra. The Applicant made no effort to identify or consider important open spaces or wildlife habitat before it designed the Project; these were minimally considered after-the-fact. See Klemens PFT #1 & #8, pp. 6-7, following Tr. 1274; Tr. 1072 (noting that the Project is a "virtual train wreck" because it is not based upon any "understanding of natural systems on the site"); 1871-1872 (noting that the critical upland habitat was "not recognize[d] . . . as important spots initially," and that where the Project happened to avoid this habitat was somewhat "inadvertent").

276. Additionally, carefully clustered development results "in less overall impact" to open space resources and wildlife habitat than sprawled development restrained only by limited after-the-fact conditions. Glennon PFT #8, pp. 12-13, following

Tr. 1991; see Spada PFT #1, pp. 8, 12, following Tr. 4213; see also Tr. 954-955; 1086; 1031-1032 (stating that the Project is "sprawl on steroids"); 3187; 4098-4100.

277. Therefore, the Project's 80 residential lots proposed for RM lands are not compatible with the "purposes, policies and objectives" of RM lands. APA Act § 805(3)(g)(2); APA Act § 809(10)(b). As a result, as demonstrated by the Petition's Fifteenth and Sixteenth Causes of Action, APA's approval of the Project was not supported by substantial evidence, was arbitrary and capricious, affected by error of law, and should be annulled.

THE CAUSES OF ACTION REGARDING THE PROJECT SPONSORS' USURPATION OF THE STATE FOREST PRESERVE BOAT LAUNCH ARE RIPE FOR ADJUDICATION

278. The State alleges that the Petition's Seventeenth, Eighteenth, Nineteenth, and Twentieth Causes of Action are not ripe for adjudication. State's Answer Point C, p. 2.[59]

279. The Project Sponsors allege that the Petition's Seventeenth, Eighteenth, Nineteenth, and Twentieth Causes of Action are not ripe as they relate to DEC (only) because DEC has not yet made a determination on ACR's proposed use of the State Boat Launch. Answer, Point 6, pp. 10-11; Answer ¶358. The Project Sponsors also allege that the claims are not ripe because

[59] Lack of ripeness is also alleged at ¶¶ 31, 440, 443, 449, 455, 456, 459, 461, 463, 465, 466, 467, 472, 474, 475, 479, 480, 488, 507, 508, 509, 511, 514, and 515 of the State's Answer.

the valet service "is not in existence" yet and there have not yet been any violations of the Environmental Conservation Law ("ECL"), DEC regulations, or the State Constitution. Answer p. 10.

280. Petitioners' claims regarding the State Boat Launch are ripe because APA has made a "final" determination to approve the ACR Project. Church of St. Paul & St. Andrew v. Barwick, 67 N.Y.2d 510, 519 (1986).

281. Petitioners' Seventeenth through Twentieth Causes of Action challenge APA's determination with respect to its approval of the ACR Project despite its impacts on the State Boat Launch and the public's use thereof. See ¶¶ 310-319, infra.

282. APA "has taken a definitive position" and there is no further administrative procedure whereby Petitioners could challenge APA's approval. Church of St. Paul & St. Andrew v. Barwick, 67 N.Y.2d at 522. Therefore, these challenges are ripe for review. See id.

283. Petitioners are not required to wait for the valet service to be in existence, for the capacity of the State Boat Launch to be overwhelmed, or for there to be a violation of the ECL, DEC regulations or the Constitution, before the claims related to the boat launch are ripe. See Capital Dist. Enters., LLC v. Windsor Dev. of Albany, Inc., 53 A.D.3d 767, 769-770 (3d Dept. 2008) (holding that the controversy was "ripe for review" even though no "'breach or violation'" had yet occurred).

284. Contrary to the Project Sponsors' assertions, the use of the boat launch is not subject to review by DEC. Answer pp. 10-11. During the January 19, 2012 Agency Board meeting wherein the approval of the ACR Project was discussed, Agency Chairwoman Leilani Ulrich mentioned the possibility of a DEC permit for the use of the boat launch. See George Aff. ¶116. However, Agency Member and Designee from DEC,[60] Judy Drabicki, corrected the Chairwoman by stating that "there really isn't a separate DEC permit for [the use of the boat launch]." George Aff. ¶117.

285. Therefore, if the claims against APA and DEC are not ripe now, they will never be ripe.

286. Even if it is subject to review by DEC, the Petitioners' causes of action vis-a-vis APA's decision-making are not unripe due to some hypothetical future review by a separate agency. See Matter of Essex County v. Zagata, 91 N.Y.2d 447, 455 (1998) (acknowledging that review of a project by APA is separate from DEC's review).

287. Further, any determination by the Court that the proposed use is prohibited as a matter of law will be binding upon any future review by DEC of the Project Sponsors' use of the State Boat Launch because DEC is a party to this proceeding. Therefore, Petitioners' claims regarding the State Boat Launch are ripe. Compare Cuomo v. Long Island, 71 N.Y.2d 349 (1988).

[60] See APA Act § 803.

PETITIONERS HAVE THE STANDING AND LEGAL CAPACITY TO LITIGATE APA'S FAILURE TO PROPERLY CONSIDER UNDER THE APA ACT THE LEGALITY OF THE VALET BOAT LAUNCHING SERVICE UNDER ARTICLE 14, § 1 OF THE STATE CONSTITUTION

288. The State and the Project Sponsors allege that Petitioners lack standing and legal capacity to raise in this proceeding a claim regarding an alleged violation of Article 14 of the State Constitution. State's Answer p. 2;[61] Project Sponsors' Answer p. 11.

289. As the Project Sponsors' Answer points out (p. 11), the Petition's causes of action do not directly incorporate the alleged violation of Article 14 of the Constitution.

290. Instead, the Petition's Seventeenth, Eighteenth, Nineteenth, and Twentieth Causes of Action are based upon APA's failure to comply with the APA Act by not making the required determinations and not properly taking into consideration all of the relevant statutory factors. Petition, ¶¶ 422-522. In making the required determination of no "undue adverse impact," APA was required to take into account the relevant Development Considerations, including the Project's "conformance with other governmental controls", pursuant to APA Act § 805(4)(e)(1)(a) and § 809(10)(e). The Constitution is obviously a "governmental control."

[61] This is also alleged in the State's Answer at ¶¶ 423, 475, 480, 488, 504, 507-509, and 515.

291. Therefore, Petitioners do have standing and legal capacity to raise the Article 14 violations in this context and the consent of the Appellate Division was not required.

APA HAS JURISDICTION OVER STATE LAND
SUCH AS THE TUPPER LAKE BOAT LAUNCH

292. The State alleges that "the Agency has no authority to review the applicant's proposed use of State-owned lands." Answer ¶426.[62]

293. The Project Sponsors allege that "APA had no subject matter jurisdiction over the use of the State Boat Launch" (Answer ¶217).[63]

294. The State's and the Project Sponsors' contentions that APA had no authority to review the legality or the impacts of the use of the State-owned boat launch are wrong.

295. In approving a project, APA must consider whether a proposed activity complies "with other governmental controls." APA Act § 805(4)(e). APA Staff witness, Colleen Parker ("Parker") testified that "conformance with other government controls," specifically "any DEC - New York State Department of Environmental Conservation laws that apply to the use of the State boat launch," was a relevant Development Consideration with

[62] This is also alleged at ¶518 of the State's Answer.

[63] This is also alleged at Point 5 of the Project Sponsors' Answer (pp. 9-10).

respect to the approval of ACR's use of the State Boat Launch. Tr. 259-260; see Tr. 266; Parker PFT #7, pp. 5-6, following Tr. 358. See also R. 9271 (APA Staff noting that ACR "should avoid use of the DEC boat launch").

296. Therefore, APA should have examined whether the Project Sponsors' valet service at the State Boat Launch was permissible under DEC's regulations and the State Constitution.

297. Additionally, contrary to the Respondents' claims, APA was required to assess ACR's impacts upon the State Boat Launch, and APA could only approve the ACR Project if it first determined, *inter alia*, that the Project would not have an undue adverse impact "... upon the ability of the public to provide supporting facilities and services made necessary by the project...". APA Act § 809(10)(e).[64]

298. In making that determination of no "undue adverse impact," APA was required to take into account the Project's "burden on the public in providing facilities and services", the project's impacts on "adjoining and nearby land uses" and the "ability of government to provide facilities and services." APA Act § 809(10)(e); APA Act § 805(4); APA Act § 805(4)(c)(2)(a); § 805(4)(d)(1)(a).[65]

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[64] Petition ¶424.

[65] Petition ¶¶ 425-426.

299. APA Staff witness Parker testified that the Project's "impacts to adjacent land" and the "ability of government to provide facilities and services" were relevant Development Considerations with respect to the approval of ACR's use of the State Boat Launch. Tr. 259, 266, 291-292; see Parker PFT #7, pp. 5-6, following Tr. 358.

300. Therefore, even if APA did not have jurisdiction to regulate the Boat Launch itself, or ACR's use of the Boat Launch, when approving the ACR Project, APA should have taken into consideration the "burden on the public" and the "ability of [DEC] to provide" adequate boat launching opportunities at the "nearby" State boat launching facility. See APA Act § 805(4)(c)(2)(a), § 805(4)(d)(1)(a).

301. The record reveals that ACR's use of the State Boat Launch would create a "burden on the public" and on the "ability of [DEC] to provide" adequate boat launching opportunities for the public at the State Boat Launch. See APA Act § 805(4)(c)(2)(a), § 805(4)(d)(1)(a).

302. APA Staff testified that "there is a potential that heavy use of the proposed 'valet service' may limit or affect the ability of the general public to use the State boat launch and cause congestion and user conflicts, particularly on high use

weekend and holiday periods." Parker PFT #7, pp. 3-4, following Tr. 358.[66]

303. The Project Sponsors' witness conceded that, based upon estimated usage by the ACR Project (47 boats per day) and the actual capacity of the State Boat Launch (48 boats per day), the private valet service would only leave one (1) spot per day for the general public to use at the State Boat Launch. See Tr. 186-196; Parker PFT #7, p. 3, following Tr. 358.

304. While the Applicant claimed that its estimate of 47 boats per day being launched is only "an estimated average to maximum number" (Tr. 197), the highest usage will no doubt occur on holidays and weekends, when public usage is also at its highest (Tr. 321-322; R. 18848-18853; R. 18866-18872), thereby compounding the problem.

305. Even if the valet service only launched, say, one-half of its estimated usage of 24 boats on a weekend day, that would overwhelm the Boat Launch due to the existing public usage of 40 to 50 boats on such days (Tr. 321; R. 18848-18853; R. 18866-18872).[67]

306. Even without the valet service, boating from the Project would overwhelm the facility because there is nothing to

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[66] The Project Sponsors' witness admitted that congestion at the State Boat Launch was indeed possible. Tr. 231.

[67] Demand of 40 (public) + 24 (ACR residents) = 64; Boat Launch capacity = 48 per day; making demand one-third (33%) greater than capacity.

prevent ACR Project residents from launching their boats at this public facility on their own. See Tr. 203-206, 252; Parker PFT #7, p. 5, following Tr. 358.

307. The State Boat Launch already suffers from congestion problems, especially on windy days when using it is more difficult, and on sunny summer days when usage is higher. See Tr. 312-318, 321-325. The addition of 47 boats per day from the Project would create more congestion at the launch site and in the parking lot. See Tr. 322-323. In the event of a storm on the lake, it would be difficult to get all 47 resort-based boats off of the lake. See Tr. 326-327.

308. The record shows that the APA failed to exercise its authority to review the legality or the impacts of the ACR Project's use of the State Boat Launch.

309. Having admitted that APA approved the ACR project (State's Answer ¶494) without "review[ing] the applicant's proposed use"[68] of the State Boat Launch (State's Answer ¶426) and making "no findings as to the applicant's proposed boat launching valet service" (State's Answer ¶595), APA's decision must be annulled as arbitrary and capricious as a matter of law.

[68] The State admitted that the ACR Project included a boat launching valet service that would use the State-owned boat launch. State's Answer ¶¶ 481, 494. The State also admitted that "the ACR residents could launch their boats at the boat launch on their own." State's Answer ¶456. Either of these options would impact the capacity of the State Boat Launch as a result of the ACR Project's use of the State Boat Launch.

REPLY TO OTHER NEW MATTER ALLEGED IN THE ANSWERS
ON THE SEVENTEENTH TO TWENTIETH CAUSES OF ACTION:
THE IMPACTS OF THE VALET LAUNCHING SERVICE REQUIRE
THE ANNULMENT OF THE APPROVAL OF THE ENTIRE PROJECT

310. The Respondents argue variously that the valet boat launching service "is not a separate form of 'land use or development' but is simply a service that the applicant proposes to provide to the ACR residents and their guests" (State's Answer ¶422(ii)(a)); "there was no 'approval of the Valet Boat Launching Service' by the APA" (Project Sponsors' Answer ¶236; see also ¶¶ 240, 243); and that since there was no such approval, "there is nothing in this regard for the Court to annul" (Project Sponsors' Answer ¶240(a)). The implication of these arguments appears to be that APA did not need to take the valet boat launching service into account in its decision, or that there was nothing to approve, or disapprove, so there is no reason for the Court to address this aspect of the Project.

a. The APA itself obviously did not think so. The use of the State Boat Launch was specifically made a part of the adjudicatory hearing, in Hearing Issue #7:

> Issue #7. What are the impacts, alternatives and appropriate conditions on the use of Forest Preserve such as State facilities in Intensive Use areas [DC (c)(2)(a)]? R. 9322.

The reason that this was a Hearing Issue was because the APA Staff identified the potential for "congestion and user conflicts, particularly on high use weekend and holiday periods" at the State Boat Launch. R. 8809. See also R. 8810, 8817;

Parker PFT # 7, pp. 3-4, following Tr. 358. The Agency Members shared these concerns. R. 9281.

b. In the final Order, APA specifically addressed this part of the Project, under the heading of "State Boat Launch and Marina". R. 24-25.

c. An applicant can not parse its project into little bits and then claim that some of them are not jurisdictional. In this instance, the valet service was part of the marina operation (R. 24-25), and is thus jurisdictional under APA Act § 810(2)(a)(10). It is intended to service the subdivision and hotel aspects of the Project, as it would be available for use by both types of users. Tr. 199; Project Sponsors' Answer ¶254. Both of these types of land uses are also jurisdictional actions. APA Act §§ 810(1)(b)(3), 810(2)(a)(9).

d. The valet boat launching service was presented in the application materials as an integral part of the Project. R. 853-854, 948-950. As the State admits (Answer ¶494(i)), "the applicant proposed as part of the ACR project the valet boat launching service". At ¶225(c) of their Answer, the Project Sponsors quote their own witness's testimony that the valet boat launch service was one of the "components of the proposed project".

e. Therefore, when APA approved the Project as a whole (R. 1-39), it approved this part of it, and that approval is subject to judicial review under APA Act § 818 and CPLR Article 78.

Because the valet boat launch service is just one part of the overall Project, and because the Project's impacts on the Boat Launch will occur with or without the valet service (Petition ¶¶ 460-463), the approval of the entire Project should be annulled.

311. The Project Sponsors rely upon testimony by the APA Hearing Staff that currently, the Boat Launch is not used to its full capacity, and that it was not known if and when the Project's quick launch service might adversely affect public use of the State Boat Launch. Answer ¶¶ 220(c), 226(b), quoting Parker PFT #7, pp. 5-6, following Tr. 358. However, this prefiled testimony was written before the hearing, and before the hearing testimony proved that the Boat Launch is often at full capacity (Tr. 321-325), and that the addition of the Project, with or without the valet service, would overwhelm its capacity. Petition ¶¶ 427-463. Therefore, this prefiled testimony was rendered obsolete, and is of little value, if any.

312. The Project Sponsors also rely upon testimony by the APA Hearing Staff that this was "an issue largely subject to NYSDEC's administration and regulation" and that there had been "no formal determination from NYSDEC" regarding this proposed use of the Boat Launch. Answer ¶226(a), quoting Parker PFT #7, pp. 5-6, following Tr. 358. However, DEC's designee to the APA board, Judy Drabicki, stated that DEC had no permitting jurisdiction over this activity. George Aff. ¶¶ 116,117. Therefore, as discussed above, it remains up to APA to address

this issue, pursuant to APA Act § 809(10)(e), § 805(4)(c)(2)(a), § 805(4)(d)(1)(a), and 805(4)(e).

313. The Project Sponsors (Answer ¶228(a)(iii))[69] dispute the Petitioners' interpretation of the evidence regarding current levels of use of the State Boat Launch by the public. This evidence comes from Exhibits 125 and 126 (R. 18837-18872), which are excerpts from the 2009 and 2010 *Summary of Programs and Research* reports of the Watershed Stewardship Program of Paul Smith's College's Adirondack Watershed Institute. The Project Sponsors' interpretation of those reports does not change the fact that the Project will overwhelm the capacity of the Boat Launch.

a. The Project Sponsors' Answer states at ¶228(a)(iii) that, based on the Paul Smith's College reports, the number of motorized boats using the launch "should be interpreted as 20 to 25 per weekend day". Answer ¶228(a)(iii). Assuming for the sake of discussion that this interpretation of the data is correct, the Project will still overwhelm the launch's capacity and adversely affect the general public's use thereof.

b. The Applicant's own witness testified that the capacity of the launch is 48 boats per day, and that the Project will use

[69] The Project Sponsors' Answer ¶228(b) correctly notes that there is a typographical error in Petition ¶445, which states that 474 boats from the ACR Project would use the State Boat Launch on certain days. As stated in ¶228(b), the correct number is an estimated 47 boats, as is stated elsewhere in the Petition.

