STATE OF NEW YORK
ADIRONDACK PARK AGENCY

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

APA Project No. 2005-100

PRESERVE ASSOCIATES, LLC,

APPLICANT.

POST-HEARING BRIEF
AND CLOSING STATEMENT OF
PROTECT THE ADIRONDACKS! INC.

CAFFRY & FLOWER
JOHN W. CAFFRY, of Counsel
CLAUDIA K. BRAYMER, of Counsel
Attorneys for Protect
the Adirondacks! Inc.
100 Bay Street
Glens Falls, New York 12801
(518) 792-1582
jcaffry@caffrylawoffice.com

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INTRODUCTION

The proposed Adirondack Club & Resort ("ACR") project would violate several sections of the Adirondack Park Agency Act,[1] the Environmental Conservation Law ("ECL"), Department of Environmental Conservation ("DEC") regulations, and Article 14, § 1 of the State Constitution. Regardless of whether the project might create hundreds of jobs (which the record proves it won't do), regardless of whether it might generate a tax windfall for local governments (which the record proves it won't do), regardless of the political support for it (or the lack thereof), regardless of the public support for it (or the lack thereof), approving this application would be arbitrary and capricious and would violate the law. Therefore, the application must be denied.

The reasons that the law and the hearing record mandate that the application must be denied include both legal issues and the applicant's failure to prove its case on each of the 12 hearing issues. The legal issues include:

- The applicant's plans for transferring principal building opportunities on Resource Management lands across three intervening private properties would violate the overall intensity guidelines of the APA Act. Point 12, infra.

- The project's valet boat launching service would usurp the entire capacity of the Tupper Lake Boat Launch Intensive Use Area of the Forest Preserve ("Boat Launch") in violation of Article 14, § 1 of the State Constitution. Point 7.B, infra.

- The valet boat launching service would constitute the operation of a commercial business at the Boat Launch, in violation of the ECL and applicable regulations of the Department of Environmental Conservation ("DEC"). Point 7.B, infra.

The reasons why the application must be denied due to the applicant's failure to meet its burden of proof include:

- The project, including the ski area, will fail financially, its IDA funding scheme is not legal, the promised jobs will not materialize, and the applicant failed to meet its burden of proof[2] that the project would not create financial burdens for local governments. Point 5/6, infra.

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[1] Executive Law Article 27 ("APA Act").

[2] See pp. 5-8, infra.

- The project would irreparably fragment thousands of acres of wildlife habitat and damage the timber resource base in the region, there are viable less harmful alternatives, and the applicant failed to meet its burden of proof that the project meets any of the criteria of APA Act § 809(10). Point 1, infra.

- The project's high altitude developments would cause erosion and other impacts and the applicant failed to meet its burden of proof that there would not be undue adverse impacts from these parts of the project. Point 3, infra.

- The applicant failed to meet its burden of proof that the proposed sewer district #27 was feasible. Point 4, infra.

- The project would usurp the entire capacity of the Boat Launch and the applicant failed to meet its burden of proof that there would be no undue adverse impact on the Forest Preserve. Point 7, infra.

- The applicant failed to meet its burden of proof that the project would not have an undue adverse impact on wetlands. Point 8, infra.

- The applicant failed to meet its burden of proof that the project's stormwater runoff would not have an undue adverse impact. Point 9, infra.

- The proposed enforcement mechanisms are inadequate. Point 10, infra.

- The applicant failed to meet its burden of proof that there will not be undue adverse visual impacts. Point 11, infra.

Each and every one of these issues is grounds for denial of the application. If the applicant fails to prevail on just one of them, the application must be denied.

This Brief also includes appeals on three evidentiary rulings that were made by the Hearing Officer, Administrative Law Judge Daniel P. O'Connell, during the hearing, as set forth at Appendix D. The Agency is requested to grant those appeals, overrule the Hearing Officer, and grant the relief requested as part of each appeal.

Even if there were some room for reasonable doubt as to whether or not the project complied with the law, as the Supreme Court, Appellate Division, Third Department, has held, with regard to this same project:

> [t]he 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, aesthetic, ecological, wildlife, historic, recreational or open space resources of the park" (Executive Law § 809[9], [10][e]).

Association for the Protection of the Adirondacks, Inc.[3] v. Town Board of Town of Tupper Lake, 64 A.D.3d 825, 826 (3d Dept. 2009).

The Court further held that:

> [t]his environmental mandate predated SEQRA[4] and, as reflected in the APA's regulations, it is more protective of the environment [than SEQRA]. (emphasis added)(internal citations omitted)

Association, supra, at 826-827. Moreover, while SEQRA requires agencies to strike a balance between social and economic goals and the protection of the environment (Association, supra, at 829 (concurring opinion)),

> [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. (emphasis added)

Therefore, the APA Act places "environmental concerns above all others". Id., at 830. (emphasis added) Indeed, "the APA's mandate is more protective of the environment than that embodied within SEQRA." Id.

This recent ruling is strongly supported by precedent. When finding the APA Act to be a valid exercise of the State's power, the Court of Appeals looked to:

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[3] The petitioners in this lawsuit included The Association for the Protection of the Adirondacks, Inc. and Residents' Committee to Protect the Adirondacks, Inc., which later combined to form Protect the Adirondacks! Inc. ("Protect") Tr. 71:23-72:13.

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

> the constitutional and legislative history stretching over 80 years[5] to preserve the Adirondack area from despoliation, exploitation, and destruction by a contemporary generation in disregard of generations to come. (citations omitted)

Wambat Realty Corp. v. State, 41 N.Y.2d 490, 495 (1977).

While the Agency may consider a project's alleged potential commercial and other benefits in assessing the ability of the public to provide public facilities and services under APA Act § 805(4) and § 809(10)(e), because it is mandated to place "environmental concerns above all others" (id.), **the APA Act does not authorize the Agency to weigh and balance the alleged financial and fiscal benefits of a proposed project against its environmental impacts**. Id., at 826-827, 829-830. Financial benefits are only to be considered in the context of whether or not they will offset the "burden on the public in providing facilities and services made necessary by" the project. APA Act § 805(4). See Association, supra, at 826-827, 829-830. They may not be considered in the context of whether or not they will offset the project's environmental impacts.

Protect the Adirondacks! Inc. ("Protect") does not oppose the reopening of the Big Tupper Ski Area, or the creation of new jobs in the Tupper Lake area. However, the record shows that the applicant's promises of hundreds of new jobs for the community are false. Moreover, not only would approval of the project violate the law, the proposed project represents the greatest threat to the ecological integrity of the Adirondack Park since the creation of the Adirondack Park Agency.

Approval of the project would also create a very negative precedent for the future of the Adirondack Park, which is a matter of state-wide, and even national concern. See Wambat Realty, supra, at 494-495; Wambat Realty v. State, 85 M.2d 489, 493 (1975). The APA Act "... serve[s] a supervening State concern transcending local interests." Wambat Realty, supra, at 41 N.Y.2d 495.

The APA Act mandates that in reviewing this project, the APA must place "environmental concerns above all others". Id. Therefore, all doubts about the project's compliance with the law must be resolved in favor of protecting the environment.

For all of the foregoing reasons, as a matter of law, the application must be denied.

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[5] Now over 110 years.

THE BURDEN OF PROOF IS ON THE APPLICANT TO PROVE THE ALLEGATIONS OF THE APPLICATION

In this case, the burden of proof is entirely on the applicant to prove that its project complies fully with the law, and that it is absolutely entitled to a permit. The burden is not on the Agency to prove otherwise. The burden is not on the intervenors to prove otherwise. The burden is on the applicant.

If the applicant does not affirmatively prove that each and every aspect of the project complies with the law, the application must be denied. If it fails to meet its burden of proof on any one of the 12 hearing issues, or on any other legal issue, the application must be denied.

The application materials are not proof. They are merely allegations that must be proven at the hearing by the applicant. If it does not do so, the application must be denied.

In addition, the applicant's proof must be given by credible witnesses, and can not be made up of mere conjecture, conclusions, and suspicions. It must be supported by real facts. In this case, the applicant utterly failed to meet its burden of proof and the application must be denied.

A. The Burden of Proof Is on the Applicant

It is not up to the intervenors to prove that the application must be denied. Section 306(1) of the State Administrative Procedure Act provides that "the burden of proof shall be on the party who initiated the proceeding". The Agency's regulations at 9 NYCRR Part 580 make it clear that the applicant has the burden of proof with regard to all hearing issues:

> The [agency] staff is not required to assume the project sponsor's burden of proof. 9 NYCRR § 580.6(a).
>
> (b) *Burden*. The burden shall be on the project sponsor to present testimony concerning the matters alleged in the application. 9 NYCRR § 580.11(b).
>
> (3) The hearing officer may order the project sponsor to make a brief, informal presentation at the outset of the hearing ... . Such a proceeding shall not relieve the project sponsor of his burden to present competent evidence in support of the application ... . 9 NYCRR § 580.14(b)(3).

> (6) Direct case. (i) In addition to proving the allegations of the application, the project sponsor shall have the burden of demonstrating that the project will be in compliance with applicable statutory and regulatory requirements. 9 NYCRR § 580.14(b)(6)(I).

The effect of these rules is that, in making its case for approval of an application, **an applicant can not merely rely on the application materials**. The application is treated as mere allegations, **which must be proven by testimony** presented at the hearing. Without such testimony, any claim made in the application remains just that, an unproven claim, and can not form the basis for a finding of fact or conclusion of law that the project meets the statutory criteria of the APA Act.

The ACR application must be denied because the applicant failed to satisfy its "burden of demonstrating that the project will be in compliance with applicable statutory and regulatory requirements" 9 NYCRR § 580.14 (b)(6)(i). See Matter of Friedman v. APA, 165 A.D.2d 33, 37 (1991). In order to adequately approve an application as being "in compliance," the Agency must, among other things, determine that the proposed 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, or the Agency must determine that the adverse impacts are sufficiently mitigated. 9 NYCRR § 580.14(b)(6)(i). See APA Act § 809(10); Dudley Road Ass'n. v. APA, 214 A.D.2d 274, 281 (1995).

The Agency's determination must have a rational basis that is supported by substantial evidence in the record. See 9 NYCRR § 580.15(a)(3). While the Agency may conduct investigations, exams, tests or site evaluations to verify information contained in an application (APA Act § 809(12)), it is the applicant's burden to present testimony concerning the matters alleged in the application. 9 NYCRR § 580.11(b). Additionally, although the Agency Staff is required to present evidence concerning the application with respect to the required findings of § 809(10) of the APA Act, the Agency "staff is not required to assume the project sponsor's burden of proof". 9 NYCRR § 580.6(a).

