

STATE OF NEW YORK
APPELLATE DIVISION

SUPREME COURT
THIRD DEPARTMENT

In the Matter of the Application of

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

Petitioners-Appellants,

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-Respondents.

STATE OF NEW YORK)
) SS.:
COUNTY OF WARREN)

JOHN W. CAFFRY, being duly sworn, does hereby depose and say
that:

1. I am a member of Caffry & Flower, the lead attorneys for
the Appellants in this Article 78 proceeding. As such, I am
fully familiar with the facts and circumstances pertaining
hereto.

2. I make this affidavit in support of the motion by
Appellants Protect the Adirondacks! Inc., Sierra Club, and

**AFFIDAVIT IN SUPPORT
OF MOTION FOR LEAVE
TO APPEAL TO THE
COURT OF APPEALS**

Appeal No. 516901

Phyllis Thompson ("Appellants")¹ pursuant to CPLR § 5602(a)(1)(i) and 22 NYCRR § 800.2(a) for leave to appeal to the Court of Appeals from the Opinion and Judgment and Order of the Appellate Division, Third Department, dated and entered July 3, 2014 ("Judgment"),² which dismissed Appellants' transferred Article 78 proceeding, and which denied their appeal of the order of Supreme Court which denied them leave to conduct discovery under CPLR § 408, on the questions set forth herein, for the reasons set forth in the annexed Memorandum of Law.

3. Appellants seek leave to appeal on the following questions:

a. Whether the Appellate Division erred when it held that the Adirondack Park Land Use and Development Plan of APA Act § 805 is merely guidance to APA and is not binding on that agency, despite the plain language of the statute to the contrary? Judgment pp. 5, 10, fn 12.

b. Whether the Appellate Division erred when it held, despite the plain language and legislative intent of the APA Act to the contrary, that the APA Act allows APA to weigh and balance

¹ Petitioners-Appellants Robert Harrison and Leslie Harrison do not join in this motion because they are in the process of selling their property in the Town of Tupper Lake which is the basis of their standing to sue as individual parties in this proceeding. They continue to be members of Appellants Sierra Club and Protect the Adirondacks! Inc.

² A copy of the Judgment is annexed hereto as Exhibit A.

the alleged economic benefits of a project against its adverse environmental impacts when deciding whether or not those impacts are "undue"? Judgment pp. 5, 15.

c. Whether the Appellate Division erred when it held that APA's reliance upon post-approval studies of adverse impacts to wetlands and wildlife, that have not yet been conducted, as grounds for approval of the project, was not arbitrary and capricious? Judgment pp. 6-8.

d. Whether the Appellate Division erred when it failed to apply the complete standard under the Freshwater Wetlands Act regulations and when it created its own rationale to support APA's decision? Judgment pp. 6-8.

e. Whether the Appellate Division erred when it held that an administrative agency that conducted an adjudicatory hearing at which evidence and testimony was taken may base its decision after the hearing primarily on an unapproved internal guidance document that was not introduced at the hearing? Judgment p. 8 fn 9.

f. Whether Supreme Court abused its discretion in denying Appellants leave pursuant to CPLR § 408 to conduct discovery regarding APA's improper *ex parte* communications with the Executive Chamber, and whether the Appellate Division erred when it answered this question in the negative and also dismissed that cause of action? Judgment pp. 14-15.

4. The Judgment is appealable to the Court of Appeals because the appeal will be taken in a proceeding originating in the Supreme Court "from an order of the appellate division which finally determines the action and which is not appealable as of right". CPLR § 5602(a)(1)(i).

5. As set forth in Appellants' Memorandum of Law which is submitted herewith, this case presents novel and significant questions of statewide importance, and leave to appeal should be granted.

WHEREFORE, it is respectfully requested that an order be made and entered:

A. Granting Appellants leave pursuant to CPLR § 5602(a)(1)(i) and 22 NYCRR § 800.2(a) to appeal to the Court of Appeals from the Opinion and Judgment and Order of the Appellate Division, Third Department, dated and entered July 3, 2014, which dismissed Appellants' transferred Article 78 proceeding, and which denied their appeal of the order of Supreme Court which denied them leave to conduct discovery under CPLR § 408, on the questions set forth herein, for the reasons set forth in the annexed memorandum of law; and

B. Granting such other and further relief as the Court
deems just and proper.

/s/ John W. Caffry
John W. Caffry

Sworn to before me this
4th day of August, 2014.

NOTARY PUBLIC

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