47 of those launch slots per day, leaving just one for the general public. Tr. 186-196; Petition ¶¶ 435-440. If existing public use on peak weekends is "20 to 25 per weekend day" (Project Sponsors' Answer ¶228(a)(iii)), then the demand will be 67 to 72 per day, yet the capacity will still only be 48 per day, or a shortfall of 40% to 50%. This will result in "congestion and user conflicts". R. 8809. Hearing testimony by two local boaters showed that such problems already occur on weekends, including holiday weekends. Tr. 321-325.

c. The Project Sponsors further manipulate the data in the Paul Smith's College reports to claim that, on average, there are only 13.9 to 15.8 motorized boats using the Boat Launch on a weekend day. Answer ¶228(a)(iv). Again, assuming that these numbers are accurate, that works out to 15 per day over a two year period. With the Project's projected demand being 47 per day, and an assumed public usage of 15 per day, the demand would be 62 boats per day, yet the capacity would still only be 48 per day, or a shortfall of about 30%. Again, even using the numbers most favorable to the Applicant, this will result in "congestion and user conflicts". R. 8809; Tr. 321-325.

d. Moreover, the use of average per day numbers, instead of peak day numbers, ignores the most likely problem, that of "congestion and user conflicts, particularly on high use weekend and holiday periods". R. 8809; Tr. 321-325; Parker PFT #7, pp.

3-4, following Tr. 358. Therefore, the likely shortfall is at least 40% to 50% or more.

e. Even using the Applicant's own numbers, the Project will cause the demand for the Boat Launch to exceed its capacity by 30% to 50%, adversely impacting public recreational activities, and the ability of government to provide such services. APA Act § 805(4)(c)(2)(a), § 805(4)(d)(1)(a).

314. The State repeatedly argues that the Project's potential impacts on the Boat Launch are "speculative" because the valet launch service does not yet exist. Answer ¶¶ 440, 443, 459, 461, 463, 476. If the Court were to accept this argument, then the issuance of a permit by any state or local agency, planning board, zoning board of appeals, or other such body, would never be subject to judicial review.

a. Almost all Article 78 cases regarding the approval of permits are filed before the project gets built, or the land use commences. If the project did get built before the case was decided, the case would most likely get dismissed on mootness grounds. Thus, in almost all such cases, the courts are called upon to review potential impacts, based upon an administrative record that should establish how likely they are, or are not, to occur.

b. Here, there was extensive testimony on this issue, and multiple exhibits. Tr. 170-240, 248-328; R. 18784-18785, 18837-

18872; Parker PFT #7, following Tr. 358; Franke[70] PFT #7, following Tr. 242. There was an ample record before APA for it to consider in making its determination regarding the potential impacts. Likewise, there is an ample record for the Court to review, and the impacts of the valet service on the State Boat Launch, and upon the pertinent Development Considerations is not "speculative".

315. The Project Sponsors' Answer at ¶244 contains extensive quotations from the prefiled testimony of the Applicant's witness Kevin Franke, much of which draws legal conclusions about the legality of the valet service. See Franke PFT #7, following Tr. 242. This testimony can not be credited. Based on an objection from counsel for PROTECT (Tr. 172-179), the Hearing Officer ruled that "I do believe that the response does require the witness to make a legal conclusion, which he is not qualified to do." Tr. 178.

316. The Project Sponsors (Answer ¶¶ 244, 253, 254) argue that the valet service will not be a commercial use of the Boat Launch and the Forest Preserve. As set forth in Petition ¶¶ 476-495, this is incorrect. In addition, the Project Sponsors admit that the valet service "is intended to be a service and amenity to resort residents and guests." Answer ¶254.

[70] Kevin Franke.

317. The State argues (Answer ¶517(iii)) that the Development Considerations of APA Act § 805(4) ("DC's") are not "criteria that a project must conform to." The DC's are indeed "criteria":

a. Section 809(10) of the APA Act provides, in pertinent part:

> 10. The agency shall not approve any project proposed to be located in any land use area not governed by an approved local land use program, or grant a permit therefor, unless it first determines that such project meets the following **criteria**: ...
>
> e. The project would not have an undue adverse impact 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. (emphasis added)

Section 809(10) lays out 5 "criteria". One of them, APA Act § 809(10)(e), requires consideration of the DC's. Thus, The DC's are "criteria".

b. Even if the DC's are not "criteria" in and of themselves, this argument would not be dispositive of these causes of action. In making its decision on any project, the APA must review and take into consideration each and every one of the DC's set forth in § 805(4). APA Act § 805(4), § 809(10)(e). In doing so, it must make a specific determination as to each

relevant Development Consideration, which must be supported by substantial evidence in the record. See ¶¶ 370-394, infra.

c. Because an applicant bears the burden of proof on all issues (¶¶ 37-43, supra), it is up to the applicant to prove that each such DC has been addressed by competent proof in the record. Therefore, an applicant must prove that each of the relevant DC's has been satisfactorily addressed, before the Agency can have a rational basis for its decision, that is supported by substantial evidence. In this case, the Applicant has completely failed to do so.

318. The Project Sponsors' Answer at ¶280 makes the claim "that use of the State Boat Launch facility was not an issue before the APA nor its adjudicatory hearing...". It is not clear what hearing the Project Sponsors and their attorneys participated in. As set forth above at ¶¶ 292-309, the use of the State Boat Launch most certainly was "an issue before the APA [and] its adjudicatory hearing", being the focal point of Hearing Issue #7. The Project Sponsors put in 9 pages of prefiled testimony on this issue (Franke PFT #7, following Tr. 242). There are at least 150 pages of hearing transcript devoted to testimony on the issue (Tr. 170-240, 248-328), including about 70 pages of the Applicant's own witness's testimony (Tr. 170-240), and 3 exhibits. R. 18784-18785, 18837-18872. This witness stated:

> Use of the State boat launch facility is obviously an issue the Agency members wanted to have discussed at this hearing. Franke PFT #7, p. 1, following Tr. 242.

Nothing could be clearer, and the rationale behind the claim in the Project Sponsors' Answer at ¶280 is not apparent.

319. The record conclusively proves that the valet boat launching service, and the Project as a whole, will have an undue adverse impact on the resources of the Adirondack Park, namely the State Boat Launch. In addition, the service would be an illegal commercial use of the Forest Preserve. Therefore, the Order and Permits must be annulled.

REPLY TO NEW MATTER ALLEGED IN THE ANSWERS ON THE TWENTY-FIRST AND TWENTY-SECOND CAUSES OF ACTION: THESE CLAIMS STATE VALID CAUSES OF ACTION

320. The Twenty-First and Twenty-Second Causes of Action (Petition ¶¶ 523-552) demonstrate that, in reviewing the Project, APA failed to adequately consider the potential adverse fiscal impacts of the Project on local governments and taxpayers as required by APA Act § 805(4), § 805(4)(c)(2)(b), § 805(4)(d)(1)(a), § 805(4)(d)(1)(b), § 805(4)(e)(1)(a), and § 809(10)(e), because APA incorrectly assumed, without proper consideration, and without making the necessary findings, that the Project would sell enough real estate to generate a net positive cash flow for local governments.

321. Section 809(10) of the APA Act provides, in pertinent part:

> 10. The agency shall not approve any project proposed to be located in any land use area not governed by an approved local land use program, or grant a permit therefor, unless it first determines that such project meets the following criteria: ...
>
> e. The project would not have an undue adverse impact 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.

322. The "pertinent" development considerations include:

- § 805(4)(c)(2)(b) - "Adequacy of site facilities."
- § 805(4)(d)(1)(a) - "Ability of government to provide facilities and services."
- § 805(4)(d)(1)(b) - "Municipal, school or special district taxes or special district user charges."
- § 805(4)(e)(1)(a) - "Conformance with other governmental controls."

323. Therefore, the APA Act required that the APA take into account the Project's potential fiscal impacts, as well as its conformance with other laws. APA failed to properly take into account that the record shows that the Applicant's claimed volume of real estate sales was fabricated out of thin air, and would not create the alleged high levels of tax and PILOT revenues, and so the Applicant's proposed means of avoiding such adverse fiscal impacts would not materialize.

324. The Project Sponsors' Answer (¶286(c)) alleges that the Project will "result in a net positive fiscal position for the Town" of Tupper Lake and other affected municipalities. However, as they concede (Answer ¶286(c)), this claim is entirely based on the Applicant's 2010 updated financial analysis, Hearing Exhibit 85 (R. 12262-12359).

325. This claim (¶286(c)) ignores the fact that the record conclusively demonstrates that the Project's alleged net positive fiscal impact is based on projected sales of real estate in the Project that are completely without any credibility whatsoever, such that the Applicant failed to meet its burden of proof on the issue of fiscal impacts to municipalities and taxpayers.

326. The record proves that the projected sales upon which Exhibit 85 (R. 12262) was based were fictitious numbers, made up out of thin air, with absolutely no support in the record. By relying upon this purported data, the APA failed to properly consider the applicable Development Considerations, and its decision lacks a rational basis and is not supported by substantial evidence.

327. These sales projections were based on prices set forth in Table II-10 of the Applicant's Exhibit 85, the "Fiscal & Economic Impact Analysis Updated Report - 2010", dated June 2010. R. 12305. This table predicted total real estate sales revenues

of $581,521,106[71] from 651 units, and local tax and/or PILOT revenues of more than $12,000,000. R. 12330. Despite a 6.9% reduction in the planned number of units since 2006, and the complete crash of the real estate market in those four years, the projected revenues dropped by only $20,279,000, or 3.4%, when compared to the 2006 prices in Exhibit 36, Att. 1, Table II-9. R. 6618. No explanation was ever given for these inconsistencies.

328. Nor was there any explanation given as to how this 2010 report claimed almost the exact same total pricing for 651 units ($581,521,106) (R. 12305) as was claimed in Exhibit 194 in 2006 for 739 units ($581,050,000). R. 19207.

329. PROTECT's expert witness, David Norden, testified that the claimed increase in per unit prices was "counter to the very apparent trend towards ... reduction in price" in the industry. Norden PFT, pp. 32:17-33:3, following Tr. 3339.[72]

330. On cross-examination, the author of the Applicant's 2010 report (Exhibit 85), James Martin, admitted that the Applicant's principal, Michael Foxman, came up with these prices. Tr. 2429-2430, 2518, 2599-2601. However, he did not know what qualifications or background Mr. Foxman had that made him

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[71] On cross-examination of the Applicant's witness James Martin, it was revealed that math errors in Table II-10 had inflated this number by $11,500,000 and that the real total was $570,021,106. Tr. 2537-2542.

[72] David Norden.

qualified to do so. Tr. 2430. Nor did he have any clue, at all, how Mr. Foxman got them. Tr. 2430, 2599-2601. Mr. Martin also made it clear that no other consulting group, firm, or individuals contributed to this revenue analysis. Tr. 2518. Therefore, the sole source of these numbers was Mr. Foxman.

331. Mr. Foxman is not a real estate professional. He is a lawyer and failed banker from Philadelphia.[73] He has no documented prior experience with Adirondack real estate, no documented expertise in real property valuation, and no documented track record as a real estate developer.

332. Despite (or perhaps because of) the lack of supporting data, the prices for the various types of units in the Project varied wildly between the 2005 predictions on the one hand, and the 2010 predictions, on the other. Tr. 2431-2451. Many types of units went up by 40 to 65% for no apparent reason. Tr. 2431-2451. Again, this occurred despite the fact that the market did not go up by that much from 2005 to 2006 (Tr. 2620:7-11), and that it had dropped precipitously from 2006 to 2010. Tr. 2407, 3239:23-3240:9.

333. There is no source other than Mr. Foxman given for the 2010 price estimates, and he was not qualified to create them. Therefore, there is no competent proof in the record of the source of the "matters alleged in the application" (9 NYCRR

[73] See U.S. v. Foxman, 87 F.3d 1220, 1221 (11th Cir. 1996).

§ 580.11(b)) regarding real estate pricing, and these estimated prices should have been disregarded by the Agency in rendering its decision. See ¶¶ 37-43, supra.

334. Faced with the complete lack of competent sources for its projected sales revenues, the Applicant repeatedly cited to alleged sources for these numbers that, upon closer examination, turned out to be blatantly false. These falsehoods included:

a. The 2006 application update (Exhibit 36, Att. 1, R. 6614-6617) repeatedly cited to the 2006 Cushman & Wakefield marketing study (R. 19132-19240) for numbers that were nowhere to be found in that document. Tr. 2582:7-24, 2586:8-2587:19, 2592-2594, 2601:16-2602, 2604:10-2605:15, 2610:8-2611:6. While Mr. Martin repeatedly tried to come up with after-the-fact rationales for his citations to non-existent numbers, he had to admit that he could not recall how he had come up with them. Tr. 2611:5-6.

b. The June 2010 Fiscal & Economic Impact Analysis (Exhibit 85) stated at page 16 (R. 12283) that an updated market analysis had been done, and implied that the Applicant's marketing witness, Terry Elsemore, had done the update. In fact, there was no such updated marketing analysis and Mr. Elsemore testified that he did not do one, nor did he have any idea why Exhibit 85 claimed that he had done so, and that as of that time, he had not yet even reviewed the market status of the Project. Tr. 2647:11-2648:15.

c. Page 38 of Exhibit 85 (R. 12307) claimed that "[p]roject sales are based on an updated review of the resort housing market as performed by Terry Elsemore." However, Mr. Elsemore testified that this statement was not true and that he had not done any such projection or estimation of sales prices as of that date. Again, he had no idea how that claim found its way into Exhibit 85. Tr. 2648:16-2650:10. Mr. Martin, the author of Exhibit 85, was forced to admit that Mr. Elsemore had not been involved. Tr. 2518:15-18.

d. The November 24, 2010 "Project Sponsor's Response" to PROTECT's discovery demands (which is part of Exhibit 90 (R. 12494-18112), which was signed by the Applicant's attorney, affirmed at page 3 that the aforesaid "updated market study" referred to at Exhibit 85 (R. 12307), had been incorporated into the application and provided to PROTECT. Tr. 2650:23-2654:5. However, Mr. Martin admitted that Mr. Elsemore was not involved (Tr. 2518:15-18) and Mr. Elsemore testified that he had not done any such study. Tr. 2656:14-2658:9.

e. Despite these repeated written claims by the Applicant's consultants and attorney that the 2006 market study had been updated in 2010 by Mr. Elsemore, he testified that:

> I didn't do any -- any studies. I didn't create any studies or analysis. I simply viewed the project and took a cursory view of the existing prices, but did not do any type -- I'm not an analyst. I'm a sales and marketing person. And I didn't do any specific

> analysis to determine pricing or any of that. Tr. 2658:3-9.

Therefore, not only did the application materials obscure the fact that the 2010 sales and pricing estimates were created by Mr. Foxman, by falsely claiming that Mr. Elsemore had provided them (Tr. 2647:11-2648:15, 2648:16-2650:10, 2650:23-2654:5, 2656:14-2658:9), Mr. Elsemore's own testimony shows that this type of analysis was not even within his area of expertise. Tr. 2658.

f. Despite the Applicant's attempts to bolster Mr. Foxman's numbers by claiming that they were provided by Cushman & Wakefield and Mr. Elsemore, the reality is that, as Mr. Martin and Mr. Elsemore admitted, other than the 2006 Cushman & Wakefield report (R. 19132-19240), no market studies or other documents exist to support the alleged potential sales prices of the real property in the Project. Tr. 2564:15-2565:16.[74] And the sales price estimates in that document were not the result of any analysis by that firm. They were provided to Cushman & Wakefield by the developer, Mr. Foxman. R. 19206.

335. The real property tax and payment-in-lieu-of-taxes ("PILOT") revenues that the Project was predicted to pay to local governments were calculated based upon the predicted property

[74] The Applicant's witnesses, Jeff Anthony and Kevin Franke, the leaders of the project team at the LA Group, the Applicant's consultants, also admitted that there were no other such studies. Tr. 3721:16-3722:9.

sales prices. R. 12328-12336. As shown above, those prices are fictional, and as is established at ¶340 below, they are grossly overstated. Indeed, the likely volume of real estate sales is only about $5,000,000 and not $38,000,0000, as predicted by the Applicant. See ¶340(j), infra.[75]

336. Witnesses for both sides agreed that, under these circumstances, if real estate sales were to be as low as Mr. Norden's study (discussed below) shows, the revenues received by the local governments would be significantly less than predicted. Tr. 2451-2452, 2562-2564 (Martin); Norden PFT, pp. 53-54, following Tr. 3339; Tr. 2116-2122 (Ratner). Since there was no rebuttal to Mr. Norden's estimate of $5,000,000 per year (¶340(j), infra; Norden Exhibits 218, 219 (R. 19429, 19430), and the Applicant failed to meet its burden of proof to support its claim of $38,000,000 per year, as a matter of law, it must be assumed that the actual sales will only be about $5,000,000 per year. Therefore, the claimed local tax revenue windfall will not materialize.

337. It should also be noted that the Applicant significantly inflated tax revenue projections by not applying the State Office of Real Property Services' 70% equalization rate

[75] For a more complete analysis of the testimony which discredited the Applicant's claims of fiscal benefits from the Project, see PROTECT's Hearing Brief and Reply Brief at R. 20500-20537, 20967-20989.

for the Town of Tupper Lake to the property values, when calculating the estimated tax revenues. Tr. 2631-2633. In effect, this error significantly inflated the potential tax revenues. Tr. 2623-2643.

338. For all of the foregoing reasons, the Applicant failed to prove that its claimed tax bonanza for local governments would occur, as alleged at ¶286(c) of the Project Sponsors' Answer. Therefore, this claim should have been ignored by the Agency in its decision-making process. Instead, the APA assumed that this claim was accurate and based its decision on this faulty assumption. R. 28-30. As shown above, the Applicant's 2010 updated fiscal analysis (Hearing Exhibit 85, R. 12262) and its author, Mr. Martin, were thoroughly discredited, but APA based its findings on that report. R. 28-31.