Furthermore, it is the applicant's burden to "present competent evidence in support of the application". 9 NYCRR § 580.14(b)(3). "[A]ll evidence must be competent, material and relevant." 9 NYCRR § 580.15(a). Therefore, if there is not substantial, competent evidence in the record to allow the Agency to find that the project would not have an undue adverse impact, then the application must be denied. Green Island Assoc. v. APA, 178 A.D.2d 860, 862 (1991); 9 NYCRR § 580.14(b)(3). Without that

level of proof in the record, the Agency would not be able to make its statutorily required findings. Pfau v. APA, 137 A.D. 2d 916, 917 (3d Dept 1988). When the Agency does deny an application on that basis, it will be upheld by the courts. Id., at 918.

B. The Applicant's Proof Must be Competent and Credible and Can Not Consist of Mere Conjecture and Speculation

Not only does the applicant bear the burden of proof, its proof must be credible. See Meyer v. Board of Trustees, 90 N.Y.2d 139, 146-147 (1997); T-Mobile Northeast v. Village of East Hills, ___ F. Supp. ___, 2011 WL 1102759 *9 (E.D.N.Y. 2011).

> [T]he essential attributes of "credible evidence" are well settled. Thus, it has been said that credible evidence is evidence that proceeds from a credible source and reasonably tends to support the proposition for which it is offered, and further that it must be evidentiary in nature and not merely a conclusion of law, nor mere conjecture or unsupported suspicion.

Id. (citations omitted)

The Agency may reject the applicant's purported experts' testimony as incredible or insufficient, even when there is no opposing expert proof presented. Eber v. Jawainio, 85 A.D.3d 1520, 1521-1522 (3d Dept. 2011). In, fact, when a consultant's conclusion is supported by nothing more than his own opinion and is not supported by credible evidence, then that conclusion must be discounted by the decision-making agency. T-Mobile, supra.

In this case, much of the applicant's evidence was not credible. As set forth below, its witnesses were often forced to admit on cross-examination that their prior testimony and application materials had been false. Their testimony also generally consisted of "merely a conclusion of law, ... mere conjecture or unsupported suspicion" (Meyer, supra), and was generally not supported by credible evidence. Id.; T-Mobile, supra. As often as not, their conclusions were not supported by any evidence at all. Because these witnesses were not credible, their testimony must be rejected. For that reason alone, the applicant has failed to meet its burden of proof on many important issues.

Also, the substantial testimony, documentary submissions and exhibits presented during the 19-day hearing in this case detailed the varied and numerous adverse impacts of the proposed

project, but there was little testimony on how these impacts would be eliminated or mitigated. Compare Dudley Road Ass'n, supra at 280.

C. Conclusion

The matters alleged in the application materials were not proven by credible testimony or evidence presented at the hearing as required by 9 NYCRR § 580.11(b). Therefore, without such testimony or evidence, any claim made in the application remains just that – an unproven claim – and can not form a rational basis for an Agency finding that the project would not have an undue adverse impact. See Green Island Assoc., supra, at 862.

Accordingly, since the applicant failed to present substantial, competent evidence "to prove that [it] had met the criteria for issuance of a permit," the application must be denied in its entirety. Friedman, supra, at 37. See 9 NYCRR § 580.14(b)(3); 9 NYCRR § 580.14(b)(6)(i).

ISSUES #5 & #6

The Application Must Be Denied Because the Applicant Did Not Provide Competent Proof of the Project's Alleged Benefits and It Will Have Adverse Fiscal Impacts on the Local Governments

Issue #5, as revised by the Hearing Officer in his Issues Ruling of November 16, 2010 (Ex. 87, Appendix B., p. 2)[6] states:

Issue #5. [DC (d)(1)] What are the fiscal impacts of the project to the governmental units should any phase or section of the project not be completed as proposed; what is the public vulnerability should the project either fail or not proceed at its projected pace relating to on- and off-site infrastructure for which cost-sharing has been proposed between the developer and local governments (e.g. drinking water plant improvements, road maintenance) or on-site private infrastructure that may be subject to eventual operation by the Town; what is the ability to provide municipal and emergency services to any section in light of the road design or the elevation (e.g. East Ridge booster pump station)?

Issue #6. Section 805(4) requires the consideration of the burden on and benefits to the public. What are the positive and negative impacts of the project (including fiscal impacts) to the governmental units? What are the impacts of the project on the municipalities' electric system's ability to meet future demand? To what extent will energy conservation mitigate demand impacts? What are the assumptions and guarantees that the Big Tupper ski area can be renovated and retained as a community resource; what are the current and expected market conditions relating to available housing for the project's workforce; what are the impacts of the proposed project on the local housing market?

The project may only be approved if the Agency determines that it will 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). In addition, APA Act § 805(4) and § 809(10)(e) require that the Act's DCs must be taken into account when making that determination.

[6] References herein to hearing exhibits are abbreviated as "Ex.".

The DCs relevant to Issues #5 and #6 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"

The application should be denied because the Applicant failed to meet its burden[7] of proving:

(A) That the project will achieve real estate prices and resultant tax revenues at the levels alleged in the application. In fact, there is no competent proof to support the sales and tax revenue numbers claimed in the application materials.[8] See 9 NYCRR § 580.14(b)(3).

(B) That the market estate market will support sales of the levels projected for the project. Instead, due to the ski area's small size, the resort's remote location, and the lack of a well-established ski area, the real estate sales are only likely to be about one-eighth of the claimed levels.

(C) That the proposed PILOT and sub-PILOT structure for the IDA bonding that is essential to the funding of the construction of the project's infrastructure is approvable by the IDA. The record actually shows that the proposal is unprecedented and the CFIDA and its bond counsel have significant doubts about its legality.

(D) That it is feasible for the ski area to be maintained as a community resource. Instead, the skier levels and the financial subsidies from the resort that are necessary to reopen Big Tupper, and to keep it open, will not be achieved.

(E) That the project will actually create jobs at the levels claimed in the application materials. The construction jobs will mostly go to non-local and out-of-state contractors, and there is

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[7] Pages 5 to 8, supra.

[8] As set forth above at page 4, the alleged financial benefits of the project may only be taken into account when assessing the ability of the public to provide such facilities and services, and can not be used for any kind of weighing and balancing against the project's adverse environmental impacts. See Association v. Town Board, supra, at 830.

no support in the record for the claimed levels of on-site resort employment.

(F) That there will not be unfunded fiscal and municipal services burdens imposed on the local governments. Because of the lack of tax revenue and the inability of the applicant to fund the infrastructure, the burdens will all fall on the local governments.

Ordinarily, it is not the role of the Agency to ensure the financial viability of the projects that come before it. Thus, for example, the potential market prices of the lots in a subdivision, or the potential rate of sales of the lots, is not usually of concern in the permitting process. However, the Agency does, and should, assess the "financial capacity" of the project sponsor. 9 NYCRR § 572.4(c)(5).

In this case, because of its sheer size, the potential downside of the ACR project for the Town and Village of Tupper Lake and other affected municipalities is enormous. As set forth in Hearing Issues #5 and #6, and in DCs (c)(2)(b), (d)(1)(a), (d)(1)(b), and (e)(1)(a), the potential fiscal impacts of this project must be assessed by the Agency. The potential costs of the project for infrastructure and services have been estimated by the applicant to be tens of millions of dollars. Ex. 36, Att. 1, p. 35 (2006); Ex. 85, pp. 51-56 (2010).

However, the tax revenues which will allegedly offset those costs, and allegedly even yield a net benefit for the municipalities, are fictitious. At the least, the applicant has failed to meet its burden of proof of showing that those revenues will materialize.[9] The record actually shows that there is no basis in reality for these claims. Therefore, the application must be denied. APA Act § 805(4) and § 809(10)(e); DCs (c)(2)(b), (d)(1)(a), (d)(1)(b), and (e)(1)(a).

[9] As set forth above at p. 4, even if these alleged financial surpluses had been proven to be guaranteed to materialize, that would be irrelevant to the Agency's decision-making process because the APA Act mandates that the Agency place "environmental concerns above all others". Association v. Town Board, supra, at 830. See also Wambat Realty, supra.

A. The Alleged Net Municipal Revenues from the Project Are Based on Fictitious Estimates of the Sale Prices for Real Estate in the Project

The application materials contain extensive detailed charts that predict enormous tax revenues for local governments over the life of the project. Exhibit 85, pp. 57-65. However, those projections are based upon predicted sale prices for the real estate in the project (Exhibit 85, pp. 34-37, Table II-9) that, upon closer examination of the application and hearing exhibits, and cross-examination of the applicant's witnesses, turn out to be fictional, at best. There is just no support whatsoever in the hearing record for these numbers, and therefore no support for the projected tax revenues.

Accordingly, the applicant did not meet its burden[10] of proving that the allegations of the application on this issue are true. The projected prices, and the projected tax revenues, as "matters alleged in the application" (9 NYCRR § 580.11(b)), were not proven by "competent evidence in support of the application..." (9 NYCRR § 580.14(b)(3)), and the applicant did not meet its "burden of demonstrating that the project will be in compliance with applicable statutory and regulatory requirements." 9 NYCRR § 580.14(b)(6)(i).

Therefore, the projected tax revenues to local governments, which are based on these fictitious projected real estate sales prices, are equally fictitious, and **the Agency can not rely upon these fictitious revenues in assessing whether or not the project will create a financial burden on the municipalities**. It must be assumed that the enormous costs of the project, both direct and indirect, will fall upon the municipalities.

Over the course of the 6+ year application process, the projected sales prices changed repeatedly. Different numbers were produced in 2005 (Ex. 11, p. 5-48, Table 5-4), 2006 (Ex. 194, pp. 74, 105), 2006 again (Ex. 36, Vol. 2, Attachment 1, Table II-9) and 2010 (Ex. 85, Table II-10). As it turns out, these projections were not based upon market studies, and they were not provided by professional real estate appraisers, or by marketing experts, or by economists, or by real estate brokers, or by real estate salespersons.

Instead, so far as can be determined from the record, all of the projected sales prices were created out of whole cloth by

[10] "The burden shall be on the project sponsor to present testimony concerning the matters alleged in the application." 9 NYCRR § 580.11(b).

ACR's leader, Michael Foxman, a lawyer and failed banker from Philadelphia[11], who 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. Nothing in the record proves that he has any qualifications at all to project, predict, or estimate the market prices for the real estate in the ACR project.

1. The Source of the First Set of Pricing Estimates is Unknown

The first set of projected sales prices was set forth in the original application, dated April 18, 2005. Ex. 11, Vol. 1, p. 5-48. It predicted total real estate sales revenues of $403,450,000 from 704 units and local tax and/or PILOT[12] revenues of $5,076,360. Ex. 11, p. 5-46. No source was cited for these sales revenue numbers, and so they are not even remotely credible.

James Martin, the applicant's primary hearing witness on this subject, testified that he had no idea how the 2005 estimated sales prices were created. Tr. 2414, 2427-2428.[13] At first he claimed that they came from a Cushman & Wakefield study, but when confronted with the fact that said study was not produced until 2006, he recanted this claim. Tr. 2414, 2427-2428. Therefore, the source of these numbers remains completely unknown.

