NEW YORK STATE
Adirondack
parkagency

July 24, 2012

John W. Caffry, Esq.
Caffry & Flower
100 Bay Street
Glens Falls, NY 12801

Dear Mr. Caffry:

RE: Freedom of Information Request Appeal re P2005-100

This letter responds to your letter, dated July 12, 2012, and received on July 13, 2012, appealing the Agency's response to a request made under the Freedom of Information Law ("FOIL") for certain records associated with Agency file P2005-100. Please note that the initial request was made by you personally, not on behalf of any parties, while the appeal appears to have been filed on behalf of Protect! the Adirondacks and the Sierra Club. We are responding to your July 12th letter pursuant to 9 NYCRR § 587.1(i), on the assumption that your reference to the two organizations was made inadvertently and that the appeal, like the initial FOIL request, is being filed by you personally. Please contact us if you disagree with this assumption.

Background

On March 23, 2012, the Agency received a request from you for records associated with Agency file P2005-100. That request sought, among other things, documents related to the "Guidelines for Biological Survey" undertaken in connection with the Adirondack Club and Resort ("ACR") application, all calendars maintained by the Agency related to such application, and all communications related to such application between the Agency, other governmental employees and elected officials, and representatives of ACR. On July 6, 2012, the Agency responded to your request with the release of 149 pages of responsive material. Materials withheld by the Agency at that time included records exempted from disclosure pursuant to Public Officers Law ("POL") §87(2) and records already provided to you as representative for a party to the adjudicatory hearing on this matter. We also wish to note that a portion of the records

initially withheld are protected from disclosure under attorney-client privilege and as attorney work product. *See POL* §87(2)(a); CPLR §§ 4503(a)(1), 3101(c).

Response to Appeal

Under POL §87(2), the Agency may release documents otherwise exempt from disclosure. *See* Matter of Capital Newspapers Div. of Hearst Corp. v. Burns, 67 N.Y.2d 562, 567 (1986) ("while an agency is permitted to restrict access to those records falling within the statutory exemptions, the language of the exemption provision contains permissive rather than mandatory language, and it is within the agency's discretion to disclose such records, with or without identifying details, if it so chooses"). Given the nature of your request and the fact that the Agency's approval of the ACR project is being challenged in court under CPLR Article 78, the Agency chooses not to assert the exemptions from disclosure for non-privileged records subject to your request. Accordingly, in response to your appeal, please find enclosed all documents that are responsive to your request and not subject to a privilege. These additional documents total 946 pages, including pages redacted for the reasons specified below.

The documents considered responsive under this FOIL appeal were created between the dates at issue in the initial FOIL request – January 1, 2010 and March 23, 2012. A description of all of the documents being withheld or redacted is as follows:

1) Nine email threads between Agency attorneys (or other Agency employees acting pursuant to attorneys) and attorneys within the Executive Chamber, which are being withheld pursuant to POL §87(2)(a). These documents are subject to the attorney-client privilege and are attorney work product.
2) Three legal updates exchanged between Agency attorneys and attorneys within the Executive Chamber, which are being withheld pursuant to POL §87(2)(a). These documents are subject to the attorney-client privilege and are attorney work product.
3) Six email threads between Agency employees and employees within the Executive Chamber, which are being withheld as inter-agency documents pursuant to POL §87(2)(g). These documents are also subject to the deliberative process privilege.

4) Five draft Agency meeting agendas, which are being withheld as inter-agency documents pursuant to POL §87(2)(g). These documents are also subject to the deliberative process privilege.
5) All redacted materials are either (i) not responsive to your request or (ii) withheld pursuant to POL §87(2)(a) or (g) and subject to one or more of the attorney-client, deliberative process, and official information privileges.

The Agency waives any costs for the attached documents.

This letter is the final determination with respect to your appeal. You have the right to seek review of this determination pursuant to CPLR Article 78 and POL §89(4)(b).