339. In its efforts to overcome this obvious deficiency in the Applicant's proof, Dan Kelleher of the APA Executive Staff created his own real estate sales projections and tax revenue analysis and presented that analysis to the Agency Members. See Petition ¶¶ 540-545. The State's Answer (¶540) argues that this was merely "aid and advice" that "was based upon evidence in the hearing record". This rationalization for the Staff's improper presentation is without merit:

a. Mr. Kelleher did not merely present information from the record. He performed an entirely new economic analysis of

estimated real estate sales and tax revenues, using figures that no witness had testified to. For instance, he discussed a hypothetical scenario in which sales would be 70% of the Applicant's projected levels, based on "an average sales price of about $308,000 per home" (George Aff. ¶123) and then calculated anticipated resultant tax and/or PILOT revenues (George Aff. ¶¶ 127-128), but did not give any basis for these numbers from the record. See George Aff. pp. 33-38.

b. Nor does the State's Answer provide any reference to any source for these figures in the record. In fact, these figures do not come from the record, but were instead made up by the Executive Staff. See George Aff. pp. 33-38.

c. This presentation by the Executive Staff went way beyond "aid and advice" (State's Answer (¶540) and entered the realm of original financial analysis and testimony. See George Aff. pp. 33-38. The Agency can not base its decision on information such as this that is not in the hearing record and was not subject to cross-examination and/or rebuttal in the hearing.

d. Paragraphs 543 and 544 of the Petition, and ¶340 below, establish that the record proved that real estate sales will be about 87.5% lower than the Applicant's projected levels, so that the Executive Staff's analysis based on a 70% reduction in sales overstated the results by 300%. The State (Answer ¶544) argues that this is "speculative". This is anything but speculative,

and is amply supported by expert testimony and multiple exhibits in the record. See ¶340, infra.

e. Finally, there is no evidence in the record that Mr. Kelleher was professionally qualified to provide "aid and advice" on these issues, let alone to perform the type of complex financial analysis that he presented to the Agency Members.

f. Despite this, the approval of the Project by APA was expressly based on his presentation:

> 130. The Project Sponsor's projected average Phase 1 sales price of $1,041,150 could decrease 70% per unit and the PILOT agreement could still cover bond debt payment and the increased costs of municipal service provisions incurred from the project. Benefits related to net increases in revenue (lowering the tax rate, increasing municipal services, etc) will not occur until the Phase 1 sales of $25,688,137 are achieved. R. 30.

g. Because Mr. Kelleher's analysis and testimony was outside of the hearing record, and because APA expressly based its approval of the Project on it, APA's action approval was arbitrary and capricious, affected by error of law, and must be annulled.

340. As set forth above, the Project Sponsors' claim (Answer ¶286(c)) that the Project will "result in a net positive fiscal position for the Town" of Tupper Lake and other affected municipalities was not proven at the hearing. Not only did the Applicant fail to prove that the Project could succeed, PROTECT

proved at the hearing that it definitely would not. The Answer ignores all of this proof.

a. PROTECT retained David Norden, one of the leading mountain resort development consultants in the world, to review the Project and to testify at the hearing. The results of his analysis were perhaps best summarized during his cross-examination:

> ...I can't find a ski area of this scale that has produced the type of results[76] that are being proposed." Tr. 3324:18-20.

b. As shown by his resume (R. 19321-19322), Mr. Norden has over 20 years of experience in the mountain resort development business. Norden PFT, pp. 1-5, following Tr. 3339. He has led the development of new ski resorts in Japan and South Korea, and major projects at Stowe, Vermont and Aspen, Colorado. Norden PFT, pp. 1-5, following Tr. 3339; Tr. 3231. He is currently consulting on the development of a vineyard-centered resort in Argentina. R. 19321-19322; Norden PFT, p. 6, following Tr. 3339.

c. This experience gave him an in-depth insider's knowledge of what works, and what does not work, in developing a new resort such as ACR. Not only that, up to this point, he has always worked as, or for, the developer of such resorts, so that he did not come to this assignment with an anti-development perspective. Norden PFT, pp. 10-11, following Tr. 3339. He also lived in, and

[76] Tr. 3324:7-9, referring to the Applicant's projected sales of $38,000,000 of resort real estate annually for 15 years.

then regularly visited, the Adirondack Park, for many years. Norden PFT, pp. 11-12, following Tr. 3339.

d. In addition to his hands-on project-specific work, he has significant expertise in analyzing national trends in the industry. In 2009 and 2010, Mr. Norden and his colleague Chris Kelsey engaged in extensive nationwide research into the effects of the Great Recession on the mountain resort development industry, and its implications for the future. This work was published in four reports which were well-received throughout the industry. Norden PFT, pp. 7-10, following Tr. 3339. Copies of the most recent [as of the time of the hearing] Kelsey & Norden reports, Spring 2010 and Fall 2010, are in the Record at R. 19323-19422.

e. Mr. Norden's expertise was recognized by the Applicant when it relied upon his work in preparing its application materials. The Spring 2010 report (R. 19323-19356) was cited by the Applicant in the June 2010 application update. Exhibit 81, R. 10153-10154. As it turned out, the Kelsey & Norden report did not actually support the conclusion that the Applicant tried to draw from it. Norden PFT, pp. 38-40, following Tr. 3339. However, the fact remains that even the Applicant can not dispute his credentials and the reliability of his work in this field.

f. Mr. Norden did extensive research on the ACR Project and on similar resorts in the Northeast. Norden PFT, pp. 14-20, 33-

37, 45-53, following Tr. 3339. His resulting conclusion was 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, following Tr. 3339.

His research revealed that the Project suffers from four major disadvantages in the market:

(1) The Ski Area is too small to successfully compete;

(2) Access is very difficult, due to the location of Tupper Lake, compared to competing resorts that are closer to major population centers;

(3) Big Tupper is too unknown to compete with well-established ski areas in the current difficult market; and

(4) Even though the Ski Area is supposed to be the centerpiece of the Project, it has too little slopeside housing to achieve the planned premium pricing. Norden PFT, pp. 18-19, following Tr. 3339.

g. Other disadvantages include a lack of amenities in the town and minimal waterfront property in the Project for lake access. Norden PFT, p. 20, following Tr. 3339; Tr. 3391:24-3393:13. In nearby Vermont, projects at larger, more well-known ski areas, such as Stowe and Sugarbush have succeeded in recent years, while at least three smaller resort redevelopments, similar to Big Tupper, have failed. Norden PFT, pp. 20, 47, following Tr. 3339.

h. In order to better understand the project's viability, Mr. Norden performed his own market review of the Project, using publicly available information. Norden PFT, p. 33, following Tr. 3339. He used this research and analysis to create a number of graphs, which were entered into the record. R. 19423-19432. These graphs first showed that Big Tupper is much smaller than, and farther from the New York City market than, competing ski resorts. Norden PFT, pp. 33-34, following Tr. 3339; Exhibits 212, 213 (R. 19423-19424); Tr. 3234-3238.

i. He then analyzed ski area size versus resort real estate sales in the local market for each ski area. Norden PFT, p. 33; Exhibit 218 (R. 19429); Tr. 3252-3258. This analysis revealed that there is generally a direct correlation between the size of the ski area and the dollar volume of real estate sales that it can support. Id.

j. Unfortunately for the Applicant, Exhibit 218 (R. 19429) shows that Big Tupper, as one of the smaller ski areas in the region, will only support a small amount of real estate sales, about $5,000,000 per year. Exhibit 218 ("ACR Volume Indicated by Statistics"); Norden PFT, pp. 33-34, following Tr. 3339; Tr. 3255-3256. However, the Applicant has predicted about $38,000,000 per year in sales, almost 8 times higher. Exhibit 218 ("Proposed ACR Volume") (R. 19429); Norden PFT, pp. 33-34, following Tr. 3339; Tr. 3257-3258. Thus, Mr. Norden concluded

that the projected level of sales of $38,000,000 per year "is substantially out of line with the results that could be sustained on a consistent level over a 15-year timeframe." Norden PFT, pp. 50-51, following Tr. 3339.

k. As shown on Mr. Norden's Exhibit 218 (R. 19429), the Applicant's claimed sales volume is an enormous statistical outlier. The volume predicted by the Applicant would be roughly equal to the sales volumes at Stratton and Okemo, two of the largest and most well known resorts in southern Vermont, which are much closer to the New York and Boston markets. R. 19429. ACR's proposed volume is far larger than the actual results achieved by such larger, more well known, and more accessible Vermont resorts such as Stowe, Killington, Sugarbush, and Mt. Snow, and Hunter and Windham mountains in the Catskills. Id. The idea that the Applicant can achieve these results at Big Tupper is a fantasy.

l. Mr. Norden's Exhibit 219 (R. 19430) shows the relationship between annual customer visits and real estate sales volume. Again, size matters. The areas with the most visitors sell the most real estate. R. 19430; Norden PFT, pp. 33-34, following Tr. 3339; Tr. 3259-3261. Again, the Applicant's "Proposed ACR Volume" of $38,000,000 per year is a huge statistical outlier. R. 19430. The "ACR Volume Indicated by Statistics" is, again, far smaller, at around $5,000,000, or 1/8

of the Applicant's claimed sales. Id. See also Norden PFT, pp. 46-47, 50-51, following Tr. 3339.

m. Mr. Norden was also able to rely upon his experience in developing the $500,000,000 Spruce Peak at Stowe project (Norden PFT, pp. 5, 47-49, following Tr. 3339) to assess the ACR project's likelihood of achieving its projected sales volume. Following the development of the Spruce Peak project, Stowe sold from about $10,000,000 to $40,000,000 in real estate in each year from 2003 to 2010. ACR has projected that it would achieve $38,000,000 in sales per year, which is at the upper end of Stowe's range, every year, for 15 years. R. 12305, Exhibit 85, Table II-10; Norden PFT, p. 48, following Tr. 3339. It is entirely unrealistic to expect that ACR can achieve results comparable to Stowe's, due to the differences in ski area size, reputation, location, community, and quality of ski facilities. For instance, Stowe has about 350,000 visitors per year, while ACR predicts that it will have 40,000 to 100,000, only a small fraction of Stowe's visitorship. Norden PFT, pp. 47-48, following Tr. 3339.

n. Mr. Norden's analysis also showed that the volume of resort real estate sales went down significantly from 2006 (the year of the Applicant's only market study) to 2011. Norden PFT, p. 34, following Tr. 3339; Exhibits 214, 215, 216, & 217 (R. 19425-19428); Tr. 3238-3252. This occurred at the national (R.

19425), state (R. 19426), regional (R. 19427-19428), and county (R. 19427-19428) levels. Overall, resort real estate volume is down to about 40% of what it was at its peak around 2006. Tr. 3239:23-3240:9.

o. Mr. Norden also analyzed per square foot sale prices for resort condominiums in the region. Exhibits 220, 221 (R. 19431-19432); Norden PFT, pp. 51-53, following Tr. 3339; Tr. 3261-3266. This analysis showed that the condos in the ACR Project would be overpriced, in that ACR was projecting sales prices that could only be achieved at better-known, larger, more well-established resorts. Id.

p. Finally, using regional sales data obtained mostly from the Applicant's own marketing study, he was able to analyze the potential sale prices of the Great Camp lots. Norden Exhibits 223, 234 (R. 19451-19453); Tr. 3287-3304. This data showed that comparably large properties in the northern Adirondack region sold for about $13,000 per acre (Tr. 3291:17-21), but that the 8 large Great Camp lots were predicted by the Applicant to sell for about $65,000 per acre (3293:9-10) and the smaller Great Camp lots were to be priced at about $30,000 per acre (Tr. 3293:18-19) and $43,000 per acre (Tr. 3293:21-22). Thus, the predicted sales prices for the Great Camp lots were overestimated by the Applicant by anywhere from 230% to 500%.

q. For Franklin County, where the Project would be located, he analyzed publicly available sales data on 44 comparably large properties from 2009 and 2010. Norden Exhibit 224 (R. 19452-19453); Tr. 3297-3304. This analysis of the most recent local sales showed that large lots like the Great Camps sold for $1,511 per acre. R. 19452-19453; Tr. 3300:3-6. Based on the most recent and most local data available, the Great Camp lot price estimates were inflated by 2,600% to 5,650%.

r. Within the Town of Tupper Lake itself, the average per acre sale price of large lots like the Great Camp lots was only $1,919 per acre (R. 19452-19453; Tr. 3301), which, again, is far less than what the Applicant has predicted it could sell Great Camp lots for.

s. An analysis by PROTECT's economist witness, Shanna Ratner, showed that the carrying costs for the homes in the Project would be in excess of $24,000 per year, or $2,000 per month. Ratner[77] PFT, pp. 13-15, following Tr. 2341. Mr. Norden testified that high carrying costs can frustrate and deter potential buyers. Norden PFT, pp. 58-59, following Tr. 3339.

t. The overall result of Mr. Norden's analysis was:

> that the ACR project does not possess the basic physical characteristics to achieve top-of-market sales volume compared with similar ski-centric real estate projects. However, the Applicant has projected top-of-

[77] Shanna Ratner.

market type sales volume anyway. Norden PFT, p. 34, following Tr. 3339.

Based upon this research and analysis, as well as the application materials, and his many years of experience, Mr. Norden drew the following conclusions:

(1) The Project lacks the necessary characteristics to be successful coming out of the recession: name recognition, amenity base, existing infrastructure and current client base. Norden PFT, p. 37, following Tr. 3339.

(2) "...I do not believe that the project as proposed will be able to achieve the sales volume that is proposed here. And I believe that there is a little bit of a disconnect behind [sic] what people looking for [a] mountain resort experience are really seeking." Tr. 3329:16-21.

(3) The Project's prices have not been discounted due to the recession, as has been done at resorts elsewhere by about 29% on average. See Norden PFT, pp. 38, 39, 44, following Tr. 3339. Thus, the Project's proposed pricing is not competitive with the market. See Tr. 3276.

(4) The current market favors "[p]rojects in great locations with great brands" and "it is an extraordinarily challenging environment for new developments." Norden PFT, pp. 39.

(5) "The fact that the developer will be selling on a promise [due to its lack of a track record and the remote

location] creates a major obstacle in the sales process in today's market." Norden PFT, p. 42, following Tr. 3339.

(6) Sales will be hampered by the fact that the developer plans to purchase fixed-grip ski lifts, which most ski areas no longer purchase, rather than faster, more modern, detachable lifts, which customers have come to expect. See Norden PFT, pp. 36-37, 45-46, following Tr. 3339; Tr. 3312, 3393:14-3395-7.

(7) The number of ski areas in the U.S. has declined from 735 to 471 in the last 27 years. Most of the losses have occurred in Big Tupper's size range. See Norden PFT, pp. 49-50, following Tr. 3339.

(8) The Applicant's marketing witness had stated that the target market area for the Project was a five hour driving radius, including such cities as Syracuse, Albany, and Montreal. See Tr. 2472. Mr. Norden testified that Syracuse and Albany were too small and too close to competing resorts, and that for Montreal, being an international market provided difficulties, and that it was also closer to many larger resorts. See Tr. 3274:15-3276:3. As shown by Exhibit 225 (Tr. 3305-3306), five major resorts, including Mount Tremblant, Stowe and Jay Peak are closer to Montreal than Big Tupper. See Tr. 3305-3306.

(9) Most of the Project's so-called ski-in, ski-out housing, which can be sold at a much higher price point, is not actually ski-in, ski-out, because it is too far from the ski

lifts or too hard to access. Thus, sale prices are likely to be lower than the Applicant has projected. See Tr. 3278:20-3286:13.

u. When faced with this definitive analysis by a true industry expert, which completely destroyed the credibility of its 2010 update fiscal analysis (Exhibit 85, R. 12262), the Applicant did only minimal cross-examination (Tr. 3350-3391, 3403-3404) and provided no rebuttal testimony. Therefore, Mr. Norden's conclusions stand as the definitive analysis in the record of the Project's lack of likelihood of financial and fiscal success.

v. Despite this, APA found that:

PROJECT IMPACTS

Fiscal and Economic Impacts

> 121. The Updated 2010 "Fiscal and Economic Impact Analysis" report ("F&EIS Report") prepared by the LA Group and dated June 2010 describes the anticipated economic and fiscal impacts of the proposed Adirondack Club and Resort on the Town and Village of Tupper Lake as well as Franklin County, the Tupper Lake School District, and the surrounding region. ...
>
> 128. The Project Sponsor maintains it is important that development of the ski area and marina amenities and the public infrastructure occur simultaneously with lot and unit sales, as lot and unit sales are intended to provide capital for the construction of the project's amenities.
>
> 129. Delay in residential lot sales or unit sales could affect the pace or occurrence of amenity development, including the ski area. ...

Project Benefits

> 132. There are three primary sources of financial and economic impacts to the community: 1) increased tax assessments; 2) short term commerce activities from construction; and 3) permanent commerce opportunities from both the residential and resort components. ...
>
> 134. Construction on the Adirondack Club and Resort is projected to last 15 years. According to the F&EIS, it is expected that a total of $142,470,407.92 of direct construction wages will be paid to an average annual workforce of 307 during that period. At full operation, the Adirondack Club and Resort is projected to employ 236 full time workers with an average salary of $20,700. In addition, the reopening of the ski resort is projected to attract 100,000 visits per year upon completion of the proposed improvements, resulting in an additional $22.6 million in local spending per year.
>
> 135. Usage of the project's seasonal residences is projected to induce $4,631,760.97 of spending in the local economy per year. R. 28-31.

w. These findings ignore the record which proves, as shown above, that the "Updated 2010 "Fiscal and Economic Impact Analysis" report ("F&EIS Report") prepared by the LA Group and dated June 2010" (R. 28, ¶121), upon which all of these findings of alleged Project benefits were based (R. 28, ¶121), was a work of fiction, and had been thoroughly discredited in the hearing. See ¶¶ 326-334, supra. Therefore, there is not substantial evidence to support the APA's findings that the Project will provide any benefits to the community, or that it will avoid adverse fiscal impacts to municipalities and taxpayers. Its decision was arbitrary and capricious, lacked a rational basis, and should be annulled.

341. The Project Sponsors, lacking any actual evidence to support their wild claims of fiscal benefits, instead rely upon an analysis that was supposedly given to, or done by, the Town of Tupper Lake. Answer ¶¶ 287, 297. However, there was no testimony (Tr. 1-4487) about this alleged, conclusory, analysis, it was not documented or supported by any actual evidence, and it was not subject to cross-examination, so it can not provide substantial evidence to support APA's decision.