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[11] "Michael Foxman and other members of a Philadelphia-based law firm formed Sunrise [Savings & Loan Association] in 1979. Foxman was installed as Chairman... . Sunrise almost immediately embarked on certain courses of conduct which led to the thrift's insolvency and to criminal charges (as well as civil suits) against Sunrise's officers, lawyers and biggest borrowers." U.S. v. Foxman, 87 F.3d 1220, 1221 (11th Cir. 1996). "Sunrise become insolvent in 1985." Id.

[12] A "PILOT" agreement is a payment-in-lieu-of-taxes agreement that is used to, among other things, reduce the property tax payments on a developer's property. See Point 5/6.C, infra.

[13] References to the hearing transcripts herein are abbreviated as "Tr." followed by the page number and sometimes the line number. References to pages and lines of prefiled testimony ("PFT") are similarly numbered.

2. The Only Source for the Second Set of Pricing Estimates Was Mr. Foxman

The next set of prices was set forth in a report entitled "The Adirondack Resort Residential Market Study Tupper Lake, New York", dated July 2006, which was prepared by a consulting firm known as Cushman & Wakefield. Ex. 194.[14] This study did not analyze or predict sales prices, but stated that the prices used therein were "[b]ased on the developers [sic] anticipated lot pricing...". Ex. 194, p. 73. As set forth therein, at that time the developer (Mr. Foxman) predicted total real estate sales revenues of $581,050,000 from 739 units. Ex. 194, pp. 73-74, 104-106.

There is no source other than Mr. Foxman given for these price estimates, and he was not qualified to create them. Therefore, there is no competent proof in the record of the source of these "allegations" and these estimated prices must be disregarded by the Agency in rendering its decision. Pages 5-8, supra.

3. The Source of the Third Set Of Pricing Estimates is Unknown

The third set of prices was set forth in the applicant's response to the APA's second notice of complete application ("NIPA"), dated October, 2006. Ex. 36, Vol. 2, Att. 1, Table II-9. At this point, the predicted total real estate sales revenues had ballooned to $601,800,000 from 699 units. No source for these price numbers was cited in this document, and no explanation was offered for the almost 50% increase in predicted sales revenues in the mere 18 months since the 2005 estimate was created.

On cross-examination, Mr. Martin admitted that he had prepared the October 2006 Fiscal and Economic Impact Analysis Supplemental Report (Ex. 36, Att. 1), which contained these numbers. Tr. 2582. However, he could not recall where the predicted sales prices came from. Tr. 2584. He also admitted that he had no knowledge of why how they had magically become 50% higher than the 2005 numbers. Tr. 2584. He then engaged in speculation as to why they may have changed, but had to admit again that he really had no knowledge of how this change

[14] The applicant withheld this document from the Agency and the parties, and failed to produce it in discovery, until forced to do so late in the hearing process. See Exhibit 90; Tr. 2415, 2421.

occurred. Tr. 2585, 2599.[15] Moreover, the applicant's own marketing witness, Terry Elsemore, admitted that market prices had not risen 50% in that time frame. Tr. 2620:7-11.

The 2006 report did contain several footnotes (Ex. 36, Att. 1, pp. 32-35) referencing the July 2006 Cushman & Wakefield study (Ex. 194), and Mr. Martin speculated that this may have provided the basis for the new 2006 numbers. Tr. 2586-2587. However, since Exhibit 194 expressly states at page 73 thereof that the developer provided the numbers used in that report, it can not possibly have been the source of the October 2006 numbers. In fact, the record shows that it was the other way around. Rather than Cushman & Wakefield providing a basis for Mr. Foxman's amateur property value estimations, as claimed by Mr. Martin, Mr. Foxman's guesswork provided the basis for Cushman & Wakefield's work. Ex. 194, p. 73; Tr. 2428.

Therefore, there is no competent proof in the record of the source or veracity of the applicant's "allegations" regarding pricing and the 2006 estimated prices must be disregarded by the Agency in rendering its decision. Pages 5-8, supra.

4. The Only Source for the Final Set of Pricing Estimates Was Mr. Foxman

The final set of prices was set forth in the "Fiscal & Economic Impact Analysis Updated Report - 2010", dated June 2010. Ex. 85, Table II-10. It predicted total real estate sales revenues of $581,521,106[16] from 651 units, and local tax and/or PILOT revenues of more than $12,000,000. Ex. 85, p. 59. Despite the 6.9% reduction in the 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. No explanation was ever given for these inconsistencies.

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) as was claimed in Exhibit 194 in 2006 for 739

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[15] See also Ex. 223, Tr. 3288-3294; p. 24, infra (the applicant's own data shows that the predicted Great Camp prices are inflated by 230% to 500% or more).

[16] On cross-examination of Mr. 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.

units ($581,050,000). Protect's expert witness, David Norden, testified that this was "counter to the very apparent trend towards ... reduction in price" in the industry. Norden PFT, pp. 32:17-33:3.[17]

On cross-examination, Mr. Martin admitted that Mr. 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 qualified to come up with these numbers. Tr. 2430. Nor did he have any idea 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, a lawyer and a banker (footnote 11, supra), who has no apparent qualifications to estimate real estate values, especially for a project of this magnitude.

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 2006 or the similar 2009 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 by 2010. Tr. 2407, 3239:23-3240:9.

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 applicant's "allegations" regarding pricing and these estimated prices must be disregarded by the Agency in rendering its decision. Pages 5-8, supra.

5. The Application Materials Relied On Multiple False Citations to Support the Applicant's Baseless Pricing Claims

Faced with the complete lack of competent sources for its projected sales revenues, the applicant repeatedly cited to

[17] Prefiled testimony of David Norden, 6/7/11, Tr. 3230, Attachment B (hereinafter "Norden PFT").

alleged sources for these numbers that, upon closer examination, turned out to be blatantly false. These falsehoods include:

- The 2006 application update (Ex. 36, Att. 1, pp. 32-35) repeatedly cited to the 2006 Cushman & Wakefield marketing study (Ex. 194) 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 an after-the-fact rationale for his citations to non-existent numbers, he had to admit that he could not recall how he did come up with them. Tr. 2611:5-6.

- The June 2010 Fiscal & Economic Impact Analysis (Ex. 85) stated at page 16 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, and as of that time, he had not yet even reviewed the market status of the project, nor did he have any idea why Exhibit 85 claimed that he had done so. Tr. 2647:11-2648:15.

- Page 38 of Exhibit 85 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.

- The November 24, 2010 "Project Sponsor's Response" to Protect's discovery demands (which is part of Exhibit 90), which was signed by the applicant's attorney, affirmed at page 3 that the aforesaid "updated market study" referred to at Exhibit 85, page 38, 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.

Despite these repeated written claims by the applicant's consultants and attorney that 2006 the 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 done 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. 2658:3-9.

Despite the applicant's attempts to bolster Mr. Foxman's numbers by claiming that they were provided by Cushman & Wakefield and by Mr. Elsemore, the reality is that, as Mr. Martin and Mr. Elsemore admitted, other than the 2006 Cushman & Wakefield report (Ex. 194), 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.[18] And the sale price estimates in that document were not the result of analysis by that firm. They were provided to Cushman & Wakefield by the developer, Mr. Foxman. Ex. 194, p. 73.

6. Because the Potential Tax Revenues Are Based on Fictional Real Estate Sale Prices, the Predicted Tax Revenues Are Also Fictional

The tax and PILOT revenues that the project is predicted to pay to local governments are calculated based upon the predicted property sales prices. Ex. 85, pp. 57-65. As shown above, those prices are fictional, and as is established at Point 5/6.B(2) 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 pp. 22-23, infra.

Witnesses for both sides agreed that, under these circumstances, if real estate sales were to be as low as Mr. Norden's study 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; Tr. 2116-2122 (Ratner). Since there was no rebuttal to Mr. Norden's estimate of $5,000,000 per year (Point 5/6.B(2), infra; Ex. 218, 219), and the applicant failed to meet its burden of proof supporting its estimate of $38,000,000 per year, as a matter of

[18] 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.

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.

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 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.

For all of the foregoing reasons, the applicant failed to prove that its claimed tax bonanza for local governments would occur. Therefore, this claim must be ignored by the Agency in its decision-making process.

B. The ACR Project is Doomed to Failure In the Current Resort Real Estate Market

The potential tax revenues and job creation from the project, and the future viability of the ski area, are dependent upon the financial success of the project, which is in turn dependent upon sales of lots and townhouses. The application contains a detailed chart showing how many units will be sold in each year of the project's development, but despite having the burden of proof, the applicant produced no evidence at the hearing that these projections had any basis in reality.

Thus, the applicant failed to meet its burden of proving the allegations of the application with competent evidence.[19] Therefore, it must be assumed that the project will fail to sell real estate at the projected rates and that the predicted tax revenues and financial support for the operation of the ski area will not materialize.

1. The Applicant Did Not Prove That the Projected Levels of Resort Real Estate Sales Could Actually Be Achieved by ACR

As set forth above, the applicant predicted varying levels of sales for the project, which it then used to project tax revenues to local governments. However, in addition to the lack of competent evidence proving that these numbers were realistic,

[19] Pages 5-8, supra.

the applicant failed to prove that the current and foreseeable real estate markets would support this level of sales for this project.

The only marketing study produced by the applicant was the 2006 Cushman & Wakefield study. The parties were basically in agreement that this study was obsolete. Norden PFT, pp. 26-27; Elsemore PFT[20], p. 5:18-22. Tr. 3319:23-3320:10, 3354:7.

The applicant's marketing witness, Mr. Elsemore, said only that the project might succeed if the real estate market recovers. Elsemore PFT, pp. 3-4. However, he admitted that he had not actually studied the market, and that he was not qualified to do any kind of market analysis. Tr. 2658:3-9.

Therefore, there is no competent evidence in the record to support the allegations of the application that the project can sell $580,000,000 worth of real estate in the next 15 years, or even that it can sell $38,000,000 worth in any one year.

2. Protect's Resort Area Development Expert Proved That the Project Faces Too Many Handicaps to Succeed

Not only did the applicant fail to prove that the project could succeed, Protect proved at the hearing that it would not. 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[21] that are being proposed." Tr. 3324:18-20.

As shown by his resume (Ex. 209), Mr. Norden has over 20 years of experience in the mountain resort development business. Norden PFT, pp. 1-5. He has led the development of new ski resorts in Japan and South Korea, and major projects at Stowe, Vermont and Aspen, Colorado. Ex. 209, Norden PFT, pp. 1-5; Tr.

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[20] Prefiled testimony of Terry Elsemore, 6/1/11, Tr. 2247, Attachment A (hereinafter "Elsemore PFT").

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

3231. He is currently consulting on the development of a vineyard-centered resort in Argentina. Ex. 209; Norden PFT, p. 6.

This experience gives 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. He has also lived in, and then regularly visited, the Adirondack Park, for many years. Norden PFT, pp. 11-12.

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. Copies of the most recent Kelsey & Norden reports, Spring 2010 and Fall 2010, are Exhibits 210 and 211, respectively.