Sincerely,

Sarah Reynolds
Acting Counsel

SHR:mp
Enclosures

cc: Robert Freeman, Committee on Open Government

STATE OF NEW YORK SUPREME COURT
APPELLATE DIVISION THIRD DEPARTMENT

In the Matter of the Application of

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

Petitioners,

ALBANY COUNTY
INDEX NO. 1682-12

for a Judgment Pursuant to CPLR Article 78

-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' MEMORANDUM OF LAW IN SUPPORT OF MOTION

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September 6, 2012

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SUMMARY OF THE ARGUMENT

This motion is made on the following grounds:

A. Petitioners should be granted leave pursuant to CPLR § 408 to conduct disclosure because it is necessary to prosecute the proceeding;

B. The Adirondack Park Agency ("APA") engaged in prohibited *ex parte* communications that demonstrate the need for disclosure, and are a basis for annulment of the agency's decision; and

C. The State should be required to produce a full record of the APA proceedings under consideration by providing a transcript of the APA's meetings in which the relevant deliberations were conducted.

POINT I:
DISCLOSURE IS NEEDED
TO PROSECUTE THE PROCEEDING

"Leave of court shall be required for disclosure" in an Article 78 proceeding. CPLR § 408. The court has "broad discretion" to permit "any discovery that is relevant to the controversy at issue." Matter of Town of Pleasant Val. v. New York State Bd. of Real Prop. Servs., 253 A.D.2d 8, 16 (2d Dept. 1999). Under CPLR § 408, the court should grant a request for leave to conduct disclosure where the disclosure "sought [is] likely to be material and necessary to the prosecution or defense of [the] proceeding." Stapleton Studios v. City of New York, 7 A.D.3d 273, 275 (1st Dept. 2004); see Allen v. Crowell-Collier Publ. Co., 21 N.Y.2d 403, 406-407 (1968).

One of the critical claims of the Amended Petition[1] in this Article 78 proceeding is that the Adirondack Park Agency ("APA"), the agency which was responsible for the environmental review of the Adirondack Club & Resort ("ACR") project,[2] failed to follow the law, and its own regulations, when it engaged in improper *ex parte* communications with the Project Sponsors and others, after the adjudicatory hearing record had been closed. Amended

[1] Petitioners' Amended Petition verified June 18, 2012 ("Amended Petition").

[2] See Matter of Association for the Protection of the Adirondacks, Inc. v. Town Bd. of Town of Tupper Lake, 64 A.D.3d 825 (3d Dept. 2009).

Petition, Twenty-Eighth Cause of Action; Affidavit of John W. Caffry, sworn to on September 7, 2012 ("Caffry Aff."), ¶¶ 19-31. This allegation arose from a January 17, 2012 broadcast of a radio interview of the Mayor of the Village of Tupper Lake (a strong supporter of the ACR project) who stated that there had "been ongoing talks" between the Project Sponsors and individuals at APA, who were likely covered by rules prohibiting *ex parte* communications. Amended Petition ¶610; see Caffry Aff. ¶20.

At the time, that small revelation by the Mayor may have been "insufficient to warrant deferral of judgment pending discovery." Price v. New York City Bd. Of Educ., 51 A.D.3d 277, 293 (1st Dept. 2008). However, the administrative record of the APA's deliberations provided further support that there were ongoing communications between the project sponsor and the APA staff. Reply[3] ¶398; see Caffry Aff. Ex. G. The Mayor's affidavit, annexed to the State's Answer[4] to the Article 78 Petition, also confirmed that there were secret negotiations between the Project Sponsors and an APA attorney. Reply ¶399; see Caffry Aff. ¶¶ 22-23.

Additionally, pursuant to the Freedom of Information Law, Public Officers Law Article 6 ("FOIL"), the Petitioners have since obtained additional documentation confirming that there

[3] Petitioners' Reply dated July 15, 2012 ("Reply").

[4] State's Amended Answer dated July 9, 2012 ("State's Answer").

were prohibited *ex parte* communications between the Project Sponsors and the APA staff, and quite likely, the voting Members of the APA. Reply ¶396; Caffry Aff. ¶¶ 25-27, 30-31. Also, according to a letter dated July 24, 2012 from the Agency's Acting Counsel, there are 15 e-mail threads, and three other documents responsive to the Petitioners' FOIL request, which the Agency is withholding from disclosure under FOIL. Caffry Aff. ¶30. The description of the withheld documents indicates that there may have been additional *ex parte* communications between APA and the Executive Chamber. Caffry Aff. ¶30.

While the Agency's Acting Counsel asserts that these documents are not subject to release under FOIL, there is no valid basis under FOIL, or the disclosure rules, for withholding the documents. See Matter of Miller v. New York State Dept. of Transp., 58 A.D.3d 981, 984-985 (3d Dept. 2009), lv denied 12 N.Y.3d 712 (2009). In any event, any privilege dispute will have to be resolved as part of the normal course of disclosure.