342. The State (Answer ¶526), claims that the APA was not required to make a finding as to the economic viability of the Project, and that this question is not relevant to the required determination about the Project's undue adverse impacts on the resources of the Adirondack Park. This allegation is incorrect.

a. Economic viability is not, in and of itself, a criterion for approval under the APA Act. However, as set forth above at ¶¶ 320-323, fiscal impacts must be part of the Agency's determination as to undue adverse impacts on the resources of the Park. For this Project, avoiding undue adverse fiscal impacts depends entirely on the volume of real estate sales and the resultant level of real estate tax and PILOT revenues. If the sales do not materialize, then neither will the municipal revenues. Therefore, this issue is highly relevant to the APA's required determination under APA Act § 805(4), § 805(4)(c)(2)(b),

§ 805(4)(d)(1)(a), § 805(4)(d)(1)(b), § 805(4)(e)(1)(a), and § 809(10)(e).

b. In addition, APA was required to make a specific finding about each legal issue that was before it. See ¶¶ 370-394, infra. As the record shows (¶¶ 324-341, supra) the Project is not even close to being financially viable and the Project Sponsors' tax revenue claims are grossly inflated. Thus, any finding by APA to the contrary would have been arbitrary and capricious, lacking a rational basis, and not supported by substantial evidence.

343. Paragraph 529 of the Petition states:

> The evidence shows that it is not likely to be feasible for the Ski Area to be maintained as a community resource. Instead, the skier use levels, and the financial subsidies from the ACR resort, that are necessary to reopen the Big Tupper Ski Area, and to keep it open, will not be achieved. See PROTECT Brief, pp. 34-39. (R. 20525-20530)

a. In responding to this, the Project Sponsors' Answer (¶289), misses the point. It lays out some various ways that they say that they will be able to raise capital to fund the reopening of the Ski Area and some initial upgrades. Answer ¶289. However, the ultimate point of Petition ¶529 is that, even if the Ski Area is reopened, over the long term, the necessary financing will not be available to keep it open.

b. The record shows that operating the Ski Area in the manner proposed by the Project Sponsors is not financially

feasible, so that it will not stay open, and it will not provide the community benefits that the Project Sponsors claim it will, and that APA's Order found would occur. See R. 28-30.

c. As with the real property sales and tax figures, the number of skier days used for budgeting purposes for the Ski Area lacks any support in the record, and appears to be fictional. This creative accounting resulted in much higher predicted levels of Ski Area revenues than is otherwise supported by the record.

d. In 2006, the Applicant produced an analysis of the Ski Area's proposed operations and finances. See R. 3948-3955. This document stated that the "largest stream of revenues will be lift ticket revenues" and that "[u]nderlying the revenue assumption is the number of anticipated skier visits." R. 3952.

e. The Jack Johnson Company, a respected national ski area consulting company, performed a "Pro Forma Financial Analysis for Mountain Development & Operations" for the Applicant in December 2005. R. 19433-19450. It estimated that the Ski Area would initially generate a mere 4,500 skier days per year, 21,600 in the second year, and would eventually plateau at 40,500 skier days per year. See R. 19438-13439, 19450; Norden PFT, p. 35, following Tr. 3339.

f. By the time that the February 2006 report was prepared by the Applicant, just two months later, the predicted skier visits had miraculously increased to 23,600 in the second year

(up 9%) and were predicted to eventually reach 72,000 (up 178%). R. 3952. No source was cited for these new numbers and they appear to have just been made up out of whole cloth.

g. To compound this questionable math, the Applicant later began using an even higher number of 100,000 skier days per year. See Exhibit 85, R. 12315; Tr. 2531. No basis or foundation was given for that increase. See Norden PFT, p. 35, following Tr. 3339. The Applicant's witness James Martin later testified (Martin PFT, p. 21:18-21, following Tr. 2341; Tr. 2531:24-2534:3) that this number was given to him by another witness, Scott Brandi, but there was still no basis given for the method by which this number was calculated, or the data that was used to estimate it. See id.

h. Moreover, nothing in either Mr. Brandi's prefiled testimony[78] or his live testimony (Tr. 3442-3454) confirmed this number or explained how it was arrived at. Indeed, Mr. Brandi testified that he had never spoken to anyone at Mr. Martin's company, the LA Group, before the Hearing. See Tr. 3452:12-18. Thus, again, the number of skier days appears to have just been made up by Mr. Martin, and he then falsely attributed this number to Mr. Brandi.

i. This fudging of the numbers allowed the Applicant to claim much higher lift ticket revenues than it otherwise could

[78] Scott Brandi Redacted PFT, following Tr. 3456.

have. The table set forth in PROTECT's post-hearing brief at R. 20527-20528 shows the amount of revenue inflation resulting from the invention of the higher skier day per year figures. The Jack Johnson Company's independent analysis (R. 19433-19450) had estimated lift ticket revenues of $1,215,000 in Year 7 of operation. With the Applicant's fanciful inflated numbers, estimated lift ticket revenues in Year 7 grew to $2,175,000. See R. 20527. However, there is absolutely no basis in the record for these new numbers.

j. The unexplained inflation in the number of predicted skier days had the effect of making the Ski Area look much more financially sound than it really will be. For instance, the Applicant projected that the Ski Area would be profitable by its seventh year of operation ("Year 7"). See R. 4652. However, as shown by the PROTECT table (R. 20527-20528), that would only be possible by overstating lift ticket revenues by $960,000. When the only credible figure, the Jack Johnson estimate of 40,500 skiers per year, is used, the projected profit of $71,000 becomes a loss of $889,000. Over the 11 year period for which estimates are available, lift ticket revenues are overstated by almost $6.5 million. See R. 20527-20528.

k. Therefore, the Applicant's estimates of skier days and lift ticket revenues have been highly inflated, are not reliable, and the Ski Area will not be profitable.

l. The other major source of revenue for the Ski Area is supposed to come from annual subsidies of $1,000 per year from homeowners in the development. Exhibit 81, R. 10142. However, many of the units will be exempt from those payments. Id. Also, the projected $600,000 annually in such subsidies is dependent upon real estate sales proceeding at the Applicant's projected rate, which is unlikely to occur. See ¶¶ 324-341, supra. The actual rate of sales will only be about 1/8 of the projected rate. Id. Therefore, the subsidies that are actually paid will fall far below the projected levels, creating severe budget shortfalls for the Ski Area. Norden PFT, pp. 55-56, following Tr. 3339.

m. For instance, Year 10 of the Applicant's Pro Forma shows that the Ski Area should make a profit of $1,430,000. R. 4652. After adjusting for the inflated lift ticket sales (per the table at R. 20527-20528), the profit would be reduced to $310,000. Also, the Pro Forma (R. 4652) assumes that there will be large State of New York tax rebates each year, because the Ski Area is in an "Empire Zone". However, that program has ended and the Ski Area will not receive such rebates. Tr. 2505-2507. For Year 10, that subsidy was predicted to be $453,000. Without that rebate, the Ski Area would lose $143,000.

n. In addition, $644,000 of the revenues in Year 10 are projected to come from the $1,000 per year, per home, assessment

on resort residents ("HO Assessments"). R. 4652. This calculation does not take into account the fact that 67 of the 651 homes in the Project will be exempt from these fees (Exhibit 81, R. 10105, 10142), and the subsidy will only be $584,000, or $60,000 less than predicted, so that the Year 10 loss will increase to $203,000.

o. Once one takes into account the fact that real estate sales will be far below the projected levels (see ¶340, supra), it becomes even clearer that the Ski Area will never become profitable. For instance, if, by Year 10, a total of 200 homes was sold (which is far more sales than Mr. Norden's analysis predicts[79]), up to 67 of which would be exempt from the $1,000 HO Assessments, that would only produce about $150,000 per year in HO Assessments. For Year 10, this would lead to an additional loss of $427,000, for a total loss of $630,000 in Year 10.

p. To summarize, using Year 10 as an example: Predicted profit ($1,430,000) - overstated lift ticket sales ($1,120,500) - loss of Empire Zone subsidy ($453,000) - homes exempt from paying HO Assessment subsidy ($60,000) - reduced HO Assessment subsidy due to reduced home sales ($427,000) = loss of $630,000.

[79] Sales of $5,000,000 per year (R. 19423, 19424; ¶340(j), supra) divided by $500,000 +/- per unit = 10 units per year, times 10 years = 100 units.

q. Using the Applicant's own budgetary figures, and correcting for its fabrications, errors and exaggerations, it becomes clear that the Ski Area will not ever show a profit. Under those circumstances, it will almost certainly close once again, and will cease to be a recreational resource for the community.

r. Despite the lack of any evidence (let alone substantial evidence) to support the claim that the Ski Area operation would be sustainable, its operation by the Project Sponsors, and their promise to make it available to the public for 50 years, were among the alleged "Project Benefits" found by the Agency to be justification for approving the Project:

> 134. ... In addition, the reopening of the ski resort is projected to attract 100,000 visits per year[80] upon completion of the proposed improvements, resulting in an additional $22.6 million in local spending per year.
>
> 137. The continued public availability of the Big Tupper Ski Area has been identified as a significant objective of the local community in relation to the proposed project. This goal was particularly evident in the legislative comments provided in relation to the proposed project.
>
> 138. The public will benefit from access to the Big Tupper Ski Area as long as it operates, or for 50 years from the date of this Permit and Order, whichever comes first. R. 30-31.

[80] As set forth above at ¶343, this number was fabricated out of thin air, and there is no evidence to support it, substantial or otherwise.

s. Therefore, there is not substantial evidence to support the APA's findings that the Project will provide any benefits to the community, its decision was arbitrary and capricious, lacked a rational basis, and should be annulled.

344. The State (Answer ¶532) alleges that 9 NYCRR § 572.4(c)(5) does not require it to request information as to the Project Sponsor's "financial capacity", and that it is merely in the Agency's discretion to do so. This argument misses the point of Petition ¶532:

a. Section 572.4(c) states:

> (c) The Agency may request any additional information and data reasonably necessary to enable it to make the findings and determinations required by section 809 of the [APA Act] ... the additional information may include: ...
>
> (5) any relevant information describing the project sponsor, <u>including financial capacity</u>... . (emphasis added)

b. Thus, the potential financing of a project, and its financial feasibility, does constitute "information and data reasonably necessary to enable it to make the findings and determinations required by section 809 of the [APA Act]". 9 NYCRR § 572.4(c)(5).

c. More importantly, 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</u>

financial capacity to complete the project or any material part thereof ... . (emphasis added)

d. Therefore, contrary to the State's claim that the financial viability of the Project is not relevant (State's Answer ¶526), this issue is completely within APA's jurisdiction and is highly relevant to the determinations that the APA must make, including the finding as to the Project's undue adverse fiscal impacts. APA's failure to consider this is contrary to the requirements of the APA Act. See APA Act § 805(4), § 805(4)(c)(2)(b), § 805(4)(d)(1)(a), § 805(4)(d)(1)(b), § 805(4)(e)(1)(a), § 809(10)(e), and § 809(13)(b).

345. The State (Answer ¶547) claims that "the development considerations of Executive Law § 805(4) are not approval criteria to which a project must conform." As set forth above at ¶¶ 292-300, this argument is not correct.

The Project Will Cause Undue Adverse Fiscal Impacts on Local Governments and Taxpayers

346. The Project Sponsors' claim (Answer ¶286(c)) that the Project will "result in a net positive fiscal position for the Town" of Tupper Lake and other affected municipalities ignores significant testimony to the contrary, which the Applicant did not rebut on the hearing record. In her testimony, PROTECT's expert economist Shanna Ratner (R. 19081-19121; PFT pp. 1-2, following Tr. 2341) gave several examples of the types of burdens

that are likely to fall upon the local governments as a result of the Project:

a. The Village and Town of Tupper Lake are likely to incur unplanned liabilities and related costs for repairs to sewer laterals. Ratner PFT, pp. 4-7, following Tr. 2341; Tr. 2231-2233.

b. The Village and Town could be forced to take over maintenance of the sewers and private roads in the development (Ratner PFT, pp. 7-13, following Tr. 2341; Tr. 2223-2225), and the existence of excess capacity in the sewer system will drive up the cost of doing so (Ratner PFT, pp. 7-10, following Tr. 2341).

c. If a phase of the Project fails, the few houses built to date may not generate enough revenue to cover the cost of maintaining roads and other facilities. Tr. 2234-2238. This is especially a concern because the bond payments will take priority over the payments to the Town in the event that PILOT and sub-PILOT payments are not paid in full. Ratner PFT, pp. 12-13, following Tr. 2341; ¶¶ 323-338, supra.

d. The risks to the local governments are also exacerbated by the fact that the application materials usually estimated the demand for, and costs of, municipal services based on average residency numbers at the resort, rather than being based on peak demands. Ratner PFT, pp. 34-35, following Tr. 2341. This could

have several effects, including creating an inability to meet the demand for such services, and increasing the cost of such services. Id. This miscalculation also increases the likelihood that the resort will fail to provide services itself, pushing the costs onto the municipalities. Id.

e. The Village and Town could be forced to take over the private sewage treatment plant. Ratner PFT, pp. 10-11, following Tr. 2341; Tr. 2234-2238. See New York Transportation Corporations Law.

347. The Applicant's witness, Eduardo Hernandez, P.E., admitted that there was a risk that the transportation corporation that would be formed to own and operate the private sewage treatment plant could go out of business, without a bond in place to cover its costs, leaving the customers to own and operate it. Tr. 3039-3045. In such a case, the Town may have to take over the system and operate it for a relatively few customers. Tr. 3043-3045.

348. The Applicant claimed that, if it fails, another developer will come along and bail it out. R. 10149. However, as demonstrated by the testimony of Mr. Norden, in the current uncertain real estate market, this is unlikely to occur, because the project is such a risky one, with an unknown name, in a remote location. Norden PFT, pp. 56-58, following Tr. 3339.

349. Exhibit 191, the detailed report prepared for the Village of Tupper Lake by The Hudson Group, LLC, an interdisciplinary consulting group (R. 19046), also pointed out several risks to the local governments from the Project:

a. The electric demand from the Project could drive up rates for existing ratepayers. R. 19052.

b. At present, adequate water and sewer capacity is only certain for Phase I of the project. R. 19054. Adverse effects on the Village can be avoided only if the Project Sponsors honor all of their commitments to fund their own water and sewer capital project needs. Id. As set forth above at ¶¶ 320-340, it is unlikely that the Project Sponsors will be able to keep their commitments.

c. It is currently uncertain whether the Village has adequate water supply to meet the Project's requirements after Phase I. R. 19056.

d. The mechanisms and agreements needed to confirm the Project Sponsors' commitments to the Village have yet to be worked out. R. 19058.

e. As discussed above, the Town may have to take over the private sewer system. R. 19062.

f. The Fire Department is only sure of its ability to protect the project through Phase 1. R. 19063. In addition, additional fire protection locations and equipment will need to

be acquired as the Project progresses. R. 19063. There is currently no mechanism in place for the Project Sponsors to pay for these items. Also, additional firefighting personnel will be required (R. 19063), but the Project Sponsors have not committed to providing them.

g. The Fire Department has several concerns for Phases II to IV of the project. R. 19063-19064.

(1) It will not be able to reach some of the developments in the project within the normal desired response time of under 10 minutes.

(2) There will not be adequate water to fight fires at the Great Camps.

(3) Road grades in some of the developments may be too steep for firefighting vehicles. The Project should have been modified to address these problems.

(4) There is a need to ensure that the Department will have the financial resources needed to meet the needs of the Project.

h. There are concerns about the ability of the Village Police Department to meet the law enforcement needs of the Project. Although the Project is outside of the Village, the Village Police often provide coverage in the Town. R. 19066. The Applicant has discussed the idea of assessing the Project's homeowners to pay for such services, but no formal commitment

exists. R. 19066. Thus, the Village is at risk for incurring increased costs in the Police Department budget, with no means to pay for them.

350. All of these fiscal risks are exacerbated by the fact that the Applicant did not prove that the IDA can or will fund the construction of the Project's infrastructure. ¶¶ 353-361, infra.

351. For all of the foregoing reasons, the approval of the Project by the APA has put the affected municipal governments at great financial risk. In addition, as shown by the Hudson Group report (R. 19043-19080), there are still significant open questions about the ability of the municipalities to provide the necessary services that the Project will require. The Project Sponsors did not prove otherwise.

352. The record establishes that the Project will create undue adverse fiscal impacts on local governments and taxpayers. APA's approval of the Project failed to make the appropriate determinations on the relevant Development Considerations, based on this record. Therefore, its decision was arbitrary and capricious, lacked a rational basis, and was not supported by substantial evidence in the record.

REPLY TO NEW MATTER ALLEGED IN THE ANSWERS ON
THE TWENTY-THIRD AND TWENTY-FOURTH CAUSES OF ACTION:
THESE CLAIMS STATE VALID CAUSES OF ACTION

353. The Twenty-Third and Twenty-Fourth Causes of Action (Petition ¶¶ 528, 553-574) demonstrate that, in reviewing the Project, APA failed to adequately consider the potential adverse fiscal impacts of the Project on local governments and taxpayers as required by APA Act § 805(4), § 805(4)(c)(2)(b), § 805(4)(d)(1)(a), § 805(4)(d)(1)(b), § 805(4)(e)(1)(a), and § 809(10)(e), because APA merely assumed, without proper consideration, and without making the necessary findings, that the Project's infrastructure would be financed by industrial revenue bonds, when the record shows that this will not occur.