Mr. Norden's expertise was recognized by the applicant when it relied upon his work in preparing its application materials. The Spring 2010 report (Ex. 210) was cited by the applicant in the June 2010 application update. Ex. 82, pp. 56-57. 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. However, the fact remains that even the applicant can not dispute his credentials and the reliability of his work in this field.

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. 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.

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.

Other disadvantages include a lack of amenities in the town and minimal waterfront property in the project for lake access. Norden PFT, p. 20; 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.

Mr. Norden also analyzed the project's planning process (Norden PFT, pp. 15-16, 26-33), and compared it to the more common planning practices used in the industry (Norden PFT, pp. 21-25). He found that the applicant's marketing research and analysis was out-of-date, lacking in benchmarks, vague, incomplete, confusing, and fell short of what was necessary in several ways. Norden PFT, pp. 26-33.

The result is that "the developer is at great risk that its product will not meet preferences of the market" and that due to the lack of "top-quality current market research" the "project becomes purely speculative, and increases the risk profile significantly". Norden PFT, pp. 29-30.

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. He used this research and analysis to create a number of graphs, which were entered into the record as Exhibits 212-221. These graphs first showed that Big Tupper is much smaller than, and farther from the New York market than, competing ski resorts. Norden PFT, pp. 33-34; Ex. 212, 213; Tr. 3234-3238.

He then analyzed ski area size versus resort real estate sales in the local market for each ski area. Norden PFT, p. 33; Ex. 218; 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. A copy of Exhibit 218, which shows this relationship, is appended hereto as part of Attachment A.

Unfortunately for the applicant, Exhibit 218 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. Ex. 218 ("ACR Volume Indicated by Statistics"); Norden PFT, pp. 33-34; Tr. 3255-3256. However, the applicant has predicted about $38,000,000 per year in sales, almost 8 times higher. Ex. 218 ("Proposed ACR Volume"); Norden PFT, pp. 33-34; 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.

As shown on Exhibit 218, this proposed volume is an enormous statistical outlier. The volume of sales 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. Ex. 218. ACR's proposed volume is far larger than the actual results achieved by such larger, more well known, and more accessible Vermont resorts 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.

Exhibit 219 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. Ex. 219; Norden PFT, pp. 33-34; Tr. 3259-3261. Again, the applicant's "Proposed ACR Volume" of $38,000,000 per year is a huge statistical outlier. Ex. 219. 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. A copy of Exhibit 219 is appended hereto as part of Attachment B. See also Norden PFT, pp. 46-47, 50-51.

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) to assess the ACR project's likelihood of achieving its projected sales volume. Following the development of the Spruce Peak project, Stowe has 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 per year, which is at the upper end of Stowe's range, every year, for 15 years. Ex. 85, Table II-10; Norden PFT, p. 48. 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.

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; Ex. 214, 215, 216, & 217; Tr. 3238-3252. This occurred at the national (Ex. 214), state (Ex. 215), regional (Ex. 216, 217), and county (Ex. 216, 217) 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.

Mr. Norden also analyzed per square foot sale prices for resort condominiums in the region. Ex. 220, 221; Norden PFT, pp. 51-53; Tr. 3261-3266. This analysis showed that the ACR project was overpriced, in that it was projecting sales prices that could only be achieved at better-known, larger, more well-established resorts. Id.

Finally, using regional sales data obtained mostly from the applicant's marketing study, he was able to analyze the potential sale prices of the Great Camp lots. Ex. 223, 234; 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%.**

For Franklin County, where the project would be located, he analyzed publicly available sales data on 44 comparably large properties from 2009 and 2010. Ex. 224; 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. Ex. 224: 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%.**

Within the Town of Tupper Lake itself, the average per acre sale price of large lots like the Great Camps was only $1,919 per acre (Ex. 224; Tr. 3301), which, again, is far less than what the applicant has predicted it could sell Great Camp lots for.

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

PFT[22]. Mr. Norden testified that high carrying costs can frustrate and deter potential buyers. Norden PFT, pp. 58-59.

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-market type sales volume anyway. Norden PFT, p. 34.

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

- 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.

- "...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.

- Project prices have not been discounted due to the recession, as has been done at resorts elsewhere by about 29% on average. Norden PFT, pp. 38, 39, 44. Thus, the proposed project pricing is not competitive with the market. Tr. 3276.

- 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.

- "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.

- 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. Norden PFT, pp. 36-37, 45-46;; Tr. 3312, 3393:14-3395-7.

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[22] Prefiled testimony of Shanna Ratner, 6/1/11, Tr. 2092, Attachment ___ (hereinafter "Ratner PFT").

- 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. Norden PFT, pp. 49-50.

- 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. 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. 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. Tr. 3305-3306.

- 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. Tr. 3278:20-3286:13.

When faced with this definitive analysis by a true industry expert, 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 minimal likelihood of financial and fiscal success.

C. The Applicant Has Not Proven that Its Proposed PILOT Funding Arrangements Have Been, or Can Be, Approved by the FCIDA

The financing of the project's infrastructure and the project's entire financial success, as well as its promised fiscal benefits to local governments, are dependent upon the applicant obtaining bond financing through the County of Franklin Industrial Development Agency ("CFIDA") through a novel and untested payment-in-lieu-of-taxes ("PILOT") structure that involves the use of unique "sub-PILOT" agreements. The applicant has not met its burden of proving[23] that this PILOT structure is either legal, or practical.

Thus, because the applicant will not be able to fund the construction of the municipal and private infrastructure which it has promised to build with the bond proceeds (Ex. 85, pp. iii-vi, 57-59), the application must be denied. 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).

[23] Pages 5-8, supra.

1. The Applicant's Ability to Pay for Construction of the Project's Infrastructure and the Alleged Fiscal Benefits Are Dependent Upon the Proposed PILOT Arrangement Which is of Dubious Legality

It is the applicant's intent to fund all or most of the construction of the public and private infrastructure (roads, electric service, water, sewer, etc.) for the project with industrial development agency ("IDA") bonds issued by the CFIDA. Ex. 85, pp. iii-vi, 57-59; Ex. 204. To secure the repayment of the bonds, much of the land in the project site would be conveyed or leased to the CFIDA. Id.; Tr. 3062-3064, 3075.

Initially, the bond payments would be made by the applicant pursuant to a standard PILOT agreement, but as townhomes or building lots in the project are sold, the lot buyers would be required to enter into sub-PILOTs and to make regular payments to the CFIDA. Id. These individual payments would continue until the bonds are paid off in about 30 years. Id. As demonstrated below, the sub-PILOT idea is untested, at least for individual residential homes, and is of dubious legality. Thus, there is significant doubt that the project's infrastructure can be financed by the CFIDA.

The CFIDA funding and the use of a PILOT and sub-PILOTs are crucial to the financing and construction of the project. They will provide low-interest financing for the construction of the infrastructure, and various tax exemptions at the time of construction. In addition, the sub-PILOTs will be used to pay off the bonds over time, rather than the developer paying them off from its profits (Ex. 85, pp. iii-vi, 57-59; Ex. 204), as is the usual case. The PILOT and sub-PILOT agreements will also be used to more or less freeze the property tax exposure of the developer's property. Id. Without the CFIDA bonds, the project will not be built.

2. The Record Shows that the Proposed PILOT Structure is of Questionable Legality and Has Not Been Approved by the CFIDA

The applicant has claimed that this financial scheme is acceptable to the CFIDA. Tr. 2990. However, the record shows otherwise. In a letter to the applicant's attorney dated February 1, 2011 (Ex. 227; 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.

A copy of this letter is set forth as Attachment B hereto.[24] This letter is the most recent communication from the CFIDA in the record, and the applicant did nothing to refute it during the hearing. The letter alone proves that the applicant has not met its burden of proof as to a key element of its financing scheme, requiring denial of the application pursuant to APA Act § 805(4) and § 809(10)(e).

However, the Agency need not rely on this letter alone to find that the applicant has not met its burden of proof. The record also shows that:

- 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. Ex. 201; Tr. 3085-3114, 3118.

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[24] The applicant's attorney withheld this letter from production during the discovery process in this case. Protect obtained it from the CFIDA under the Freedom of Information Law on June 16, 2011, and it was admitted into evidence by the Hearing Officer pursuant to a motion by Protect. Tr. 3474-3475. These motion papers are set forth in the Record as part of Ex. 90. Despite the existence of this letter, the applicant's counsel falsely implied, on the record, that a 2010 letter offering vague general support for the concept of the project (Ex. 82, Att. 15) was the CFIDA's Executive Director's most current position on the ACR project. Tr. 2990:7-23, 2991:15-16. See also motion papers at Ex. 90.

- 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 (Ex. 199) 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. Ex. 202; Tr. 3115, 3118. There is nothing in the record to show that the bond counsel has updated or reaffirmed its now 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.

- 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." Ex. 203; Tr. 3115, 3118. However, the applicant still continues 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. Ex. 85, pp. iii-vi, 57-59.

- 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. Ex. 204, Tr. 3115, 3118. However, this document did appear to include the new concept of the "sub-PILOT".

- 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.

Ex. 205; Tr. 3116, 3118.

- 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.

Ex. 206; Tr. 3116, 3118. At that time, the IDA board was considering rejecting the entire concept of "sub-PILOTs". Id.

- As of the CFIDA's November 10, 2010 board meeting, its bond counsel was still trying to figure out whether ACR's "sub-PILOT" idea was legal or feasible. Ex. 207; Tr. 3116, 3118.

Thereafter, the only communication from the CFIDA to the applicant was the February 1, 2011 letter from the Executive Director, which made it clear that the CFIDA was anything but convinced of the legality or practicality of the applicant's proposal. Ex. 227. Curiously, the applicant chose to withhold this document from the Agency and the parties. See footnote 24, supra.

However, 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.

3. The Applicant Did Not Prove That the Proposed PILOT Structure Complies with the Applicable Laws and Regulations

As discussed above, under the Agency's regulations, the applicant bears the burden of proving at the hearing the truthfulness of the allegations of the application materials. These materials only constitute evidence if they are supported by "competent evidence" in the hearing. 9 NYCRR § 580.14(b)(3). Pages 5-8, supra. With regard to the validity of its IDA sub-PILOT bonding scheme, the applicant utterly and completely failed to present any such evidence to meet its burden of proof.

The author of the application materials that discussed the PILOT bonding plan (Ex. 85), James Martin, could not explain how it would work. Tr. 2502-2505. The only witness presented by the applicant on this issue was Adore Flynn Kurtz, the Executive

Director of the County of Clinton IDA.[25] 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,[26] p. 3:21. 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)

Therefore, the applicant presented absolutely no expert testimony on the IDA bonding and PILOT aspects of the project. This too, in and of itself, establishes that the applicant failed to meet its burden of proof and that the application must be denied.