Since the APA's decision was made following a formal adjudicatory hearing (Caffry Aff. ¶5), subject to strict *ex parte* contact rules, the communications to the Agency by the Project Sponsors and the Executive Chamber cannot be characterized as merely "legitimate advocacy" efforts, which might not warrant disclosure under CPLR § 408. Matter of London Terrace Assoc., L.P. v. New York State Div. of Hous. & Community Renewal, 35 M.3d

525, 537 (Sup. Ct. New York Co. 2012). Moreover, none of the other adjudicatory hearing parties were ever notified of these communications. Amended Petition ¶627. Compare id.

As set forth in Point II below, these communications were prohibited, and, if the Twenty-Eighth Cause of Action is proven to the satisfaction of the Court, they will be a basis for annulling the APA's decision approving the ACR project. Disclosure, including depositions, is necessary to obtain additional evidence on this issue because "there [is] no other way" that the Petitioners can determine the full substance, extent, or impact of the prohibited communications. Matter of Chapman v. 2 King St. Apts. Corp., 8 M.3d 1026(A), *12 (Sup. Ct. New York Co. 2005); see generally Matter of Boisson v. 4 E. Hous. Corp., 129 A.D.2d 523 (1st Dept. 1987). The communications are solely within the knowledge of the individuals, both party and non-party witnesses, who took part in the conversations. See Plaza Operating Partners v. IRM (U.S.A.) Inc., 143 M.2d 22, 24 (Civil Ct. City of New York 1989).

Therefore, full disclosure regarding these communications is "material and necessary to the prosecution" of the Petitioners' petition, and should be granted. Stapleton Studios v. City of New York, 7 A.D.3d at 275; see Matter of Freidus v. Guggenheimer, 57 A.D.2d 760 (1st Dept. 1977).

POINT II:
THE *EX PARTE* COMMUNICATIONS WERE PROHIBITED

State Administrative Procedure Act ("SAPA") § 307(2) states:

> Unless required for the disposition of ex parte matters authorized by law, members or employees of an agency assigned to render a decision or to make findings of fact and conclusions of law in an adjudicatory proceeding shall not communicate, directly or indirectly, in connection with any issue of fact, with any person or party, nor, in connection with any issue of law, with any party or his representative, except upon notice and opportunity for all parties to participate.

In addition, APA's regulations prohibit *ex parte* communications regarding any matter that is the subject of an adjudicatory proceeding. See 9 NYCRR § 587.4(b).

The evidence already gathered by the Petitioners indicates that, after the adjudicatory hearing was closed, APA Staff, and potentially at least one APA Member, communicated with the Project Sponsors regarding the language of the proposed order and permits that APA approved. Reply ¶¶ 395-417; Caffry Aff. ¶¶ 19-31. For example, a memorandum written by Thomas A. Ulasewicz (an attorney for the Project Sponsors), dated just one week before APA's final vote on the Project, states, in part:

> [APA Staff Attorney Paul] Van Cott called me this morning. The Final Order and draft Permits are posted on the Agency's website. The language in these documents are [sic] what the Agency members got Wednesday evening and do not reflect a number of changes, he, I and [APA General Counsel John] Banta agreed to. ... I told him this is unacceptable...
>
> Van Cott called me back at 11AM to tell me that a second posting of Permits will go on the website today (he thought before 2PM when a phone conference is to

> take place between Agency members and Martino). All of the changes he, I and Banta had agreed to along with putting paragraph #30 back to its original language will be reflected in this new posting. He asked that we review those permits intended to be implemented early on and get back to him today with concerns. He offered to meet with me on Sunday if we had our comments together on the whole package so that he could bring them to the attention of Banta and [APA] Chairwoman [Lani] Ulrich first thing Monday morning. I told him I would see what I could coordinate. I have his cell phone number and we arranged to talk again this afternoon (probably after the conference call). Reply ¶407(d); Caffry Aff. ¶¶ 26-27, Ex. H (I).

The other parties, including Petitioners, were not served copies of these communications, nor were they given an opportunity to participate in the negotiations. Amended Petition ¶627. See 9 NYCRR § 587.4(c)(1),(2).