354. The State's Answer (¶547) states that the Development Considerations "are not approval criteria to which a project must conform." This is not correct. See ¶¶ 292-300, supra. Regardless of how they are labeled, they must still be taken into account, discussed, debated, and be the subject of specific findings, and there must be a rational basis for those findings, supported by substantial evidence. See ¶¶ 370-394, infra. In this case, the Applicant did not meet its burden of proving that undue fiscal impacts would not occur, and APA did not undertake the necessary consideration, or make the requisite findings on this issue, as follows:

a. The Project Sponsors have repeatedly stated (e.g., Answer ¶286(c)), and APA so found [R. 30], that there will be no cost to local governments for the Project's infrastructure, no financial risk to them, and a net positive revenue stream to those same municipalities, due to the use of financing from the County of Franklin Industrial Development Agency ("CFIDA")[81] for the construction of that infrastructure. APA endorsed these claims in the Order. R. 28-30.

b. Thus, the approval of the bonds by the CFIDA is critical to the avoidance of infrastructure costs and financial risks for municipalities. Otherwise, some other financing mechanism will have to be used, which could affect the "adequacy of site facilities" (§ 805(4)(c)(2)(b)), the "ability of government to provide facilities and services" (§ 805(4)(d)(1)(a)), and lead to increases in "municipal, school or special district taxes or special district user charges" (§ 805(4)(d)(1)(b)).

c. However, the only findings that APA made make which mention the CFIDA bonding all assume that the bonding would be approved. R. 27-29. There was no apparent consideration of the

[81] The Project Sponsors' Answer (p. 11) correctly points out that ¶528 of the Petition incorrectly refers to the "County of Fulton Industrial Development Agency ('CFIDA')", rather than the "County of Franklin Industrial Development Agency". However, this error does not affect the merits of the issues set forth in the Twenty-Third and Twenty-Fourth Causes of Action (Petition ¶¶ 553-574).

record, which demonstrated that the bonds, as proposed, could never be approved:

(1) In a letter to the applicant's attorney dated February 1, 2011 (R. 19529; Tr. 3474-3475), the Executive Director of the CFIDA stated, in part:

> It has been four years since AC&R's application to the IDA in February, 2007, and nearly that long since an Inducement Resolution was passed in April, 2007. The board that approved the project has since turned over four times and the project has changed. Without a current application and current board approval, it does not seem appropriate to provide testimony.
>
> There is also the matter of AC&R's proposed PILOT. Not only has the proposed PILOT not been accepted at this time, we have not determined the legal basis, precedent or workability of it. For this reason and for those noted in the paragraph above, I believe it is premature for the IDA to provide testimony or opinion in the case of AC&R.

(2) In an e-mail dated July 20, 2009, the CFIDA's bond counsel made it clear to its Executive Director that the proposed tax and ownership structure of the project would not work because, among other things, IDA bonding and a PILOT agreement do not continue to freeze the real property taxes after a parcel is sold, as was being proposed by the applicant. R. 19278-19280; Tr. 3085-3114, 3118.

(3) In an e-mail dated March 18, 2010, the CFIDA's bond counsel stated to its Executive Director that the counsel's 2006 opinion letter (R. 19260-19268) regarding the project had not been updated to reflect the changes in the applicable law and

regulations in the intervening four years, and recommended that this be done. R. 19281-19282; Tr. 3115, 3118. There is nothing in the record to show that the bond counsel had updated or reaffirmed its 5-year old opinion. Therefore, there is no proof in the record that the proposal meets the requirements of the Internal Revenue Code and other applicable laws.

(4) In an e-mail dated August 2, 2010 to local politician, ACR booster, and hearing party Paul Maroun, the CFIDA Executive Director stated that "a parcel [in the project], when sold, will be taxed at current rates. I advised Michael Foxman of this in July of 2009." R. 19283; Tr. 3115, 3118. However, the Applicant continued to adhere to the idea that when lots in the project are sold, the taxes will still be limited, subject to a PILOT or "sub-PILOT" agreement. R. 12265-12266, 12328-12330.

(5) In a draft PILOT agreement submitted by the Applicant to the CFIDA in October 2010, the Applicant continued to propose that the individual property owners within the project would make PILOT payments, despite the advice of the CFIDA that this was not feasible. R. 19284-19288; Tr. 3115, 3118. However, this document did appear to include the new concept of the "sub-PILOT".

(6) At the CFIDA's October 13, 2010 board meeting, the following discussion was held:

> A discussion ensued about the Adirondack Club and Resort (ACR), prompted by Director Gillis, with a focus on

> PILOT and specifically sub-PILOTs as proposed by ACR. It is not clear how this will work, and has generated controversy in the Tupper Lake community about whether it is right to enter into a sub-PILOT when a parcel is sold. In addition, Fulbright & Jaworski has previously advised the IDA that a parcel, when sold, would be taxed at the then current tax rates.
>
> John related that a conference call with Fulbright & Jaworski and ACR's Bob Sweeney will be held soon to discuss the matter, and he will keep the board advised.

R. 19289-19290; Tr. 3116, 3118.

(7) In an e-mail exchange in mid-October 2010, the CFIDA's bond counsel advised its Executive Director that:

> I completely understand the members' concerns - the IDA would approve a project with ACR, but it has no knowledge of who the ultimate buyers are and likely will have no interaction with those buyers.
>
> Frankly I'm not sure this has been done. A good starting point would be to ask ACR if they know of any other projects in the State of New York where this approach has been used and talk to the IDA.

R. 19291-19292; Tr. 3116, 3118. At that time, the IDA board was considering rejecting the entire concept of "sub-PILOTs". Id.

(8) As of the CFIDA's November 10, 2010 board meeting, its bond counsel was still trying to figure out whether the Applicant's "sub-PILOT" idea was legal or feasible. R. 19293-19294; Tr. 3116, 3118. Therefore, the record shows that the Applicant's planned IDA bond funding was not legal or workable.

355. The hearing testimony also showed that the Applicant could not prove that its planned IDA bond funding was either legal or workable:

a. As of the time of the hearing, the applicant's expert witness on IDA bonding testified, with regard to the CFIDA, that "...they don't have all the information...". Tr. 2997:20-21.

b. The author of the application materials that discussed the PILOT bonding plan (R. 12262-12359), James Martin, could not explain how it would work. Tr. 2502-2505.

c. The only witness presented by the Applicant on this issue was Adore Flynn Kurtz, the Executive Director of the County of Clinton IDA.[82] Unfortunately for the parties and the Agency, Ms. Kurtz was almost entirely unfamiliar with the details of the ACR project, and she could not provide any substantive testimony. She admitted that "I have not been involved in the FCIDA [sic] transaction". Kurtz PFT,[83] p. 3:21, following Tr, 3124. Not only that, she admitted that she was not an expert on this particular project:

> ... I am aware of the application. It's not one that I studied. It's not one that I prepared. And it's not one that -- that I feel an expert on. Tr. 3066:6-9. (emphasis added)

d. The witness's entire involvement with the ACR project appears to have come from reviewing (Tr. 2989-2990) a one page

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[82] Despite having written (Tr. 2503) the June 2010 fiscal impact update report, Mr. Martin could not explain the IDA and PILOT arrangements. At least twice he said that Ms. Kurtz would be able to answer any questions on that topic. Tr. 2504, 2645:23-2646:5. As it turned out, she was also unable to do so.

[83] Adore Flynn Kurtz.

2010 letter from the CFIDA (R. 10255) and three four year old documents. Kurtz PFT, pp. 3:21-4:4, following Tr. 3124; R. 4325-4359; R. 19260-19268, 19269-19277. However, the proposal to the CFIDA had changed since the three documents were created, with the advent of the sub-PILOT idea. R. 12265-12266, 12328-12330, 19278-19294, 19529. Therefore, she had no credibility, and the Applicant presented absolutely no competent expert testimony on the IDA bonding and PILOT aspects of the project.

e. Likewise, the Applicant's economics and marketing witnesses could not explain how this would work, nor could they provide any examples from their past experience where such concepts as "beneficial owners" and "sub-PILOTs" had been used. Tr. 2643-2647.

356. As explained by Protect's witness Shanna Ratner (Ratner PFT, pp. 12-13, following Tr. 2341), this arrangement creates substantial risks for the municipalities, in that, because bond payments take precedent over payments to the municipalities under the PILOT and sub-PILOT agreements, if property owners default, the municipalities could be left without sufficient PILOT payments to cover the costs of maintaining project infrastructure that has been dedicated to them. Id., Tr. 2118-2122.

357. In addition, because the IDA must retain an ownership interest or leasehold interest ("controlling interest") in any

property that is subject to a PILOT or sub-PILOT agreement (R. 19278-19280, 19283, 19291-19292; Tr. 2536-2537, 2643-2645), the buyers of the properties would not be able to actually acquire free and clear title to their lots. Ms. Kurtz could not explain how this would work. Tr. 3064-3065. However, it is obvious that it would be very difficult, if not impossible, for home buyers to obtain mortgages in that situation. Therefore, it is likely that it would be impossible to both employ sub-PILOTS and sell townhomes or building lots in the development.

358. The Project Sponsors' Answer (pp. 12-14, ¶ 288, 302) tries to ignore these facts, and instead focuses on the undefined concept of the CFIDA's last "official action", which was actually only a generic expression of preliminary support for the Project, issued in 2007, and which is now obsolete.

a. The bond counsel's letter on which it was based predated the advent of the sub-PILOT idea, and the bond counsel was dubious, to put it mildly, about that idea when it was broached in 2010. R. 19289-19292. Even as of 2006, the opinion letter was only preliminary in nature and the ultimate bond opinion was dependent on the future evolution of the project. R. 19267.

b. The 2007 inducement resolution adopted by the CFIDA (R. 19269-19273) was also out of date, and also predated the advent of the novel sub-PILOT idea. Even when it was new, it was not a binding commitment by the CFIDA. It was only a general finding

of support. Ms. Kurtz repeatedly labeled it a "preliminary resolution" (Tr. 2998:15-22, 2999:7-16, 3024:20-21) and testified that there may be 8 or 9 resolutions necessary before the final bond approval resolution is adopted. Tr. 2999:11-16.

c. Indeed, the 2007 inducement resolution itself twice stated that it was contingent upon "the PILOT Agreement to be negotiated" (R. 19272-19273), which has yet to occur. As shown by R. 19281-19283, 19289-19284, as described above, the likelihood of that happening is now highly questionable, at best.

d. Therefore, APA failed to properly "consider those factors contained in the development considerations of the plan which are pertinent to the project under review", as required by APA Act § 809(10)(e). See ¶¶ 370-394, infra.

e. Had it done so, the record would have required it to find that the Project would have an undue adverse impact on municipal infrastructure, finances and tax rates. See ¶¶ 370-394, infra.

359. The Project Sponsors' Point 8 (Answer pp. 11-14) alleges that the Twenty-Third and Twenty-Fourth Causes of Action "lack subject matter jurisdiction and fail to state a cause of action" on the grounds that APA "has no statutory powers or jurisdiction with regard to a County Industrial Development Agency ("IDA") approving bonding...". Answer p. 11. This defense is spurious.

a. The Petition does not claim that APA has jurisdiction over the CFIDA, and this objection in point of law should be ignored. See Petition ¶¶ 553-574.

b. The State's Answer (¶528), similarly alleges that APA has no authority to approve or require any specific source of funds for the Project.

c. However, that is not what the Petition alleges. Petition ¶¶ 528, 553-574. The point of these causes of action is that, with the Applicant having put all of its infrastructure financing eggs in the CFIDA's basket, it was incumbent upon APA to ensure that this bonding was a realistic prospect and that the municipal governments and local taxpayers would not suffer undue adverse fiscal impacts, if the bonding did not materialize. See APA Act § 805(4), § 805(4)(c)(2)(b), § 805(4)(d)(1)(a), § 805(4)(d)(1)(b), § 805(4)(e)(1)(a), and § 809(10)(e).

d. Moreover, APA was required to take into account the Project's "conformance with other governmental controls" pursuant to APA Act § 805(4)(e)(1)(a). Nevertheless, it did not do so with regard to whether or not the Project would qualify for bonding through the CFIDA. The State's Answer (¶569) "affirmatively state[s] that the Order does not make any finding that the CFIDA will approve bonds for the construction of the ACR's infrastructure."

e. Therefore, without any such finding having been made, APA has failed to properly "consider those factors contained in the development considerations of the plan which are pertinent to the project under review", as required by APA Act § 809(10)(e). See 370-394, infra. Further, as set forth above, the CFIDA had not yet made any such determination and was unlikely to approve bonds for the Project in its current form.

360. Despite arguing that only "official action" of the CFIDA matters, the Project Sponsors' Answer (¶302) relies on a March 17, 2011 letter from the CFIDA"s Executive Director which expresses general support for the Project. However, in no way does this letter contradict the other evidence in the record, as discussed above, which shows that the actual arrangements relied upon by the Project Sponsor were not approvable by the CFIDA.

361. The APA's approval of the Project assumed that the CFIDA would approve IDA bonds for financing the Project's infrastructure, thereby preventing financial impacts on the affected municipalities and taxpayers. In doing so, the APA ignored the evidence that showed that this funding is not approvable, failed to take into account the relevant Development Considerations, and failed to make the requisite findings and determinations. Its decision was not supported by substantial evidence, was arbitrary and capricious, and should be annulled.

REPLY TO NEW MATTER ALLEGED IN THE
ANSWERS ON THE TWENTY-SIXTH CAUSE OF ACTION:
THE APA ACT DOES NOT ALLOW APA TO WEIGH ALLEGED
ECONOMIC BENEFITS AGAINST ENVIRONMENTAL IMPACTS

362. The Twenty-Sixth Cause of Action[84] (Petition ¶¶ 575-582) demonstrates that, despite the clear message from the Appellate Division in Association v. Town of Tupper Lake, (¶¶ 22-36, supra), that APA must place environmental concerns above all others, it improperly weighed the alleged economic benefits of the Project against its adverse environmental impacts when it approved the Project.

363. As shown by Petition ¶¶ 73-84 and 575-582, and by ¶¶ 22-36, supra, APA Act § 809(10)(e) does not permit this type of weighing and balancing of alleged economic benefits against adverse environmental impacts. Nevertheless, Respondents claim that APA may do so.

364. The State's Answer alleges in at least six places (¶¶ 77(iii), 82, 98, 127, 208, and 575) that APA is required by § 809(10)(e) to undertake this type of weighing and balancing of alleged economic benefits against adverse environmental impacts.

365. The Project Sponsor's Answer (pp. 14-16) also sets forth as its Objection in Point of Law 9, relating solely to the Twenty-Sixth Cause of Action, the theory that APA must engage in this type of analysis. See also Answer ¶¶ 315, 319.

[84] Due to a numbering error in the Petition, there is no Twenty-Fifth Cause of Action.

366. Respondents' arguments are incorrect, both on the meaning of the plain language of APA Act § 809(10)(e), and on the effect of the decision of the Appellate Division in Association v. Town of Tupper Lake, supra. See ¶¶ 22-36, supra

367. The record shows unequivocally that APA did in fact engage in this prohibited analysis when it approved the Project. The State's Answer (¶533(i)) admits "that the Agency assessed the financial impacts and likely benefits arising from the ACR project...". The Order contains extensive findings regarding the Project's alleged economic benefits. R. 30-31. APA's news release announcing its approval of the Project trumpeted the Project's economic benefits, and contrasted them to its environmental impacts. R. 22011-22013.

368. The record of the APA meetings at which the Project was discussed and approved [R. 21658] shows that the APA Members undertook such a weighing and balancing when they voted, and that in advising them, the APA's General Counsel ignored the ruling in Association v. Town of Tupper Lake. Among the statements made by APA Members and staff which revealed that this prohibited analysis occurred are:

> [Agency Member Richard] BOOTH: Economic viability of the project is relevant to our determination, because we take into account benefits, which flow from a project which is successful. December 15, 2012; 01:08. [George Aff. ¶178.] R. 21658.[85]

[85] References to the statements made during the Agency meetings are cited as "(Date of Meeting); (hour:minute)" from the

[Agency General Counsel John] BANTA: "In the permit context, in considering undue adverse impact, you are allowed to take your own view of what the record says about benefits. That would include financial benefits . . . ." December 15, 2012; 01:08. [George Aff. ¶179.]

BOOTH: ... am I correct in assuming. . . that we should conclude the benefits to the community would go down significantly?" Goes to the "benefits" . . . "That's something we need to have generally in mind." December 16, 2011; 05:19. [George Aff. ¶180.]

BOOTH: A project of this size is going to have a significant amount of impact. Our job is to weigh the benefits against the impacts. December 16, 2011; 05:24. [George Aff. ¶181.]

BANTA: That's "one of the core questions. . . . ." December 16, 2011; 05:24. [George Aff. ¶182.]

BOOTH: . . . But I'm not sure there's any real basis for being very optimistic about the benefits to the general economy . . . . It's important because the benefits from a project . . . are a big part of whether there's undue adverse impact." Not an equation, but "the amount of benefits is important" in considering undue adverse impact. January 18, 2012; 02:18. [George Aff. ¶184.]

[Agency Member, Department of Economic Development Designee Jennifer] MCCORMICK: "[M]y focus right now really is on trying to maximize the economic benefit, getting good impact from this project by doing what we can as a public body to help encourage and provide a venue for private investment to create economic activity in New York. And I was listening to Governor Cuomo's budget address yesterday . . . one of the things that he focuses on his executive budget for this coming years is the idea of public-private partnerships. So, first, we want to leverage as much private dollar as we can for our public dollar and, second, we want to spend as few public dollars as we can to encourage that private investment. And if you look at this project from that perspective, what we

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start of the meeting on that date. George Aff. ¶5(a).

have done to encourage this project is really provide the technical assistance that the applicant needs to make a good project that is in compliance with law . . . .And just looking at what has been done by staff and by this board over the past several years, there's been an extraordinary amount of effort on the public side . . . ." Worst case scenario, it's still not all that bad. "The potential for benefit is so great that I'm willing - and it appears that the local governments that will be shouldering the risk are willing - to bet that there will be more value than loss." January 18, 2012; 02:42. [George Aff. ¶185.]

MCCORMICK: "There are extraordinary .. . tremendous economic benefits that may accrue to our region from this . . . ." Looked up 'undue' - it's excessive or unjustifiable. There are adverse impacts. But, the creation of jobs, effect on TL and Adks is "fantastic." It's what we want to see, what I want to see, what the commissioner wants to see. Seven years of process has resulted in a project that doesn't just balance economic benefits against environmental benefits. It really does play one off the other and maximizes both. 4600 acres of open space is protected; that happens day one. "This is the essence of what Governor Cuomo was talking about in his economic agenda for our state. It's a public-private partnership. We the public in terms of government agencies are helping private investors and private money do what they do best, which is invest in and grow the economy. And the other piece of public. . . is the work everybody has done in this hearing. . . ." YES. January 20, 2012; 01:51. [George Aff. ¶186.]

369. For the foregoing reasons, the Project Sponsors' Ninth Objection in Point of Law should be dismissed and the Twenty-Sixth Cause of Action should be granted.

REPLY TO NEW MATTER ALLEGED IN THE
ANSWERS ON THE TWENTY-SEVENTH CAUSE OF ACTION:
THE APA FAILED TO MAKE THE REQUIRED FINDINGS

370. APA completely failed to set forth a detailed, reasoned basis for its decision to approve the ACR Project. The Order makes only one generic conclusion of law that the Project "complies with the applicable approval criteria." R. 34. Therefore, it must be annulled.