The witness's entire involvement with the ACR project appears to have come from reviewing (Tr. 2989-2990) a one page 2010 letter from the CFIDA (Ex. 82, Att. 15) and three four year old documents. Kurtz PFT, pp. 3:21-4:4 (Ex. 22, Att. 15, Ex. 199, Ex. 200). However, the proposal to the CFIDA had changed since the three documents were created, with the advent of the sub-PILOT idea. Ex. 85, pp. iii-vi, 57-59; Ex. 201, 202, 203, 204, 205, 206, 207, 227.

The most that the witness could do was discuss the IDA bonding process in generalities. See Kurtz PFT pp. 4-5; Tr. 2992:17-2997, 3003-3023. Ms. Kurtz's answers to questions about this project were generally of the following nature:

- "I'm not exactly sure when...". Tr. 3047:20-21.
- "Well, I -- I don't know all the details of this project...". Tr. 3048:9-10.
- "I'm not a tax expert in any way...". Tr. 3049:19.
- "You know, I haven't been involved in this directly ... but I didn't -- certainly didn't study it...". Tr. 3050:14-15 .

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[25] Despite having written (Tr. 2503) the June 2010 fiscal impact update report (Ex. 85), 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.

[26] Adore Flynn Kurtz Prefiled Testimony, 6/6/11, Tr. 2987, Attachment B (hereinafter "Kurtz PFT").

- "... I don't know exactly what the discussions have been between the municipality and the project...". Tr. 3052:15-16.
- "... I've not been in this situation, before so I can't say definitely." Tr. 3061:21-22.
- "... I ... really don't probably have enough information." Tr. 3080:24-3081:1.

Despite her many years of experience in the IDA field (Kurtz PFT, p. 2), Ms. Kurtz could not address the concept of the legality of sub-PILOTs, which would be given to the IDA by the so-called "beneficial owners" (Ex. 85, p. iii) of the individual houses in the project:

> I've not had experience with individual homes subject to a PILOT at the County of Clinton I.D.A." Tr. 3078:8-10.

With regard to the novel concept of "beneficial owners", which appears to be a key concept in the applicant's financing scheme (Ex. 85, p. iii), the applicant's own witness did not even seem to be familiar with the term (Tr. 3083:6-3084:4). The most she could say was:

> I've not seen it -- or -- or I've not been aware of it being in I.D.A. Documents [sic] that I look at on a regular basis". Tr. 3084:2-4.

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.

The lack of any explanation of this concept in the record is particularly troubling. However, it appears that the intent of the applicant is that, rather than make the payments on the IDA bonds and the PILOT payments to the municipalities itself, it will rely on the individual homeowners in the project to do so.[27] Ex. 85, pp. iii-vi, 57-85; Ex. 201, 202, 203, 204 (p. 4), 205, 206, 207, 227. As shown above, this appears to be unprecedented,

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[27] By relying on the homeowners to pay the bond payments over an extended period of time (Ex. 85, pp. ●; EX 704, P. 4), instead of making the payments out of the proceeds of sales as the lots are sold, the applicant will be able to pull cash out of the project at an accelerated rate, while leaving the individual homeowners with the long-term responsibility for paying the applicant's debts.

and the applicant's own witness could not explain how it would work.

As explained by Protect's witness Shanna Ratner (Ratner PFT, pp. 12-13), 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.

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 (Ex. 201, 203, 206; 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.

Ms. Kurtz did review Exhibit 199, the 2006 opinion letter of the CFIDA's bond counsel. Kurtz PFT, p. 3:23-4:2. However, as set forth above, by 2011 that letter was outdated and of questionable validity. Ex. 202. In addition, it 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. Ex. 205, 206. 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. Ex. 199, p. 8.

The applicant also relied heavily (Tr. 2989-2990, 3108) on a letter from the CFIDA executive director dated April 21, 2010 (Ex. 82, Att. 15), which gave general assurances of support for the project. However, nothing in the letter stated that the proposed structure of the project, or the IDA bonding in particular, was approvable. Nor is it clear whether the CFIDA was aware of the sub-PILOT concept at that time, as that concept appears to have been created later in 2010. Ex. 85, p. iii-vi, 57-59. Instead, as shown by Exhibits 202, 203, 205, 206 and 207, as described above, the CFIDA and its bond counsel have serious doubts about the validity of the proposal as it currently exists.

Likewise, the third document relied upon by Ms. Kurtz, a 2007 inducement resolution adopted by the CFIDA (Ex. 200), was out of date, and predated the advent of the novel sub-PILOT idea.

Like the 2010 letter (Ex. 82, Att. 15), 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.

Indeed, the 2007 inducement resolution itself twice stated that it was contingent upon "the PILOT Agreement to be negotiated" (Ex. 200, pp. 4, 5), which has yet to occur. As shown by Exhibits 202, 203, 205, 206 and 207, as described above, the likelihood of that happening is now highly questionable, at best.

It should also be noted that, as of June 2010, the projects' financing was dependent upon Empire Zone tax benefits from the State of New York. Ex. 85, pp. iii-vi, 57-59. However, that program has ended and those benefits are no longer available to the applicant. Tr. 2505-2506. Thus, the two primary financing mechanisms for the project's infrastructure will not be available for ACR.

4. The Application Must be Denied Because the Crucial IDA Bonding Proposal is Not Approvable

The applicant utterly failed to prove that its IDA bonding plans were likely to be approved by the CFIDA. Without these funds, the project's infrastructure can not be built. This situation would create heavy burdens on the local municipalities in which the project site is located. Therefore, the application must be denied pursuant to APA Act § 805(4), § 805(4)(c), § 805(4)(d), § 805(4)(e), and § 809(10)(e)

D. The Ski Area Will Lose Money and the Applicant's Plan Will Not Make it Feasible for the Big Tupper Ski Area To Be Retained as a Community Resource

Perhaps the one thing that all of the parties can agree on is the desirability of reopening the Big Tupper Ski Area and keeping it available to the community for the long run. However, the applicant's plan will not achieve that goal.

1. The Estimated Number of Skier Days Was Mysteriously Increased, Which Generated Inflated Revenue Estimates

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.

In 2006, the applicant produced an analysis of the ski area's proposed operations and finances. Ex. 21, February 2006, Vol. 1, Tab #7. 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." Id., at 58.

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. Ex. 222. It estimated that the ski area would initially generate a mere 4,500 skier days, 21,600 in the second year, and would eventually plateau at 40,500 skier days per year. Ex. 222, pp. 5-6, 17; Norden PFT, p. 35.

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%). Ex. 21, February 2006, Vol. 1, Tab #7, p. 58. No source was cited for these new numbers and they appear to have just been made up.

To compound this questionable math, the applicant later began using an even higher number of 100,000 skier days per year Ex. 85, p. 45; Tr. 2531. No basis or foundation was given for that increase. Norden PFT, p. 35. Mr. Martin later testified (Martin PFT,[28] p. 21:18-21; Tr. 2531:24-2534:3) that this number was given to him by Scott Brandi, but there was still no basis given for the method by which this number was calculated. Id.

Moreover, nothing in either Mr. Brandi's prefiled testimony[29] 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

[28] Prefiled Testimony of James Martin, 6/1/11, Tr. 2249, Attachment B (hereinafter "Martin PFT").

[29] Redacted Prefiled Testimony of Scott Brandi, 6/8/22, Tr. 3442, Attachment A (hereinafter "Brandi PFT")

company, the LA Group, before the hearing. Tr. 3452:12-18. Thus, again, the number of skier days appears to have just been made up.

This fudging of the numbers allowed the applicant to claim much higher lift ticket revenues than it otherwise could have. The following table shows the amount of revenue inflation resulting from the invention of the higher skier day per year figures:

Year	Jack Johnson Skier Days[30]	Lift Ticket Price[31]	Lift Ticket Sales[32] ($1,000)	Appli-cant's Skier Days[33]	Lift Ticket Sales[34] ($1,000)	Difference in Lift Ticket Revenues
05/06	4,500	$25	$112.5	4,520	$113	$500
06/07	21,600	$25	$540	23,600	$590	$50,000
07/08	27,000	$25	$675	29,000	$725	$50,000
08/09	40,500	$25	$1,012.5	42,520	$1,063	$50,500
09/10[35]	40,500	$30	$1,215	52,500	$1,575	$360,000
10/11	40,500	$30	$1,215	62,500	$1,875	$660,000
11/12	40,500	$30	$1,215	72,500	$2,175	$960,000

[30] Ex. 222, p. 17. The Jack Johnson Company estimated that skier days would reach 40,500 per year in 2008/2009 and then plateau at that level in 2009/2010. It did not continue its chart past 2009/2010. Id. This table uses that 40,500 figure for all subsequent years. Id.

[31] Ex. 21, February 2006, Vol. 1, Tab #7, p. 58. The Jack Johnson Company had assumed lift ticket prices of $17 per day. Ex. 222, p. 15. The applicant's 2006 projected pricing is used in this table so that the numbers will be comparable.

[32] Skier days times lift ticket price.

[33] Calculated using total "Visitors Lift Fees" from Ex. 23, February 2006, Vol. 3, Attachment 28, p. 1, divided by lift ticket prices from Ex. 21, February 2006, Vol. 1, Tab #7, p. 58.

[34] Ex. 23, February 2006, Vol. 3, Attachment 28, p. 1 ("Visitors Lift Fees").

[35]

12/13	40,500	$33	$1,336.5	72,515	$2,393	$1,056,500
13/14	40,500	$33	$1,336.5	72,515	$2,393	$1,056,500
14/15	40,500	$35	$1,417.5	72,514	$2,538	$1,120,500
15/16	40,500	$35	$1,417.5	72,514	$2,538	$1,120,500
Total	---	---	---	---	---	$6,485,000

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 has projected that the ski area will be profitable by 2012. Ex. 23, February 2006, Vol. 3, Attachment 28, p. 1. However, as shown by the table above, that is only made 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.

Therefore, the applicant's estimates of skier days, and lift ticket revenues have been highly inflated and are not reliable, and the ski area will not be profitable.

2. The Subsidies For the Ski Area Were Overstated; It Will Lose Money, and Not Make a Profit

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. Ex. 81, p. 45. 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. Norden PFT, pp. 54-55. As proven at Point 5/6.B(2) above, the actual rate of sales will only be about 1/8 of the projected rate. 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.

For instance, for 2016 (Year 10), the applicant's ProForma shows that ski area should make a profit of $1,430,000. Ex. 23, February 2006, Vol. 3, Attachment 28, p. 1. After adjusting for the inflated lift ticket sales (per the table above), the profit would be reduced to $310,000.

Also, the ProForma (Ex. 23, February 2006, Vol. 3, Attachment 28, p. 1.) assumes that there will be large State 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 2016 (Year 10), that subsidy was predicted to be $453,000. Without that rebate, the ski area would lose $143,000.

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"). Ex. 23, February 2006, Vol. 3, Attachment 28, p. 1. This calculation does not take into account the fact that 67 of the 651 homes in the project will be exempt from these fees (Ex. 81, pp. 8, 45), 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.