The fact that the communications involved the specific language of the approved order and permits, particularly the language regarding the deed restrictions and the time frame for the project to be "in existence" (Reply ¶¶ 407, 441-445), "hardly permits characterizing" the communications as not "substantive" (Reply ¶402). Matter of Goldfinger v. Lisker, 68 N.Y.2d 225, 232 (1986).

While the Respondents may argue "that petitioner[s] [were] in no way prejudiced by this procedure, the fact remains that this method of drafting final determinations not only plainly violates [SAPA] § 307(2) but, further, creates the appearance of impropriety." Matter of Kaiser v. McCall, 262 A.D.2d 920, 921 (3d Dept. 1999). Indeed, "[s]uch contacts are in violation of

administrative procedural due process and mandate an annulment of the [agency's] determination." Matter of Signet Constr. Corp. v. Goldin, 99 A.D.2d 431, 432 (1st Dept. 1984); see Matter of Rivera v. Espada, 3 A.D.3d 398, 398-399 (1st Dept. 2004) (annulling determination "tainted by the *ex parte* communication" with an attorney who participated in the hearing on behalf of a party). Even an appearance of impropriety is sufficient to "warrant an annulment of the determination" by APA to approve the ACR Project. Matter of LePore v. McCall, 262 A.D.2d 919, 920 (3d Dept. 1999).

Petitioners' diligence with respect to the *ex parte* communications claim has revealed evidence, such as the Ulasewicz memorandum quoted above, that there was, at the very least, an "appearance of impropriety" in APA's decision-making process. Matter of Kaiser v. McCall, 262 A.D.2d at 921. Therefore, APA's decision approving the ACR project should be annulled. See Matter of LePore v. McCall, 262 A.D.2d at 920. Because of the obvious merit of these claims, leave to conduct disclosure should be granted to allow Petitioners to explore the extent of prohibited communications. Point I, supra.

POINT III:
THE STATE SHOULD PROVIDE THE COMPLETE RECORD

In an Article 78 proceeding, "[t]he body or officer shall file with the answer a certified transcript of the record of the proceedings under consideration . . . ." CPLR § 7804(e). The State's Answer (¶645) alleges that it has served the Return in this matter. However, despite Petitioners' multiple requests, the State has refused, in violation of CPLR § 7804(e), to provide a transcript of the APA's deliberations on the ACR project during its meetings in November and December 2011, and January 2012. Caffry Aff. ¶39. Instead, APA's deliberations, which are crucial to the Court's analysis of the Causes of Action in the Amended Petition, have been provided in an electronic format, as copies of the webcasts of the meetings. Caffry Aff. ¶40.

Whether APA's decision was arbitrary and capricious and affected by error of law rests heavily on the APA Members' deliberations. Amended Petition, *passim*. The Petitioners, the State, and the Project Sponsors rely upon what was said during the meetings to support their various positions. Reply ¶452; Caffry Aff. ¶41.

While the Petitioners have transcribed select portions of the recorded webcasts (Reply ¶453), a full transcript is necessary for the Court to properly review the APA's action. See Matter of Captain Kidd's v. New York State Liq. Auth., 248 A.D.2d

791, 792 (3d Dept. 1998)(holding that submission of an audio tape is not in compliance with CPLR § 7804(e)). The State should be directed to produce a transcript of the relevant meetings. See id. Petitioners are "cognizant that it will be a lengthy and costly process to transcribe" the APA's meetings. Matter of Lydon v. New York State Div. of Hous. & Community Renewal, 158 A.D.2d 291, 291-292 (1st Dept. 1990). Nonetheless, under CPLR § 7804(e), the State is required to provide the transcript at its expense. See id.

In the alternative, APA's decision approving the ACR Project should be annulled, and the matter should be remanded to APA for a *de novo* determination. See Matter of Arnot-Ogden Mem. Hosp. v. Axelrod, 95 A.D.2d 947, 948-949 (3d Dept. 1983); Matter of Gittens v. Sullivan, 151 A.D.2d 481 (2d Dept. 1989).

CONCLUSION

Petitioners should be granted leave pursuant to CPLR § 408 to conduct disclosure in order to prosecute the proceeding. In addition, the State should be directed to prepare and file a transcript of the APA's deliberations on the ACR project that took place during the November and December 2011, and the January 2012 APA meetings. Accordingly, filing and service of the Record, Appendix and the Petitioners' Brief should be stayed until 60 days after the completion of discovery and the

completion and filing of the transcript by APA, whichever comes later.

Dated: September 7, 2012

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