371. The State (Answer ¶586) and the Project Sponsors (Answer ¶328) rely on the Order's "169 findings"[86] as providing a basis for the Agency's decision. However, the Order's (R. 1-39) numerous "findings of fact": (1) do not demonstrate how the Agency Members applied the relevant statutory criteria and Development Considerations to the Project, or how they resolved the 12 Hearing Issues; (2) do not - contrary to the State's (Answer ¶¶ 588, 602) and the Project Sponsors' (Answer ¶324(a)) assertions - constitute rulings upon all of the Petitioners' proposed findings; and (3) do not cite to the Record. Therefore, APA's decision should be annulled. Petition ¶¶ 583-603.

372. Although the findings of fact and conclusions of law do not have to be organized "in any particular manner" (State's Answer ¶597), they do have to be laid out in a manner that will allow the court to perform a fair and intelligent review of the reasons for the Agency's decision. See Simpson v. Wolansky, 38

[86] Only paragraphs 69-169 are within the section of the Order entitled "Findings of Fact". R. 20-36.

N.Y.2d 391, 396 (1975); Barry v. O'Connell, 303 N.Y. 46, 51-52 (1951); Quiver Rock, LLC v. New York State Adirondack Park Agency, 93 A.D.3d 1135, (3d Dept. 2012); Matter of Bader v. Board of Educ. of Lansingburgh Cent. School Dist., 216 A.D.2d 708, 709 (3d Dept. 1995); Central NY Coach Lines v. Larocca, 120 A.D.2d 149, 152 (3d Dept. 1986); Scudder v. O'Connell, 272 A.D. 251, 253-254 (1st Dept. 1947).

373. As set forth below in more detail, because there is no linkage between the Order's pro forma "Conclusions of Law" and its findings, and no specific findings were made on the 12 Hearing Issues, or on the findings proposed by the hearing parties, APA failed to satisfy this requirement. See Rauschmeier v. Village of Johnson City, 91 A.D.3d 1080, 1081 (3d Dept. 2012); Bowers v. Aron, 142 A.D.2d 32, 35-36 (3d Dept. 1988).

374. The Project Sponsors argue that the Agency Members' deliberations on the Project provide a basis for their approval of the Project (Answer ¶323). Until the vote on the final day, there were no decisions or determinations made during the prior 6 days of deliberations.[87] The Agency Members' monologues during the vote on January 20, 2012 (R. 21512-21567, 21658) do not shed any light on whether, or how, the Agency Members applied the

[87] If the Respondents expect the Court to judge whether or not the Agency Members made a reasoned determination based on those seven days of deliberations, then transcripts of those deliberations should certainly be made available to the Court, and to the Petitioners. See ¶¶ 449-455, infra.

legal criteria of the APA Act to the facts before them. Likewise, the written Order (R. 1-39) does not allow adequate review of the Agency's determination.

375. The Project Sponsors admit (Answer ¶326) that APA Act § 809(10) "sets forth the 'criteria' for project approval." However, aside from the single paragraph of conclusory "Conclusions of Law" (R. 36), APA's Order did not make one single reference to the statutory or regulatory criteria that the APA Members were supposed to consider when making their determination on this Project. APA's Order states 101 "findings of fact"[88], but it does not in any meaningful way tie these to the statutory and regulatory criteria, or to the single, conclusory paragraph of "Conclusions of Law" (R. 36). See Barry v. O'Connell, 303 N.Y. at 51-53.

376. Additionally, APA's Order does not address in a thorough or systematic manner all of the statutory and regulatory criteria applicable to each land use area affected by the Project.[89] Further, the Order does not address the Hearing Issues in a thorough or systematic way, nor does it address all

[88] Many of the statements in paragraphs 69-169 in the Order (R. 20-36) are not "findings" as determined by the Agency Members, but are instead only "underlying facts" alleged by the Applicant (e.g., ¶¶ 91, 111, 113-118, 122, 125). SAPA § 307(1) (requiring "a concise and explicit statement of the underlying facts supporting the findings").

[89] As described above, the relevant land use areas are RM and MIU.

of the Hearing Issues. See Millpond Mgt., Inc. v. Town of Ulster Zoning Bd. of Appeals, 42 A.D.3d 804, 805 (3d Dept. 2007) (stating that respondent failed "to adequately consider all of the relevant factors"); Gilbert v. Stevens, 284 A.D. 1016 (3d Dept. 1954) (stating that "[a]dequate findings" on only one factor of a legal test with multiple considerations "would not - standing alone - be sufficient to sustain" a determination). See also Kirk-Astor Dr. Neighborhood Ass'n. v Town Bd. of Town of Pittsford, 106 A.D.2d 868, 870 (4th Dept. 1984) (stating that respondent's determination was arbitrary and capricious because it failed "to evaluate the potential impacts in [a] detailed, systematic fashion").

377. For instance, the State admits "that the Agency made no findings as to the applicant's proposed boat launching valet service." Answer ¶595. The State (Answer ¶595) and the Project Sponsors (Answer ¶330) attempt to cover this omission by claiming that the Agency has no jurisdiction over the State-owned Boat Launch.

378. APA does in fact have this power. See ¶¶ 292-300, supra. Hearing Issue #7 explicitly included consideration of the Project's impacts (e.g., overcrowding at this public facility) on the State Boat Launch. R. 9322. Moreover, APA Act § 809(10)(e) requires a determination that a project will not have an undue adverse impact "... upon the ability of the public to provide supporting facilities and services." Therefore, APA's

determination was inadequate because it failed to make findings of fact or conclusions of law regarding the Project's impacts on the State Boat Launch. Accordingly, APA was unable to determine that the Project would not have an undue adverse impact on the State Boat Launch, and APA's Order should be annulled. See Gitlin v. Hostetter, 27 N.Y.2d 934, 935 (1970); Green Is. Assoc. v. APA, 178 A.D.2d 860, 862 (3d Dept. 1991).

379. As determined by the Hearing Officer, Hearing Issue #8 explicitly included consideration of the impacts to Cranberry Pond as a result of using it for snowmaking water. R. 9322, 12390-12391. Nevertheless, the State also admits that APA made no findings as to the impacts of using Cranberry Pond as a source of water for snowmaking. Answer ¶149.

380. Moreover, APA Act § 809(10)(e) requires a determination that a project will "not have an undue adverse impact upon the natural, scenic, aesthetic, ecological, wildlife . . . resources of the park." Therefore, APA's determination was inadequate because it failed to make findings of fact or conclusions of law regarding the impacts on using Cranberry Pond for snowmaking. Accordingly, APA was unable to determine that the Project would not have an undue adverse impact on Cranberry Pond, and APA's Order should be annulled.[90] See Gitlin v.

[90] See also ¶¶ 121-413, supra.

Hostetter, 27 N.Y.2d at 935; Green Is. Assoc. v. APA, 178 A.D.2d at 862.

381. The State also admits that APA did not make any findings about the wetland value rating of Cranberry Pond. Answer ¶145. See 9 NYCRR § 578.5. APA also failed to make any findings about the value rating of the 1.47 acres of wetlands that will be lost due to the Project (Project Sponsors' Answer ¶79(c)), or about the wetlands at the marina (Project Sponsors' Answer ¶93(b)). Accordingly, APA was unable to make the findings required of it by 9 NYCRR § 578.10(a) with respect to the Project's impacts on Cranberry Pond (including using it as a source of snowmaking water and discharging sewage effluent into it),[91] and on the other wetlands on the Project Site, and APA's Order should be annulled. See Gitlin v. Hostetter, 27 N.Y.2d at 935; Green Is. Assoc. v. APA, 178 A.D.2d at 862.

382. APA's Order also failed to make findings of fact or conclusions of law on Hearing Issue # 1 with respect to whether the Great Camp Lots in Resource Management ("RM") land use areas were located on substantial acreage or in small clusters, "on carefully and well designed sites." R. 9321, 22550-22553. To approve a project, APA Act § 809(10)(b) requires a determination that a project is compatible with the purposes, policies and objectives for the land area involved, which for RM areas means

[91] See also ¶¶ 144-162, supra.

residential development must be "on substantial acreages or in small clusters on carefully selected and well designed sites." APA Act § 805(3)(g)(2). APA failed to make a determination as to whether the eight Large Eastern Great Camp Lots, the thirteen 20-30 acre Western Great Camp Lots, or the fourteen 20-30 acre Small Eastern Great Camp Lots are located "on substantial acreages or in small clusters" and whether all of the Great Camps are located "on carefully selected and well designed sites." APA Act § 805(3)(g)(2). Therefore, APA's determination was inadequate because it failed to make findings of fact or conclusions of law regarding the compatibility of the Great Camps located in RM areas. Accordingly, APA was unable to determine the Project's compatibility, and APA's Order should be annulled.[92] See Gitlin v. Hostetter, 27 N.Y.2d at 935; Green Is. Assoc. v. APA, 178 A.D.2d at 862.

383. Additionally, concerning Hearing Issue #1 and APA Act § 809(10)(e), APA Act § 805(4)(a)(6) and 9 NYCRR 574.5(a)(6), APA did not make findings of fact or conclusions of law that the Project would not cause undue adverse impacts on forest resources, amphibians and other wildlife due to the development of the Project Site. R. 9321. Therefore, APA's determination was inadequate, and APA's Order should be annulled.

[92] See also ¶¶ 239-277, supra.

384. APA also failed to set forth findings of fact or conclusions of law that the Project "would not have an undue adverse impact . . . 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." APA Act § 809(10)(e). R. 9322 (Hearing Issues #5 and #6).

385. APA recognized that there will be burdens on the "local service providers including police, hospital, emergency services, utilities, public transportation, public schools and health services." R. 28; R. 12-13, 25 - 26, 31, 36. Yet, APA ignored many of these and left them to be dealt with by the municipalities at some future time. R. 12-13 (¶¶ 47, 50), 28 (¶120), 31 (¶¶ 139-140). The Order also states that the Project relies on a payment in lieu of taxes ("PILOT") financing and bond agreement with the Franklin County Industrial Development Agency, but that "no [PILOT] terms have yet been finalized." R. 28-29.

386. While APA made findings regarding the alleged economic benefits of the Project (R. 30-31), APA provided no conclusion that the burdens on the public from the Project, including the significant risk from the proposed IDA bond financing, would not have an undue adverse impact. Therefore, APA's determination was inadequate, and APA's Order should be annulled.

387. The State admits (Answer ¶¶ 589-590) that Petitioner Thompson's and Petitioner PROTECT's Briefs and Reply Briefs made numerous proposed findings of fact, on each Hearing Issue. Petitioner PROTECT made proposed findings regarding the Project's use of the State Boat Launch (R. 20574-20585, 21004-21005), the impacts on Cranberry Pond from snowmaking (R. 20586-20591, 21006-21007), the incompatibility of the Great Camps with RM land areas (R. 20549-20554, 20995-21001), the undue adverse impacts to forest resources, amphibians and other wildlife in the RM land areas (R. 20538-20548, 20990-20995), and the undue adverse impacts upon the ability of the public to provide supporting facilities and services (R. 20500-20537, 20967-20989).

388. Petitioner Thompson also made proposed findings regarding the Project's use of the boat launch (R. 20106-20107, 20649, 20655, 20663, 20672), the impacts on Cranberry Pond from snowmaking (R. 20107-20108, 20650, 20655-20656, 20663, 20672), the incompatibility of the Great Camps with RM land areas (R. 20088-20090, 20097-20099, 20653, 20658, 20672-20673), the undue adverse impacts to forest resources, amphibians and other wildlife in the RM land areas (R. 20090-20097, 20646, 20652-20653, 20664, 20671, 20672), and the undue adverse impacts upon the ability of the public to provide supporting facilities and services (R. 20100-20106, 20663, 20671-20672).

389. The Agency's Order did not constitute a ruling on the parties' proposed findings of fact because, as shown above, the Agency failed to make findings of fact with respect to, *inter alia*, the Project's use of the State Boat Launch, the Project's impacts on Cranberry Pond from snowmaking, the compatibility of the Great Camps with RM land areas, and the impacts to forest resources, amphibians and other wildlife in the RM land areas. Therefore, the Agency's decision violated APA's regulations, violated SAPA § 307(1), and should be annulled because the Order did not "include a ruling upon each proposed finding." SAPA § 307(1).

390. APA also admits that "the Agency's Order does not make specific citations to the hearing record." State's Answer ¶600; see State's Answer ¶585. Without specific citations to a hearing record of this size - consisting of over twenty-two thousand pages of documents and 4,487 pages of live testimony - it is impossible to determine whether the Agency's findings of fact are supported by substantial, legally-sufficient evidence contained within the record.[93] See Rauschmeier v. Village of Johnson City, 91 A.D.3d 1080, 1082 (3d Dept. 2012); Langhorne v. Jackson, 206 A.D.2d 666, 667 (3d Dept. 1994); Koelbl v. Whalen, 63 A.D.2d 408,

[93] As an example, it is impossible to determine how the Agency arrived at its "finding" that "[u]sage of the project's seasonal residences is projected to induce $4,631,760.97 of spending in the local economy per year." R. 31.

412-413 (3d Dept. 1978); Compare Burstein v. Public Serv. Commn. of State of N.Y., 97 A.D.2d 900, 902 (3d Dept. 1983).

391. Additionally, the Order does not make reference to specific and identifiable maps, plans and plats of the Project. Instead, the Order describes the "complete project" as "the latest revised Overall Site Development Plan (the 'Master Plan')," without reference to any particular exhibit(s). R. 2. In fact, these plans do not yet exist. A condition of approval requires the Project Sponsors to provide a "full updated set of plans which are necessary for implementation." R. 36-38. Since the "approved" plans do not yet exist, it is unclear what the Agency has approved. These not-yet-prepared (and not-yet-approved) plans are then referenced in the 14 APA permits, which require still more plans to be prepared and submitted for APA approval. See e.g., Ski Area Permit, R. 45; Marina Permit, R. 70; Large Eastern Great Camp Permit, R. 81; Small Eastern Great Camp Permit, R. 96; Lake Simond View Permit, R. 115-116; Sugarloaf North Permit, R. 126, 130, 131.

392. APA also violated SAPA § 302(3) because it made findings based upon "Agency guidance" (R. 21) that was not in the record and was not "officially noticed." SAPA § 302(3). The alleged guidance document was never promulgated as a rule or adopted for use by APA. See ¶¶ 197-230, supra. Therefore, APA's determination should be annulled.

393. In addition, in providing 10 years (R. 1) for the Project to be "in existence," APA did not set forth findings showing its "consideration [of] 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." APA Act § 809(7)(c). Moreover, APA did not set forth why it provided 10 years for the Project to be "in existence" while also providing that the Project will be "in existence when the first lot authorized herein has been conveyed," which could be accomplished quickly. See ¶¶ 429-448, infra. Therefore, APA's determination to give the Project Sponsors five times the statutory time frame was inadequate, arbitrary, and should be annulled.

394. Finally, contrary to the Project Sponsors' claims (Answer ¶324(b)), Petitioners did provide comments on the draft permit Conditions. These comments were provided as an appendix to Petitioner PROTECT's Hearing Brief (R. 20607), in Petitioner Thompson's Hearing Brief (R. 20110-20117), and in Petitioner Thompson's Reply Brief (R. 20665-20671). Even if Petitioners had not provided comments on the draft permit Conditions, this would not relieve the Agency of its duty to make the legally mandated findings before it may issue a permit.

REPLY TO NEW MATTER ALLEGED IN THE
ANSWERS ON THE TWENTY-EIGHTH CAUSE OF ACTION:
THE ANSWERS CONCEDE THAT *EX PARTE* CONTACTS OCCURRED;
NEW EVIDENCE PROVES THAT THESE CONTACTS WERE IMPROPER

395. The Twenty-Eighth Cause of Action alleges that the approval of the Project should be annulled because there were improper *ex parte* contacts between the Applicant and the APA, in violation of SAPA and the APA's regulations. Petition ¶¶ 604-629. This claim was initially based on a recorded radio station interview with Village of Tupper Lake Mayor Paul Maroun. Petition ¶¶ 609-610. The Respondents' Answers now provide further proof that there were such improper contacts.

396. In addition, documents provided to the Petitioners' counsel by APA pursuant to the Freedom of Information Law, Public Officers Law Article 6 ("FOIL"), on July 6, 2012, prove that there were indeed prohibited *ex parte* contacts between the Project Sponsors and the APA Staff. It also appears that there may have been prohibited *ex parte* contacts with one or more APA Members.

397. In its Answer (¶¶ 604-629), the State denies the entire claim, and affirmatively alleges that "no prohibited communication regarding the ACR project occurred." Answer ¶624. The State also submitted supporting affidavits by now-retired APA General Counsel John Banta and Mayor Maroun.

398. The State's denial is contradicted by the record of the APA's deliberations, in which the following discussions occurred:

> [Agency Member Cecil] WRAY: Questions role of hearing staff and negotiations with applicant. December 15, 2012; 00:24. George Aff. ¶193.

> [Agency General Counsel John] BANTA: Hearing staff circulated a draft order to parties, received comments, and the revised staff draft is what we are addressing today. "That's appropriate. That dialogue can continue among the parties just not with you. . . ." December 15, 2012; 00:25. George Aff. ¶194.

> [Agency Staff Edward] SNIZEK: "Can we verify that with the hearing staff and come back with an answer . . . .?" December 16, 2011; 00:35. George Aff. ¶204.

> [Agency Chairwoman Leilani] ULRICH: In the interest of efficiency, I would welcome that kind of input on any of the topics. . . should updated information be available for the board to have. . . . I think that would be a great idea. December 16, 2011; 00:35. George Aff. ¶205.