Once one takes into account the fact that real estate sales will be far below the projected levels (Points 5/6.A & B, 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[36]), up to 67 of which would be exempt from the $1,000 assessments, that would only produce about $150,000 per year in assessments. For 2016, this would lead to an additional loss of $427,000, for a total loss of $630,000 in Year 10.

To summarize, using Year 10 (2016) 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 subsidy assessment ($60,000) - reduced HO subsidy assessments due to reduced home sales ($427,000) = loss of $630,000.

Using the applicant's own budgetary figures, and correcting for its 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.

3. The Developer's Commitment to the Ski Area is Questionable, and the Mountain Will Have Outdated Lifts and Will Not Be Competitive

[36] Sales of $5,000,000 per year (Ex. 218, 219; Point 5/6.B(2), supra) divided by $500,000 +/- per unit = 10 units per year, times 10 years = 100 units.

It should also be noted that rather than upgrade the ski area from the outset, as should be done (Tr. 3313-3315 (Norden)), the applicant does not propose to upgrade the ski lifts until years 3, 7 and 8 of the project. Ex. 85, Table II-12. These upgrades are financially dependent upon the early property sales, particularly the Great Camp lots. As proven above at Points 5/6. A & B, these revenues are unlikely to materialize in time to fund the upgrades of the ski area, so they could be delayed well past year 3.

Also, the developer intends to install fixed grip lifts on the mountain, rather than the more modern, faster, more convenient, and more popular detachable lifts. Ex. 222, p. 2; Norden PFT, pp. 36-37, 45-46; Tr. 3312, 3377 (Norden). This, too will make the ski area non-competitive and depress skier visits. Id.

For all of these reasons, the ski area's income will be far, far less than what the applicant claims it will be, it will continue to run at a loss, and it will eventually have to be shut down again. The applicant has failed to meet its burden of proving that the ski area can be a self-sustaining operation.

Finally, there is nothing more than promises in the record that the applicant will actually upgrade, reopen, and subsidize the ski area, and there is no "guarantee[] that the Big Tupper ski area can be renovated and retained as a community resource". Hearing Issue # 6. There are no firm commitments to do any of the things that are necessary to guarantee this. Therefore, the applicant has failed to meet its burden of proof with regard to this issue, and the application must be denied.

E. The Applicant Failed to Prove that the Project Will Create the Promised Jobs; and the Jobs that Are Created Will Not Pay the Living Wage Needed to Support a Family of Four

The application projected that the project would create hundreds of construction jobs (Ex. 85, pp. 39-41) and about 524 on-site jobs (Ex. 85, pp. 43-44; Tr. 2531). Martin PFT, pp. 19, 20. However, at the hearing the applicant did not meet its burden of proving these claims by competent evidence,[37] so they must be disregarded and can not be credited by the Agency.

[37] Pages 5-8, supra.

As set forth above at page 4, even if these jobs were likely to occur, they could not be weighed against the environmental impacts of the project. Association, supra, at 826-827, 829-830. If they had been proven to be likely to occur, they could have been weighed against the burdens of the project on the public and local governments. See APA Act § 805(4); Association, supra, at 826-827, 829-830. However, because the applicant did not meet its burden of proof, its jobs claims can not even be used for that limited purpose.

The applicant did not meet its burden of proof because it could not show that these construction jobs would actually go to local workers. Tr. 2552-2554. Its witness admitted that there is not a feasible way to ensure that this would occur. Id.

Not only did the applicant not meet its burden of proof, Protect presented testimony on this issue by Shanna Ratner of Yellow Wood Associates, an economist and an expert in rural economic development, with over 25 years of experience. Ratner PFT, p. 1. Ms. Ratner has extensive experience working in the Adirondacks, including working with local governments and with organizations such as the Adirondack North Country Association. Id., at 1-2; Tr. 2091. She is also experienced in analyzing the economic and fiscal impacts of resort development on rural communities. Id., at 2. A copy of her resume is Exhibit 192.

She testified that it was unlikely that unemployed construction workers in the region would be hired to do the construction work on the project. Ratner PFT, pp. 17-24. Her research showed that large resorts like this are usually built by highly experienced and specialized companies, and that no such companies exist in the local area. Id. For instance, at least two out of three recent major projects in Lake Placid were built by contractors from outside of the Adirondacks. Id., at 21-22.

She further testified that such companies do not usually hire local workers. Instead, they use their own staff and subcontractors that have had good track records with them. Id., at 20-21. One such firm only hires 2 or 3 unemployed people per project. Id., at 21.

With regard to the claimed 524 on-site jobs in resort operations (Ex. 85, p. v), the applicant's witness on this subject, Mr. Martin, admitted that there was no calculation or methodology providing a foundation for this number in the June 2010 application materials. Tr. 2531. Nor was any such methodology or basis for the calculation provided on the record at the hearing. Thus, there is no competent evidence that the project will create these jobs, and the applicant has failed to

meet its burden of proof on this question. Pages 5-8, supra. Therefore, it must be assumed that this number is groundless.

This is consistent with Ms. Ratner's testimony that, "[t]here is no clear basis or methodology used to support the jobs estimates offered by the developer." Ratner PFT, p. 26 (emphasis added). She went on to discuss various methodologies by which this work could have been done, but which were not used by the applicant. Id., at pp. 26-27.

Ms. Ratner also testified that, other than the 81 (mostly seasonal) jobs predicted for ski area, the jobs claims were inflated. Ratner PFT, pp. 24-27. Her research showed that the jobs claimed for the marina seemed particularly inflated. Id., at 26.

Thus, so far as the record is concerned, the applicant's claim of 524 jobs to be created in resort operations is a work of fiction, on a par with the applicant's projected real estate sales prices.

Ms. Ratner also pointed out that, based on her experience and research, in the Adirondacks and elsewhere, many tourism jobs now go to foreign students and other non-local workers. Ratner PFT, pp. 27-30. One study that she relied upon showed that in situations like the one at issue herein:

> in the near term, 40% to 60% of new jobs go to newcomers and in the longer term 60% to 90% of these jobs are filled by newcomers. Ratner PFT, p. 30.

This testimony was not rebutted by the applicant. Therefore, even if some of the claimed jobs do materialize, most of them will not go to local residents.

And, of course, the ability of the project to produce jobs is dependent upon real estate sales and the ability of the project to support the operation of the ski area. As set forth above at Points 5/6.A and 5/6.B, the predicted real estate sales will not materialize. As set forth above at Point 5/6.D, the likelihood of the ski area remaining open for long is low.

Ms. Ratner also testified that, based on the applicant's own data, average wages at the resort are likely to be about $19,000 per year, but that this is not a living wage in Tupper Lake. Even two people in a household making this income could not make the living wage needed to support a family of four in the community. Ratner PFT, pp. 30-32. At the same time, these low wages will make it difficult to fill jobs with local workers from

outside of Tupper Lake, due to the long commutes required and the high cost of gas. Ratner PFT, pp. 32-33.

Therefore, many of the promised jobs are not going to materialize, and most of those that do will not pay a living wage. The applicant's jobs claims should not be taken into account by the Agency in its decision-making.

F. The Project Creates Significant Fiscal and Public Services Risks for the Town and Village and it Will Overburden the Village's Police and Fire Departments

As proven above at Points 5/6.A and 5/6.B, the project will fail. Nobody can predict at what phase this will occur, but the real estate market simply will not support the sale prices and rate of sales that are necessary for the project to succeed economically. Points 5/6.A & 5/6.B, supra. The question then becomes, what are the consequences of that failure? There will certainly be environmental consequences if land is cleared and roads and buildings are built, then left fallow. These actions will cause habitat loss and habitat fragmentation, as discussed below at Point 1.

There will also be fiscal consequences. Without the promised tax and PILOT revenues (Point 5/6.A(6), supra), the affected local governments will have no way to pay to maintain the roads, utilities, and other infrastructure that is constructed and then abandoned by the developer. The applicant has argued that it will phase development in such a way that large unfunded infrastructure will not be created. While that sounds good in theory, it is unlikely to occur.

As set forth above, the estimated real estate sales were radically overestimated by the applicant, both as to the prices of individual units (Point 5/6.A, supra), and as to the total amount of property that is likely to be sold (Point 5/6.B, supra). Thus, the tax and PILOT payments will be well below the projected levels, so that they are not sufficient to cover the costs of whatever is built, no matter how it is phased. See Point 5/6.A(6), supra.

In her testimony, Shanna Ratner gave several examples of the types of burdens that are likely to fall upon the local governments:

- 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; Tr. 2231-2233.

- 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; 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).

- 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; Point 5/6.C, supra.

- 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. This could have several effects, including inability to meet the demand for such services, increased 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.

- The Village and Town could be forced to take over the private sewage treatment plant. Ratner PFT, pp. 10-11; Tr. 2234-2238. See New York Transportation Corporations Law.

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.

The applicant has claimed that, if it fails, another developer will come along and bail it out. Ex. 81, p. 52. However, as demonstrated by the testimony of Mr. Norden, in the current uncertain 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.

Exhibit 191, the detailed report prepared for the Village of Tupper Lake by The Hudson Group, LLC, an interdisciplinary consulting group (Ex. 191, p. 2), also pointed out several risks to the local governments from the project:

- The electric demand from the project could drive up rates for existing ratepayers. Id., p. 8.

- At present, adequate water and sewer capacity is only certain for Phase I of the project. Ex. 191, p. 10. Adverse effects on the Village can be avoided only if the developer honors all of its commitments to fund its own water and sewer capital project needs. Id. As set forth above at Points 5/6. A, B, and C, it is unlikely that the developer will be able to keep its commitments.

- It is currently uncertain whether the Village has adequate water supply to meet the project's requirements after Phase I. Id., at 12.

- The applicant owes the Village $13,000 for water system work that has already been done for the project, but the applicant has so far failed to pay the amount due. Id., at 13. This does not bode well for the applicant's ability to meet its commitments to the Village in the future.[38]

- The mechanisms and agreements needed to confirm the developer's commitments to the Village have yet to be worked out. Id., at 14.

- As discussed above, the Town may have to take over the private sewer system. Id., at 18.

- The Fire Department is only sure of its ability to protect the project through Phase 1. Id., at 19. In addition, additional fire protection locations and equipment will need to be acquired as the project progresses. Id. There is currently no mechanism in place for the applicant to pay for these items. Also, additional firefighting personnel will be required (id.), but the applicant is not committed to providing them.

- The Fire Department has several concerns for Phases II to IV of the project. Id., at 19-20.

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[38] The applicant's failure to pay this bill also raises questions about its "financial capacity" pursuant to 9 NYCRR § 572.4(c)(5). See also page 45 regarding the applicant's unpaid tax bills and other obligations.

- It will not be able to reach some of the developments in the project within the normal desired response time of under 10 minutes.
- There will not be adequate water to fight fires at the Great Camps.
- Road grades in some of the developments may be too steep for firefighting vehicles. The project should be modified to address these problems.[39]
- There is a need to ensure that the Department will have the financial resources needed to meet the needs of the project.

● 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 the Village, the Village Police often provide coverage in the Town. Id., at 22. The applicant has discussed the idea of assessing project homeowners to pay for such services, but no formal commitment exists. Id., at 22. Thus, the Village is at risk for incurring increased costs in the Police Department budget, with no means to pay for them.

As discussed above, the applicant owes the Village $13,000 for water system work. In addition, as of the time of the hearing, the applicant owed over $200,000 in back taxes on the project's real estate for the years 2007 to 2011. Ex. 196.[40] Also, the applicant is about $65,000 in arrears to its consultants on the project, the LA Group. Tr. 3646-3647.

Therefore, despite all of its commitments and promises to local governments, it appears that the applicant is not particularly diligent about meeting its obligations to those municipalities. And, the application materials state that the project's housing and infrastructure will be funded in part by "private debt and equity" and "developer equity". Ex. 81, pp. 45, 46. If the applicant can not even pay its current relatively small obligations, then it is doubtful that it can or will meet

[39] So far, this has not been done, and it may in fact be impossible to do so for the upper elevation developments such as West Face Expansion and West Slopeside, and some of the Great Camps.

[40] See also Protect's Appeal of the Hearing Officer's June 2, 2011 evidentiary ruling which denied admission into evidence of an additional document which Protected had offered on this question, at Appendix A hereto, pages 111 to 112.

the much greater obligations that it will incur if the project is approved. Tr.[41]

All of these fiscal risks are exacerbated by the fact that the applicant did not prove that the CFIDA can or will fund the construction of the project's infrastructure. Point 5/6.C, supra.

For all of the foregoing reasons, if the project is approved, the affected municipal governments will be put at great financial risk. In addition, as shown by the Hudson Group report (Ex. 191), there are still significant open questions about the ability of the municipalities to provide the necessary services that the project will require. The applicant has not proven otherwise, and so the application must be denied.

G. Issues #5 & #6 Conclusion

The applicant has failed to prove that the project can successfully be marketed and built, or that its infrastructure can be funded by the CFIDA. It has also failed to prove that the ski area can be kept open, or even that it will be able to fund the necessary ski area improvements. Nor has it proven that it will create a significant number of jobs for members of the community. Finally, it has not proven that it will generate the alleged tax windfalls for the local governments that it is claiming will occur, and numerous aspects of the project leave those governments at risk. Therefore, the application must be denied. APA Act § 805(4) and § 809(10)(e); DCs (c)(2)(b), (d)(1)(a), (d)(1)(b), and (e)(1)(a).

[41] See also U.S. v. Foxman, supra at footnote 11.

ISSUE #1

The Project Would Irreparably Damage the
Resource Management Lands on the Site,
Despite the Existence of Feasible Alternatives

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?

The application must be denied because:

A. The project would have undue adverse impacts on the resources of the park, because the Great Camps and other development on Resource Management lands would fragment wildlife habitat, damage natural resources, and remove thousands of acres from the park's timber resource base. APA Act § 809(10)(e).

B. The project would not be compatible with the character description and purposes, policies and objectives of Resource Management lands, the primary purpose of which is to protect and enhance biological, forest and open space resources due to overriding natural resource considerations. APA Act § 805(3)(g), § 809(10)(b).

C. There are feasible alternatives available that would avoid sprawling exurban development across thousands of acres, which could reduce the project's undue impacts and make it more compatible with Resource Management lands. APA Act § 809(10)(b), § 809(10)(e).

D. The project would not be consistent with the Adirondack Park land use and development plan. APA Act § 809(10)(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:
>
> a. The project would be consistent with the land use and development plan.

b. The project would be compatible with the character description and purposes, policies and objectives of the land use area wherein it is proposed to be located.

...

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

For each of these three criteria, the applicant failed to meet its burden of proving that the project complies with the Act,[42] and the application must be denied.

A. The Applicant Did Not Prove that the Project Would Not Have An Undue Adverse Impact on the Natural, Ecological, Wildlife and Open Space Resources of the Park

The applicant failed to meet its burden of proving that the project would not have an undue adverse impact on the resources of the park, as required by § 805(4) and § 809(10)(e) of the Act. In making its undue adverse impact determination, APA Act § 809(10)(e) requires the Agency to take into account the Development Considerations ("DCs") found in APA Act § 805(4). The DCs relevant to Issue #1 include:

- § 805(4)(a)(2) - "Land"
- § 805(4)(a)(2)(f) - "Forest Resources"
- § 805(4)(a)(2)(g) - "Open-space resources"
- § 805(4)(a)(2)(h) - "Vegetative cover"
- § 805(4)(a)(2)(i) - "The quality and availability of land for outdoor recreational purposes"
- § 805(4)(a)(5) - "Critical resource areas"
- § 805(4)(a)(5)(c) - "... key wildlife habitats"

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[42] Pages 5-8, supra.

- § 805(4)(a)(6) - "Wildlife"
- § 805(4)(a)(7) - "Aesthetics"
- § 805(4)(a)(7)(a) - "Scenic vistas"

The hearing testimony on this issue focused particularly on DCs (a)(2), (a)(2)(f), (a)(5), (a)(5(c), and (a)(6), relating to wildlife and its habitat. The applicant did a spectacularly poor job of proving that the project would not have impacts on these development considerations.

1. The Applicant Failed to Prove that There Would Not be Undue Adverse Impacts Due to Wildlife Habitat Fragmentation on the Resource Management Lands

The applicant submitted no proof to establish that the project, in particular the Great Camp lots on Resource Management lands, would not have an undue adverse impact. In particular, it totally failed to present competent evidence on the question of habitat fragmentation and impacts to wildlife. Instead, it presented only conclusory "conjecture" and "unsupported opinion". T-Mobile Northeast, supra, at *9. Speculation such as this can not satisfy the applicant's burden of proof. Id.

For instance, 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 or observations that were made while they were on the property for other reasons. Tr. 3757. In contrast, Dr. Phyllis Thompson testified that, while the applicant reported only 10 bird species on the property (Ex. 11, April 2005, Vol. 1, p. 3-18), she had observed at least 84 species over the years. Point 1.A(3), infra. Dr. Michael Klemens reported finding 14 species of amphibians immediately adjoining the site in just 1 day of fieldwork. Point 1.A(3), infra. The applicant reported a grand total of zero (0) species. Ex. 11, April 2005, Vol. 1, p. 3-18.

Without knowing what species are present on the site, it is impossible for the applicant's witnesses to provide anything more than conclusory "conjecture" and "unsupported opinion". T-Mobile Northeast, supra, at *9. For instance the sum total of the "scientific" literature that was cited on wildlife issues, other than studies that the APA Staff forced them to review, consisted of two 1980s-era field guides for lay persons, of the sort that anyone could have purchased in their local Waldenbooks store at

the time.[43] Ex. 35 (Oct. 2006), pp. 88-89; Ex. 90.

The applicant was repeatedly asked by the APA Staff for this information, yet refused to provide it. Ex. 18, NIPA, p. 33 (2005), Ex. 26, 2nd NIPA, p. 29 (2006), Ex. 38, Letter, p. 4, (11/21/06). The Agency Staff's 1/31/07 memo which recommended sending the application to hearing specifically requested this information, yet the applicant still did nothing. That memo stated:

> 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 of any changes to the biotic integrity of the site and adjacent properties. Ex. 50, p. 9.

The Agency accepted that recommendation and issued the February 15, 2007 Hearing Order (Ex. 56) which included this issue. The Hearing Order specifically found that:

> "There are several issues that do not appear to comply with Agency approval criteria set forth in APA Act §805(4). "Development Considerations" and 9 NYCRR 574.5, "Further definitions of the development considerations"; for example:
>
> e. The presence of, and effect upon, fish and wildlife on the project site. [§805(4)(a)(6)]. Ex. 56, p. 5.

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[43] "*A Guide to Field Identification - Birds of North America - Expanded, Revised Edition*", Golden Books, 1983 (list price - $7.95) and "*Harper & Row's Complete Field Guide to North American Wildlife - Eastern Edition*", 1981. These documents are part of Exhibit 90 which includes all documents produced in discovery. Rather than cite them by name in the application materials, they were cited as "Chandler et al. (1983)" and "Collins (1981)", to create the illusion that they were actual scientific references.

Nevertheless, the applicant still took no further steps to address this deficiency in its proof over the four years after the issuance of the order. That would have been ample time to do high quality wildlife and habitat assessments, yet the applicant did nothing.

Therefore, despite having multiple opportunities to do the necessary studies and to be able to meet its burden of proof in the hearing, the applicant did nothing.[44] Instead, it resorted to conclusory "conjecture" and "unsupported opinion". T-Mobile Northeast, supra, at *9. That is not enough to meet its burden of proof, and the application must be denied.

2. The Applicant's Witnesses Were Devoid of Credibility

The applicant's witnesses repeatedly exaggerated the scope of the work that they did on wildlife habitat issues, presumably to obscure the fact that they really did not do any. What they basically did was take information that they already had, such as a timber cruise report (Tr. 3600:8-10), and wetlands delineations (Tr. 3528-3532), and cobble that together in a written narrative to create a discussion of wildlife and habitat issues that had no substance. In addition, at least twice they claimed to have done extensive assessment work on wildlife issues that they did not do.[45]

For instance, they claimed (Anthony PFT,[46] pp. 5:17-6:22) that the work that they did on the ACR project was very similar to their work on the "Belleayre Resort in the Catskill Park" project, regarding which they alleged that:

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[44] See also Protect's Appeal of the Hearing Officer's June 2, 2011 evidentiary ruling which denied Protect's motion to preclude all testimony on Issue #1 by Jeffrey Anthony and Kevin Franke, at Appendix A hereto, pages 112 to 113. If this appeal is granted, there will be no evidence in the record (credible or otherwise) supporting the applicant's position on this issue.

[45] See also Protect's Appeal of the Hearing Officer's June 22, 2011 evidentiary ruling which prevented Protect from using a certain line of questioning and proposed exhibits to impeach the credibility of the applicant's witness Jeffrey Anthony, at Appendix A hereto, pages 113 to 114.

[46] Prefiled testimony of Jeffrey Anthony, 6/21/11, Tr. 3504, Attachment A (hereinafter "Anthony PFT").

- it "is very similar to the Adirondack Club and Resort" (p. 5:17-19);
- it has "similar components ... as well as require the same site analysis and design and permitting approach as required by the APA." (p. 6:1-3);
- "we were required to prepare detailed inventories of existing conditions, both natural and man-made" (p. 6:10-11);
- they had to "demonstrate compatibility with the site resources and result in no unnecessary adverse environmental impacts" (p. 6:13-15); and
- "we essentially prepared similar permit application material including reports on ... wildlife" (p. 6:16-17).

On cross-examination, the witnesses, Mr. Franke and Mr. Anthony, who were in charge of their firm's work on the ACR project, stated that they were also in charge of the Belleayre project, and were very familiar with both. Tr. 3647-3648. They also stated that Belleayre was "a very similar type project". Tr. 3648:21-22.