> [Agency Member Richard] BOOTH: "How is that working. <u>The Sponsor is still talking to hearing staff, John</u>." December 16, 2011; 00:36. George Aff. ¶206. (emphasis added)

> BANTA: "<u>The communication is between Paul Van Cott and myself primarily. There is . . .ugh</u> it is entirely appropriate for the hearing staff to remain in communication with the project sponsor and any other party that they may communicate with. With respect to truly factual . . . questions in the record, it's appropriate for the hearing staff to point to where something is in the record, although we've tried to do that essentially under supervision of Counsel." December 16, 2011; 00:36. George Aff. ¶207. (emphasis added)

> BOOTH: "But, like this question, if the hearing staff has in fact talked to the sponsor about adding" December 16, 2011; 00:36. George Aff. ¶208.
>
> BANTA: (interrupts) "That isn't an appropriate communication. What's appropriate is communication that points to information in the record. . . And the record is complicated on this stuff so it's important to know if it was hearing testimony, if it was a communication that was attached to one of the arguments . . . We want to be absolutely accurate . . . " December 16, 2011; 00:36. George Aff. ¶209.

399. The answering affidavit of Mayor Maroun (¶6) reveals that "... Mr. Van Cott also told me that he had spoken to the applicant's attorney about the publicly-available draft order and permits."

400. Thus, the facts show that APA General Counsel John Banta was discussing the deliberations with APA Hearing Staff attorney Paul Van Cott and that Mr. Van Cott was having discussions with the Applicant's attorney about the proposed permits that were being deliberated on. Mr. Banta was also discussing his communications with the Agency Members. Thus, there was an open channel of communication between the Applicant and the Agency Members.

401. The facts also show that Mr. Banta was involved in drafting the proposed permits:

> [Agency Associate Counsel Sarah] REYNOLDS: Banta wrote this added paragraph. Reads: "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." January 19, 2012; 02:15. George Aff. ¶235.

Mr. Van Cott was then discussing these documents with the Applicant's attorney. Maroun Aff. ¶6.

402. The answering affidavit of Mr. Banta (¶23) denies that there was any "substantive communication" between the Project Sponsor and the Agency Members or the so-called "aid and advice staff". However, that affidavit does not deny that there were communications, and it does not define what "substantive communications" are. Therefore, it appears that there were indeed communications, perhaps indirect, between the Project Sponsor and the APA staff members that were guiding the Agency Members' deliberations and advising them.

403. Nor does Mr. Banta deny that there were indirect communications through any as-yet unidentified third-party conduit, or another conduit within APA or elsewhere in the State government.

404. The statutes and laws prohibiting *ex parte* contacts in the APA's deliberations prohibit both direct and indirect contacts regarding any issue of fact or conclusion of law. Petition ¶¶ 606-607. There is no exception for communications that are not "substantive communications", whatever that may mean. Nor is there any exception for "truly factual . . . questions in the record". George Aff. ¶207, quoting Banta.

405. The Project Sponsors' Answer (¶341) and the State's Answer (¶621) admit ¶621 of the Petition, which states:

> Pursuant to 9 NYCRR § 587.4, the hearing parties, including the Applicant, were prohibited from communicating with the APA Members.

406. The Project Sponsors' Answer (¶341) admits ¶622 of the Petition,[94] which states:

> Likewise, 9 NYCRR § 587.4 prohibited the hearing parties, including the Applicant, from communicating with the APA's Senior Staff and the other staff persons who were providing "aid and advice" to the APA Members pursuant to § 587.4(c)(2)(ii).

407. The documents provided by the APA under FOIL prove that such prohibited contacts did in fact occur. These include:

a. **August and October 2011 e-mails between APA Hearing Staff attorney Paul Van Cott and Applicant's attorney Thomas Ulasewicz**, which show that Mr. Van Cott was letting the Applicant tell him what to put in the Hearing Staff's reply brief and draft permit (R. 19874, 21023), and negotiating the Staff's position with the Applicant, without notice to the other parties. Copies of these e-mails are Item F of the Supplemental Return. The Hearing Staff's brief, reply brief, and draft permits were then

[94] The State's Answer (¶622) denies knowledge or information sufficient to answer this paragraph.

provided to the APA Members without any notice that the Applicant had a hand in drafting them.[95]

b. **April to October, 2011 e-mails between Mr. Van Cott and Mr. Ulasewicz** about meetings which the other parties were not notified of. Copies thereof are Item G of the Supplemental Return.

c. **December 30, 2011 memo from Mr. Ulasewicz to Mr. Van Cott**, a copy of which is Item H of the Supplemental Return. This memo:

(1) Complained (pp. 4, 8, 10, 11) that the APA Executive Staff presentation to the Agency Members was not favorable enough to the Applicant and not accurate.

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[95] As just one example of how these secret negotiations prejudiced the Petitioners, in these e-mails, and presumably also in related phone calls, the Applicant's attorney and Mr. Van Cott negotiated over the content of a letter to be filed with APA by the Applicant, consenting to revised draft permit conditions, including those regarding deed restrictions on RM lands. Supplemental Return Item F. This letter was then submitted to Mr. Van Cott and was attached to the Hearing Staff's reply brief. R. 21103. The letter specifically refers to the discussions that Mr. Van Cott and Mr. Ulasewicz had regarding this issue.

Because the reply briefs were the last filings permitted under the hearing procedures, the Petitioners and other parties had no opportunity to respond to this deal that the Staff and Applicant had negotiated in secret, post-hearing. These deed restrictions have since been touted as a key mitigation measure for the Project's adverse impacts on wildlife. See R. 9, 33, 184, 185; Project Sponsors' Answer ¶31. As set forth at ¶236, supra, this claim is false, but the Petitioners had no opportunity to prove that on the record prior to APA's decision being made.

(2) Demanded (pp. 1, 2, 3, 4, 6, 8 10, 11) that certain things favorable to the Applicant be told to the Agency Members by the Executive Staff.

(3) Gave (pp. 4, 11) the Staff litigation-proofing advice.

(4) Revealed (pp. 5, 6) that the Applicant never intended to comply with certain permit conditions, and that it or the lot buyers would come back later to get them amended.

(5) Demanded (pp. 5, 6, 7, 12, 13) multiple changes to the draft permits.

(6) Discussed (pp. 10, 12) negotiations and agreements between the Applicant and the APA Staff that were not in the record and that the other parties were not part of.

d. **January 13, 2012 memo from Mr. Ulasewicz to the Applicant's principal, Michael Foxman and others, which was simultaneously e-mailed to APA General Counsel John Banta.** Copies thereof are Item I of the Supplemental Return. This memo shows that:

(1) APA Staff let Mr. Ulasewicz review the revised draft permits in early January, before they were sent to the APA Members.

(2) The Staff, including Mr. Banta, then negotiated revisions to the permit terms with Mr. Ulasewicz.

(3) When the versions of the permits that were sent out to the Members on January 11th did not match up with what the Staff and the Applicant had agreed to, Mr. Ulasewicz complained to Mr. Van Cott.

(4) Within about 2 hours, the Staff revised the draft permits. That same day the APA Staff sent a memo from Executive Director Terry Martino to the Members with the revisions to the draft permits. The Staff memo to the Members (R. 22005-22010) did not explain to them that the revisions had been made as the result of a demand by the Applicant's attorney, which resulted from prior negotiations between Mr. Banta, Mr. Van Cott, and Mr. Ulasewicz.

(5) That same day, the newly revised draft permits replaced the prior version on the APA's website.

(6) The changes listed in the Staff memo to the Members (R. 22005-22006) match up with the changes described in Mr. Ulasewicz's memo (Supplemental Return Item I), and many other substantive changes were made that were also part of the deal between Messrs Ulasewicz, Van Cott and Banta. Thus, the Agency Staff was letting the Applicant write its own permits, and not advising the public, the hearing parties, or the APA Members of this.

(7) Mr. Van Cott then asked for further input from Mr. Ulasewicz, and offered to meet with him on the following Sunday[96] to get more comments "so that he [Van Cott] could bring them to the attention of Banta and Chairwoman Ulrich first thing Monday morning." Thus, the *ex parte* contacts went beyond Mr. Van Cott and Mr. Banta, to Lani Ulrich, the APA Chairwoman, although perhaps indirectly.

(8) The Ulasewicz memo references a conference call between APA Executive Director Terry Martino and the Agency Members. If there were 6 or more Agency Members involved, that would have been a violation of the Open Meetings Law, Public Officers Law Article 7.

e. **January 13, 2012 e-mail from the Applicant's consultant, Kevin Franke of the LA Group, to Agency General Counsel John Banta.** This e-mail says simply "Delete #54 from the marina permit." While it appears that Mr. Banta did not take Mr. Franke's advice, and the paragraph in question is now ¶33 of the Marina permit, the fact that Mr. Franke so blithely fired this demand off to Mr. Banta creates, at the minimum, the impression that he and/or other representatives of the Applicant were in regular contact with Mr. Banta. Copies thereof are Item J of the Supplemental Return.

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[96] The Ulasewicz memo is dated January 13, 2012, which was a Friday. The APA was scheduled to meet again, and vote on the Project, on January 18 to 20.

408. In ¶23 of the affidavit that he submitted with the State's Answer, Mr. Banta swore that "[a]t no time ... was there any substantive communication regarding the ACR project between the Project Sponsor, its counsel... and the Agency members or the staff providing aid and advice to the members, including myself." The Ulasewicz memo proves otherwise. Even giving Mr. Banta the benefit of the doubt, and assuming that he never spoke directly to Mr. Ulasewicz, he certainly communicated with him through Mr. Van Cott, and he did receive the Ulasewicz memo (Supplemental Return Item I) and the Franke e-mail (Supplemental Return Item J), both of which discussed substantive issues.

409. In addition, it is clear that Mr. Ulasewicz's complaint to the Staff on January 13th resulted in substantive changes to the draft permits, which could only have been made with the knowledge and involvement of Mr. Banta and Ms. Martino. See R. 22005-22010. The changes outlined in Ms. Martino's January 13, 2012 memo to the Members (R. 22005-22010) were all part of the final permits approved by the APA. R. 1-276.

410. As a result of the *ex parte* contacts, the advice and draft decision documents given by the Executive Staff to the APA Members were affected by agreements and evidence outside of the record. In addition, the other hearing parties had no opportunity to respond to these proposals.

411. The documents in the Supplemental Record prove that the Respondents' denials in their Answers that there were any prohibited *ex parte* contacts are clearly false. The State's July 5, 2012 Amended Answer was verified by Mr. Van Cott, and the Project Sponsors' July 9, 2012 Amended Answer was verified by Mr. Ulasewicz "under penalties of perjury". Both of them were obviously aware of these *ex parte* contacts, yet chose to deny that they had occurred. Likewise, ¶23 of Mr. Banta's affidavit is utterly and completely false.

412. Paragraph 24 of the Banta affidavit claims that "[t]he process was open and transparent." The documents in the Supplemental Record show that this claim is also obviously untrue.

413. Mr. Banta's affidavit (¶¶ 8 to 13) relies heavily on various memos and directives that were issued by APA to guide the Staff and Members in avoiding *ex parte* contacts. These include:

a. Banta Attachment A, Memo to APA Staff from former Executive Director Richard Lefebvre, p. 2 - "hearing staff should avoid discussing the merits of the matter with other staff and, in particular, with the Executive Director and Counsel who will advise the Agency at the conclusion of the hearing."

b. Banta Attachment A, p. 3 - "Do not discuss substantive matters with John Banta, as he will remain independent and available to counsel the Agency."

c. Banta Attachment A, p. 4 - "in all cases the executive staff counseling team will base their aid and advice on the record only."

d. Banta Attachment B, APA pamphlet on adjudicatory hearings, p. 6 - advises that no party may communicate with the Agency and its Members without serving copies of the communication on all parties, and that Members who receive such communications shall report them and provide copies to all parties. This pamphlet also advises that the Agency Hearing Staff may not communicate with the board members.

e. Banta Attachment D, July 6, 2011, memo to Hearing Staff and Executive Staff from Executive Director Terry Martino, p. 4 - "The Executive Team shall not be involved in any substantive discussions about the project or the staff recommendation with the Hearing Staff Team." ... "In all cases the Executive Tam shall base their aid and advice on the record only."

414. However, the Ulasewicz memo (Supplemental Return Item I) shows that Mr. Banta's and Mr. Van Cott's actions, and apparently also those of Executive Director Martino and Chairwoman Ulrich, violated these directives. There was communication between the Hearing Staff and the Executive Staff, including Mr. Banta, on substantive matters and the staff recommendations, there were *ex parte* communications to the Agency members that were not reported, and the Executive Team based its

recommendations to the Members in part on post-hearing input from Mr. Van Cott and Mr. Ulasewicz that was outside of the record. See Martino memo to Members, January 13, 2012, at R. 22005-22010.

415. It appears that there are additional records which would shine light on this issue. Item K of the Supplemental Return is copies of Petitioners' FOIL request that resulted in the production of the records described above, and of APA's letter responding to it. The APA letter, dated July 6, 2012, shows that there are additional documents that were responsive to the FOIL request, but that were not provided, under various exceptions to FOIL. However, those exceptions to FOIL are not applicable to Article 78 and the documents should be provided by the Respondents as part of the Return herein. If they are not provided voluntarily, then Petitioners will be forced to make a motion for leave to conduct discovery, under CPLR § 408.

416. These *ex parte* communications violated SAPA § 307(2) and 9 NYCRR § 587.4, denied the Petitioners due process of law, prejudiced the Petitioners, and created an appearance of impropriety and bias.

417. Therefore, the Twenty-Eighth Cause of Action should be granted and APA's approval of the Project must be annulled.

REPLY TO NEW MATTER ALLEGED IN THE
ANSWERS ON THE TWENTY-NINTH CAUSE OF ACTION:
APA'S STAFF SUMMARIZED THE HEARING
RECORD FOR THE APA MEMBERS WITHOUT GIVING
PETITIONERS THE REQUIRED OPPORTUNITY TO
COMMENT ON THE COMPLETENESS OF THE SUMMARIES

418. The Twenty-Ninth Cause of Action demonstrates that the APA violated its own regulations when its Executive Staff, a/k/a the "aid and advice staff", provided the Agency Members with a summary of the hearing record without allowing the parties an opportunity to comment on the accuracy of that summary. Petition ¶¶ 630-642.

419. The State's Answer alleges (¶¶ 631, 635) that the aid and advice staff did not provide a summary of the record. Mr. Banta's answering affidavit (¶29) also claims that the so-called "aid and advice staff" did not provide a summary of the record to the Agency Members. He claims that they only answered the Members' questions. Id. The Project Sponsors likewise claim that the aid and advice staff did not provide a summary, but instead only engaged in question and answer discussions with the Agency Members. Answer ¶347.

420. These claims are absolutely contradicted by the record. Attachment F to the Banta affidavit is a memo from the APA Executive Director to the Agency Members dated July 7, 2011, which outlines the planned deliberation process for the Members. This memo (p. 1) states "1. Meeting One - The Agency Executive

Team will present the record to familiarize the members with the current application...".

421. The Return contains about 390 pages of PowerPoint presentations prepared by the staff and presented to the Members during their deliberations. R. 21210-21283 (November 2011), 21306-21511 (December 2011), 21535-21657 (January 2012). While some of the slides may have been in a question and answer format, and others contained proposed findings and conditions [R. 21316-21511], more than half of them were unquestionably intended to "summarize the record of [the] hearing for the aid of the agency." 9 NYCRR § 580.18(a). Of the approximately 390 total pages of PowerPoint presentations in the record, about 204, or 52%, summarize the hearing record. See R. 21210-21283, 21306-21315, 21535-21657.

422. For example, the November slides (R. 21210-21283) went through the record issue by issue, and for each such issue, summarized the background, the project proposal, the testimony by various parties, the Hearing Staff's analysis, the parties' briefs, and key exhibits. This information was often presented with references to the pertinent hearing transcript pages. By any definition, this is a summary of the record that comes within 9 NYCRR § 580.18(a).

423. The failure to allow the parties to comment on this summary of the record was prejudicial to the Petitioners. For example:

a. In the December 14, 2011 PowerPoint presentation to the APA Members on the subject of wildlife habitat and adverse impacts to wildlife[97] (R. 21312 - 21314), the Executive Staff's summary cited to the Applicant's testimony and exhibits 2 times, the APA Hearing Staff's 5 times, and opposing parties' only once, despite the extensive testimony and exhibits introduced into the record on this issue by the intervenors. This was a ratio of 7:1 favoring the supporters of the Project vs. its opponents.

b. In the November 17, 2011 PowerPoint presentation to the APA Members on the subject of the Project's economic benefits for, and fiscal burdens on, the affected municipalities[98] (R. 21586-21597), the Executive Staff's summary cited to the Applicant's testimony and exhibits 17 times, the APA Hearing Staff's 7 times, the Town of Tupper Lake's 8 times, and the Petitioners' only 3 times, despite the extensive testimony and exhibits introduced into the record on this issue by the Petitioners. This was a ratio of 32:3 favoring the supporters of the Project vs. its opponents.

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[97] See Fifth to Eighth Causes of Action of the Petition.

[98] See Twenty-first to Twenty-sixth Causes of Action of the Petition.

c. In the November 17, 2011 PowerPoint presentation to the APA Members on the subject of whether the Project complied with the requirements for approval of residential uses on RM lands, including clustering[99] (R. 21534-21546), the Executive Staff's summary cited to the Applicant's testimony and exhibits 5 times, the APA Hearing Staff's 25 times, the Petitioners' 3 times, and other opponents' 5 times, despite the extensive testimony and exhibits introduced into the record on this issue by the Project's opponents. This was a ratio of 30:8 favoring the supporters of the Project vs. its opponents.

d. In the November 17, 2011 PowerPoint presentation to the APA Members on the subject of open space[100] (R. 21238-21245), the Executive Staff's summary cited to the Applicant's testimony and exhibits 7 times, the APA Hearing Staff's 3 times, and opposing parties' 4 times, despite the extensive testimony and exhibits introduced into the record on this issue by the intervenors. This was a ratio of 10:4 favoring the supporters of the Project vs. its opponents.

e. In the November 17, 2011 PowerPoint presentation to the APA Members on the subject of the Project's proposed valet boat launching service, and its impacts on the State Boat Launch in

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[99] See Ninth to Sixteenth Causes of Action of the Petition.

[100] See Ninth to Sixteenth Causes of Action of the Petition.

the Forest Preserve on Tupper Lake[101] (R. 21280-21283), the Executive Staff's summary cited to the Applicant's testimony and exhibits once, the APA Hearing Staff's once, and the Petitioners' once. However, the citation to the Applicant's testimony made no mention of the fact that the Applicant's own witness had conceded that the valet service would use up 47 of the 48 available daily launch slots at the State Boat Launch, and other similarly adverse concessions elicited on cross-examination of that witness. Tr. 195-196.

f. The Return includes a document entitled "Financial Impact And Economic Benefits" dated January 9, 2012. R. 21741-21746. It is a summary of the "three primary sources of financial and economic impacts to the community from the proposed Adirondack Club and Resort Project. R. 21741. It is not clear who the author of this summary is. It was apparently an attachment to a memo from the APA General Counsel to the APA members which was withheld from the record on the grounds that it is subject to the attorney-client privilege. See Return, Appendix G, Item G(iii). Regardless of who the author of the document at R. 21741-21746 was, it is a summary of the record, and the parties should have had an opportunity to comment on it. 9 NYCRR §§ 580.18(a). In addition, this document references a

[101] See Seventeenth to Twentieth Causes of Action of the Petition.

tourism study that is outside of the record. R. 21745. This was impermissible. See 9 NYCRR §§ 580.14, 580.15, 580.18.

424. These examples show that the Executive Staff's summary of the record was heavily slanted towards supporters of the Project, including the Applicant, the APA Hearing Staff, and the Town of Tupper Lake, and against the Petitioners and other opponents of the Project.

425. This tally of PowerPoint slides, detailing their extensive use of citations to the hearing record, also confirms that the PowerPoint presentations given to the Agency Members were indeed summaries of the record.

426. The format and timing of the summary do not affect whether or not it is subject to the mandate of 9 NYCRR § 580.18(a). In Green Island Associates v. APA, 178 A.D.2d 860, 862-863 (3d Dept. 1991), the court was presented with a case in which an "oral summary of the record [was] presented to respondent [APA] by a staff member immediately prior to respondent's determination...". The court ruled then that 9 NYCRR § 580.18(a) was not limited to written presentations by the hearing staff:

> As written, the regulation unambiguously affords petitioner the opportunity to make written comment regardless of whether the hearing record summary was oral or written, or provided by hearing staff or other staff. Id., at 863.

427. The present case is virtually identical to Green Island Associates, except that in the present case, the oral summary that was made "immediately prior to respondent's determination" (id. at 862) was accompanied by PowerPoint slides. In both cases, the parties, including the Petitioners, were not given any "opportunity to make written comment with respect to the completeness of the summary." 9 NYCRR § 580.18(a).

428. As shown above, the slide presentations at all three Agency meetings at which the Agency deliberated on this Project included summaries of the record. Therefore, APA violated 9 NYCRR § 580.18(a), and the approval of the Project should be annulled, or, at a minimum, remitted to APA. Id.

REPLY TO NEW MATTER ALLEGED IN THE
ANSWERS ON THE THIRTIETH CAUSE OF ACTION:
APA IMPROPERLY EXTENDED THE DEADLINE
AND CHANGED THE STATUTORY CRITERIA
FOR THE PROJECT TO BE "IN EXISTENCE"

429. Petitioners' Thirtieth Cause of Action shows that the Order should be annulled because APA's attempts to extend the time frame for the Project to be "in existence," and to define the Project as being "in existence" when a single lot is conveyed, both violate APA Act § 809(7)(c)[102]. Petition ¶¶ 643-674.

430. This cause of action was added to this proceeding by Petitioners' Amended Petition, which was served on June 18, 2012.

The Thirtieth Cause of Action Was Timely

431. The Respondents, in their Amended Answers, allege that the Thirtieth Cause of Action is untimely pursuant to APA Act § 818.1 because it was interposed more than sixty days after the APA's Order was issued on January 1, 2012. State's Answer, Objection in Point of Law F, p. 2, ¶¶ 644, 656, 658, 664-667, 672, 673; Project Sponsors' Answer, Point 11, p. 19, ¶378, Third Affirmative Defense, ¶382.

[102] The Amended Petition provided an incomplete citation to the relevant statutory provision - the correct citation is APA Act § 809(7)(c).

432. This defense is without merit. CPLR § 203(f) states:

> (f) Claim in amended pleading. A claim asserted in an amended pleading is deemed to have been interposed at the time the claims in the original pleading were interposed, unless the original pleading does not give notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading.

433. This claim is timely because it was interposed in the Amended Petition, so it is deemed to have been interposed at the time of the original Petition, which was undisputedly timely. The original Petition gave notice of the "transactions, occurrences, or series of transactions or occurrences" which gave rise to this claim. CPLR § 203(f).

434. Therefore, these defenses have no merit and should be disregarded.

The Thirtieth Cause of Action
States a Valid Cause of Action

435. The Respondents, in their Amended Answers, allege that the Petition's Thirtieth Cause of Action fails to state a cause of action. State's Answer, Objection in Point of Law F, p. 2, ¶¶ 644, 656, 658, 659, 664-667, 672, 673; Project Sponsors' Answer, Point 12, p. 20, ¶378, Fourth Affirmative Defense, ¶383. However, as shown below, the Petition states a cause of action because APA violated the APA Act by improperly extending the time frame for the Project to be "in existence," and because APA exceeded its statutory authority when it provided that the

Project would be "in existence when the first lot authorized herein has been conveyed." R. 1.

436. APA Act § 802(25) 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.

437. The State argues that certain "steps . . . would need to be completed prior to conveyance of the first authorized lot." Answering Affidavit of Sarah Reynolds ¶9. However, the "steps" referred to by the State (Answering Affidavit of Sarah Reynolds ¶¶ 9-12) amount to recording documents with the County Clerk, submitting additional plans to the Agency for approval, or obtaining approvals from other entities. R. 50-56, 70, 115-116, 129-131, 145-148, 161-164, 177-178, 191-192, 204-206, 238-240, 269-272. These actions do not demonstrate "that such use or development has been substantially commenced or completed, and . . . that such subdivision or portion has been substantially commenced and that substantial expenditures have been made for structures or improvements directly related thereto." APA Act § 802(25).

438. Although the "neighborhood" permits and the Ski Area Permit require, prior to conveyance, "documentation from the Independent Environmental Monitor" indicating that certain

infrastructure was "completed according to the approved plans," the Project Sponsors can avoid this requirement by providing a "performance guarantee" instead. R. 57, 116-117, 132-133, 148-149, 164, 179, 193, 206, 240, 272-273. If a performance guarantee is used, a conveyance may be made that would make the Project be "in existence" without the Project Sponsors actually having "substantially commenced or completed" anything whatsoever. APA Act § 802(25). This would violate the purpose of the statute, and is grounds to annul the Agency's approval of the Project. See APA Act § 802(25).

439. Contrary to the State's assertion (Answering Affidavit of Sarah Reynolds ¶12), no steps need to be taken before the "Access Lot" or "Museum Lot" can be conveyed from the Large Eastern Great Camp Lots. R. 75-76. Aside from filing plans and deed restrictions, no conditions need to be met before conveying any of the other Large East Great Camp Lots. R. 75-89. Therefore, a simple conveyance of one of these lots would make the Project be "in existence," in contravention of the statute. APA Act § 802(25).

440. Even though the State claims that "there is no conveyance contemplated on the marina permit site" (Answering Affidavit of Sarah Reynolds ¶11, FN 6), there is nothing prohibiting a conveyance and, other than obtaining approvals of its stormwater management plan (R. 70), there are no conditions

to be fulfilled before the conveyance of any of the land covered by the Marina permit. R. 63-74. Therefore, a conveyance of the lot on which the Marina is located would make the Project be "in existence," in contravention of the statute. See APA Act § 802(25).

The Agency Did Not Give Due Consideration to the Legal Criteria for Extending the "In Existence" Deadline

441. The State also claims that the Agency "gave due consideration" (Answering Affidavit of Sarah Reynolds ¶¶ 14-15) to the statutory criteria for extending the time frame, but there are no findings or reasons for this decision laid out in the Order to demonstrate that APA gave the necessary "due consideration" when it quintupled the statutory time frame.[103] APA Act § 809(7)(c). Moreover, there was no discussion by the APA Members when they approved the extension from 2 years to 10 years. R. 2118-21532, 21658.

[103] The State's Answer cites to times during the Agency meetings when the "in existence" provision was presented to the Agency members. Answering Affidavit of Sarah Reynolds pp. 9-15. If the State is relying on these presentations, the State should provide a transcript of said presentations. See ¶¶ 449-555, infra.

The Statutory Definition of "In Existence" Can Not Be Changed By APA

442. Even if, assuming only for the sake of argument, APA validly extended the time frame from two years to ten years for the Project to be "in existence," APA had no authority to circumvent the statutory definition of "in existence" by attempting to define the Project as "in existence" upon the conveyance of a single lot.

Petitioners Did Not Fail to Exhaust Their Administrative Remedies

443. Petitioners have not failed to exhaust their administrative remedies as alleged by the Project Sponsors (Answer, Fourth Affirmative Defense, ¶¶ 383-384).[104] The decision to allow conveyance of a single lot to make the Project be "in existence" did not arise until sometime in December 2011 or January 2012 - well after the hearing, closing statements and reply briefs were all completed. Petition ¶668.

444. Although the Project Sponsors attempt to misdirect the Court (Answer ¶375), Condition 11 of the Hearing Staff's Revised Draft Order, submitted with the Hearing Staff's Reply Brief dated October 24, 2011, stated that "the Project shall be in existence

[104] See also ¶¶ 52-108, supra, regarding the issue of exhaustion of remedies.

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." R. 21160-21161. In the text (p. 70) of the Hearing Staff's Reply Brief dated October 24, 2011, under the heading "Condition 11," the Hearing Staff stated that "with the Project Sponsor's concurrence, this condition has been revised to allow 10 years for the project to be 'in existence', and to tie the determination of 'in existence' to the completion of Phase I of the project and the completion of the biological assessment." R. 21094.[105]

445. Contrary to the State's assertion (Answering Affidavit of Sarah Reynolds ¶17), the Petitioners had no opportunity to reply to the condition in the Staff's Reply Brief that changed the time frame from 5 years to 10 years. Moreover, the amended condition in the Staff's Reply makes no mention of allowing the Project to be "in existence" upon the conveyance of a single lot. Therefore, there was no mechanism to comment on that version of the "in existence" provision. Unlike the Project Sponsors, the Petitioners did not engage in last-minute, Sunday morning, illegal, *ex parte* contacts with the Agency in order to amend the

[105] Previously, in its Closing Statement dated September 23, 2011, APA Staff's Draft permit conditions stated that the Project must be "in existence within 5 years," along with several conditions precedent. R. 20054-20055.

language of the Order and Permits after the Reply Briefs were served. See ¶¶ 395-417, supra.

The Order Did Not Contain the Language Mandated By the Regulations

446. Contrary to the Respondents' assertions (State's Answering Affidavit of Sarah Reynolds ¶16; Project Sponsors' Answer ¶¶ 363, 377), the regulation cited in Petition ¶650 explicitly states that "[e]very project permit issued or renewed by the agency shall recite the provisions" of 9 NYCRR § 572.20(d). Since the Order (R. 1) failed to do this, the Order should be annulled.

447. Because the "in existence" language is already in the approved Order (R. 1) and Permits these claims are not "speculative" (State's Answer ¶¶ 664, 665). Petitioners do not have to wait 10 years or wait for the Project Sponsors to actually convey a lot in order to challenge this provision.

448. Although the Project Sponsors are unable to understand this cause of action (Answer ¶378), it nonetheless states a valid cause of action demonstrating that the APA's decision approving the Project was made in violation of lawful procedure, affected by error of law, arbitrary and capricious, and should be annulled.

THE APA'S ACTION SHOULD BE ANNULLED BECAUSE
THE STATE DID NOT FILE THE COMPLETE RECORD

449. CPLR § 7804(e) requires that "[t]he body or officer shall file with the answer a certified transcript of the record of the proceedings under consideration...". The State's Answer (¶645) alleges that it has served the Return in this matter.

450. The Return does include the transcript of the adjudicatory hearing. Tr. 1-4487. However, the State has failed to provide a written transcript of the deliberations of the APA at its meetings held in November and December 2011, and January 2012. Petitioners' counsel requested of the Attorney General's Office that such a transcript be made and included in the record, but that request was refused.

451. Instead of producing a transcript of these meetings, the State has instead produced barebones minutes of those meetings (R. 21188-21201, 21292-21303, 21512-21532), together with printouts of PowerPoint presentations made by the APA staff at those meetings. R. 21188-21567. However, while they include some non-deliberative discussion of the Project, those minutes do not include the actual deliberations of the APA Members. R. 21191-21196, 21294-21297, 21512-21532. Instead, those deliberations were only preserved on electronic webcasts, which are included in the record on computer disks. R. 21658.

452. The State relies upon these webcasts in its answering papers at ¶¶ 55, 271, 540 and 576 of its Answer and at ¶¶ 9, 13, 14 and 15 of the Answering Affidavit of Sarah Reynolds. The Project Sponsors do so at ¶323 of their Answer. Therefore, the State should produce transcripts for the benefit of the Court and the parties.

453. Petitioners have transcribed certain parts of those recorded webcasts. See affidavit of Ellen Egan George, Esq., sworn to June 7, 2012, which is being filed simultaneously herewith. However, this is no substitute for a full transcript, without which the Court can not properly review the APA's action. See Captain Kidd's v. NYS Liquor Authority, 248 A.D.2d 791, 792 (3d Dept. 1998)(holding that submission of an audio tape is not in compliance with CPLR § 7804(e)).

454. The State's failure to produce a transcript violates CPLR § 7804(e). The State should be required to produce the transcript of these meetings. See Captain Kidd's, supra. If no transcript is produced, then the APA's action in approving the Project should be annulled, and the matter should be remanded to APA for a de novo hearing and determination. Gittens v. Sullivan, 151 A.D.2d 481 (2d Dept. 1989).

455. Petitioners reserve the right to make a motion to compel production of the transcript and/or to annul APA's decision to approve the Project, pursuant to ¶9 of the

Stipulation and Order entered in the Albany County Clerk's Office on June 6, 2012.

OTHER ISSUES REGARDING THE RECORD

456. In addition, the State has refused, despite specific requests by Petitioners counsel that it do so, to serve the filed record on the parties. Instead, it has only provided the parties with electronic copies of the record, which it alleges has been filed with the Court. The State should be ordered to serve paper copies thereof on the parties. Petitioners reserve the right to make a motion to compel production of a paper copy of the record, pursuant to ¶9 of the Stipulation and Order entered in the Albany County Clerk's Office on June 6, 2012.

457. Appendix G of the Return states at Item G(iii) that a memorandum dated January 10, 2012 has been withheld from the Return on a claim of attorney-client privilege. However, the State has not met its burden of proving that the attorney-client privilege applies to this document. Petitioners have demanded that this document be produced for the Return, but the State has refused to produce it. Petitioners reserve the right to make a motion to compel production of said memorandum.

458. As set forth above at ¶415, it appears that there are additional records in the possession of Respondent APA which would shine light on the issue of *ex parte* contacts. All records

demanded in Petitioners' FOIL request (Supplemental Record Item K), should be produced as part of the Return.

459. Copies of the pertinent parts of APA documents relevant to this proceeding will be filed with the Court, separately bound, as the "Supplemental Return":

A. Excerpts from "Development in the Adirondack Park, Objectives and Guidelines for Planning and Review" ("DAP"), Adirondack Park Agency, 1977, last updated April 1991. http://apa.ny.gov/Documents/Guidelines/DAP1.pdf.

B. Excerpts from "Adirondack Park State Land Master Plan" Adirondack Park Agency, 1987, last updated 2011. http://apa.ny.gov/Documents/Laws_Regs/SLMP-20120201-Web.pdf

C. Pages from APA website referenced at Petition ¶274: Documents, 2012. http://apa.ny.gov/Documents/index.html

D. Excerpts from Bog River Unit Management Plan ("UMP"), Department of Environmental Conservation, 2002; includes 5 pages included in the Return [R. 22039-22044] and page 52 of the UMP, which discusses the Tupper Lake Boat Launch, but was omitted from the Return.

E. January 19, 2012 APA Staff memorandum entitled "Findings in the 10/24/11 Revised Draft Order that are no longer included in the 1/13/12 Revised Draft Order and Permits"

F. August and October 2011 e-mails between APA Hearing Staff attorney Paul Van Cott and Applicant's attorney Thomas Ulasewicz, obtained from APA under FOIL.

G. April to October, 2011 e-mails between Mr. Van Cott and Mr. Ulasewicz, obtained from APA under FOIL.

H. December 30, 2011 memo from Mr. Ulasewicz to Mr. Van Cott, obtained from APA under FOIL.

I. January 13, 2012 memo from Mr. Ulasewicz to the Applicant's principal, Michael Foxman and others, and e-mail to APA General Counsel John Banta, obtained from APA under FOIL.

J. January 13, 2012 e-mail from the Applicant's consultant, Kevin Franke of the LA Group, to Agency General Counsel John Banta, obtained from APA under FOIL.

K. Petitioners' March 23, 2011 FOIL request and APA's July 6, 2012 letter responding thereto.

THE PROJECT SPONSORS ARE NOT ENTITLED TO AN AWARD OF THEIR LEGAL FEES

460. The Project Sponsors (Answer p. 137) have requested that the Court award them their legal fees. There is absolutely no basis in the law for such an award, even in the unlikely event that they prevail in this proceeding. This request is frivolous and should be denied.

WHEREFORE, it is requested that judgment be granted:

(A) Granting the Amended Petition;

(B) Dismissing all of Respondents' affirmative defenses and objections in point of law;

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

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

(E) 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

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

Dated: July 15, 2012

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STATE OF NEW YORK)
) SS.:
COUNTY OF WARREN)

John W. Caffry, being duly sworn, deposes and says that deponent is an attorney for the Petitioners herein; that deponent has read the foregoing reply and knows the contents thereof; that the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters deponent believes them to be true; and that this verification is made by the deponent because the material allegations thereof are within my personal knowledge, and because I am a Director of petitioner Protect the Adirondacks! Inc.

John W. Caffry

Sworn to before me this
15th day of July, 2012.

Claudia K. Braymer
NOTARY PUBLIC

CLAUDIA K. BRAYMER
NOTARY PUBLIC-STATE OF NEW YORK
No. 02BR6238807
Qualified in Saratoga County
My Commission Expires April 11, 2015

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