The witnesses' claims that they had done similar work on the two projects, particularly with regard to wildlife habitat analysis, turned out to be absolutely false. On cross-examination, a section by section review of the scoping document for the Belleayre project (Ex. 234)[47] revealed that, while they had done extensive site inventories for wildlife on the Belleayre site, they had done no such work on the ACR site, despite claiming to have been "required to prepare detailed inventories of existing conditions, both natural and man-made" (Anthony PFT, p. 6:10-11) and "similar permit application material including reports on ... wildlife..." for both projects (Anthony PFT, p. 6:16-17). Tr. 3677-3689.[48]

The types of wildlife assessment work that Mr. Anthony and his firm had done for Belleayre, which, as it turned out after all, had **not** been done for ACR, included, but were not limited to:

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[47] Final Scoping Document - Belleayre Mountain Ski Center Unit Management Plan - DEIS - and Modified Belleayre Resort at Catskill Park Supplemental DEIS", February 28, 2008.

[48] See also Tr. 3648-3695 for the complete line of testimony and oral arguments over the admissibility of the Belleayre scoping document, Exhibit 234. After hearing the arguments and testimony, the Hearing Officer ultimately ruled that the document was admissible.

- establishing breeding bird survey points, doing several days of fieldwork in all seasons and all habitat types, and recording all birds seen or heard (Tr. 3679);
- recording all other wildlife (Tr. 3679-3680)[only casual or incidental (Tr. 3757) observations were recorded];
- doing reptile and amphibian survey work over multiple days, focusing on aquatic and semi-aquatic habitats, with at two-person crew, and recording all other wildlife seen (Tr. 3680);
- an analysis of post-construction carrying capacity for various classes of wildlife species and habitats (Tr. 3681-3682);
- assessing impacts to wildlife as a result of surface water impacts, hydrological changes, and the like (Tr. 3682-3683);
- assessing impacts due to human-wildlife interactions (Tr. 3683-3689)[only a cursory literature review was done]; and
- assessing mitigation measures for human-wildlife interactions (Tr. 3683-3684, 3688-3689).

Thus, their attempt to bolster their scant wildlife work on the ACR project by claiming that it was similar to the wildlife work done for the Belleayre project turned out to be extremely misleading, to put it charitably.

They also claimed (Tr. 3748-3752) that they had, at the request of the APA Staff, applied the methodology for assessing impacts on Adirondack wildlife from exurban development that was developed by Drs. Glennon and Kretser in their seminal 2005 report "*Impacts to Wildlife From Low Density, Exurban Development - Information and Considerations for the Adirondack Park*" (Ex. 236). However, as with their claims to have done a level of work similar to the work done on the Belleayre project, these claims turned out to be untrue. On cross-examination, they admitted that they had failed to do much of the analysis, fieldwork and research that the Glennon and Kretser report required. Tr. 3756-3771. For instance, they did not look into "microclimate effects" "isolation impacts", "edge effects" or "nest predation". Tr. 3757-3759. Therefore, their work was both incomplete and misleading.

As set forth above at Point 1.A(1), there was no science involved in their wildlife work, as the only citations given in support of any of it were two consumer field guides.

These false claims were all part of a pattern of non-credible work done by the applicant's consulting firm, the LA Group. See Point 5/6.A(5), supra (false claims regarding market

studies and real estate pricing); Point 5/6.D(1), supra (inflated numbers for skier days); Point 7:A, infra (false claim regarding the capacity of the State Boat Launch).

One of these witnesses, Mr. Franke, also labeled a member of the APA Staff a "greenie" and derided the inquiries she made about the design of the project during the early phases of the APA's review as "BS". Tr. 3716-3718; Ex. 235, p. 4; Attachment C hereto.

Therefore, the applicant's witnesses are completely devoid of credibility and their testimony should not be credited by the Agency during its review of the application regarding wildlife issues, or on any other issue.

3. The Record Shows That Wildlife and Wildlife Habitat Will Be Irreparably Harmed by the Project

Although the applicant's lack of credible proof on wildlife impacts is, alone, adequate grounds for denial of the application, intervenor parties presented highly qualified expert witnesses who proved that the project would have undue adverse impacts on the wildlife resources of the park. This too, requires denial of the application pursuant to APA Act § 805(4) and § 809(10)(e) and DCs (a)(2), (a)(2)(f), (a)(5), (a)(5)(c) and (a)(6).

Drs. Glennon and Kretser testified on behalf of intervenor The Adirondack Council that the project would fragment the wildlife habitat of the RM lands on the site, and have undue adverse impacts on the land and wildlife. See Prefiled Testimony of Michale J. Glennon, Ph.D. and Heidi E. Kretser, Ph.D. for Issue #1, 6/24/11, Tr. 4242, Attachment A; Tr. 4224-4272 (June 24, 2011).[49] They also testified that the applicant's consultants had not properly done the type of assessment called for in their 2005 report. Id.

The applicant's own witnesses admitted that Drs. Glennon and Kretser's 2005 report on the effects of exurban development in the Adirondack Park (Ex. 236) was "a very credible publication" and "an excellent compilation of the literature". Tr. 3750:4-13.

[49] It is assumed that The Adirondack Council's brief will address this testimony at length, and the Agency is referred thereto for a more detailed discussion thereof.

The applicant also did not present any rebuttal testimony to contradict these witnesses.

In addition, Dr. Michael Klemens, a noted expert on amphibians and the effects of development on them and their habitat, who also has many years of experience in land use planning (Ex. 167), testified on behalf of intervenor Adirondack Wild that the applicant had not done proper field assessments for amphibians, but in a single day, he found fourteen such species immediately adjacent to the site.[50] He also testified that the project had not properly taken into account the habitat needs of amphibians, focusing only on wetlands, but ignoring the impacts of development on the upland habitats that they use for much of the year. His testimony also established that the project would fragment their habitat by cutting off access between their various critical habitat areas, particularly vernal pools. See Prefiled Testimony of Michael Klemens, 4/27/11, Tr. 1004, Attachment A; Supplemental Prefiled Testimony of Michael Klemens, 6/7/11, Tr. 3137, Attachment A; Tr. 1002-1191 (4/27/11), 3134-3222 (6/7/11). Again, the applicant did not present any rebuttal testimony to contradict this witness.

Finally, Protect presented testimony by Dr. Phyllis Thompson, an adjoining property owner, and long-time local seasonal resident (Thompson PFT,[51] pp. 2-5), experienced birder (Thompson PFT, pp. 5-6, 10-11), and citizen scientist (Thompson PFT, pp. 6-10; Ex. 253-255), regarding her observations of bird species that are present on the project site. She testified that in her almost 50 years of birding on and near the project site, she had observed at least 84 species of birds. Thompson PFT, pp. 11-12. She then described these observations, and the habitat types in which they were made, in detail. Thompson PFT, pp. 12-19. These observations were documented in bird checklists that she compiled, which are Exhibits 256 and 257. She also testified regarding her observations on the adverse effects of human-bird interactions on and near the site. Thompson PFT, pp. 20-22. No rebuttal testimony was offered.

The work of these individuals demonstrates that there are many, many times the number of species of wildlife on the project

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[50] It is assumed that Adirondack Wild's brief will address this testimony at length, and the Agency is referred thereto for a more detailed discussion thereof.

[51] Prefiled testimony of Dr. Phyllis Thompson, 6/24/11, Tr. 4449-4453, Attachment B (hereinafter "Thompson PFT").

site than the 18 species that were acknowledged by the application materials. It also demonstrates that the applicant did none of the work necessary to assess the potential for adverse impacts on these species. Finally, it demonstrates that there will, indeed, be undue adverse impacts on wildlife and its habitat due to the project.

4. Thousands of Acres of Timber Lands Will be Lost

The several thousand acres of RM lands on the project site are currently owned by the Oval Wood Dish ("OWD") company. Ex. 196. These lands have been managed as timber lands for over a hundred years and continue to be used for that purpose. The applicant originally proposed that a timber management program for these lands would be a part of the project. However, that proposal was withdrawn, so that if the project is approved, the land would no longer be managed for timber. APA Staff testified that the Great Camp lots are too small to be effectively managed for that purpose.

In addition to the 2,800+/- acres that will be turned into 80 residences, some 1,200+/- acres of mostly RM lands, classified by the applicant for its own planning purposes as "Type III" land, that will not be immediately developed, will not be protected against future development. Tr. 3585-3593, 3836-3841. Indeed, this land is proposed to be the recipient of 28 RM principal building opportunities that would be transferred from other parcels of land owned by the applicant. Point 12, infra. Thus, these lands will eventually be developed as well.

B. The Project is Not Compatible With the Resource Management Land Use Area

The majority of the project site is in the Resource Management ("RM")land use area, which is the most protected private land classification in the APA Act. The applicant proposes to construct 80 single family dwellings on those RM lands (Parker PFT #12, pp. 7-9), which will be sprawled across the landscape, occupying thousands of acres of wildlife habitat and working timber lands. The application must be denied because the applicant failed to meet its burden of proving[52] that "the project would be compatible with the character description and purposes, policies and objectives of the land use area wherein it is proposed to be located." APA Act § 809(10)(b).

[52] See pages 5-8, supra.

The character description, purposes, policies, and objectives for Resource Management areas include:

> (1) Character description. Resource management areas, delineated in green on the plan map, are those lands where the need to protect, manage and enhance forest, agricultural, recreational and open space resources is of paramount importance because of overriding natural resource and public considerations. Open space uses, including forest management, agriculture and recreational activities, are found throughout these areas.
>
> Many resource management areas are characterized by substantial acreages of one or more of the following: ... critical wildlife habitats ....
>
> Other resource management areas include extensive tracts under active forest management that are vital to the wood using industry and necessary to insure its raw material needs.
>
> ...
>
> (2) Purposes, policies and objectives. The basic purposes and objectives of resource management areas are to protect the delicate physical and biological resources, encourage proper and economic management of forest, agricultural and recreational resources and preserve the open spaces that are essential and basic to the unique character of the park. ...
>
> Finally, resource management areas will allow for residential development on substantial acreages or in small clusters on carefully selected and well designed sites. APA Act § 805(3)(g)(emphasis added).

The project is not compatible with the RM lands because:

1. It is not compatible with the character description and purposes, policies and objectives of RM areas.

2. The house lots on RM lands are not small clusters or substantial acreage on well-selected sites.

3. The proposed housing is only a secondary use on RM lands, and the applicant failed to prove that the housing was compatible with its specific proposed locations and nearby uses.

Thus, the application must be denied pursuant to APA Act § 809(10)(b) and § 805(3)(g)(4).

1. The Project is Not Compatible With the RM Area

The Act requires that the applicant must prove that:

> The project would be compatible with the character description and purposes, policies and objectives of the land use area wherein it is proposed to be located. APA Act § 809(10)(b).

In this case, the applicant did prove that the project was compatible with any of these criteria. An item by item review of the character description and purposes, policies and objectives of RM areas shows that **the project is in fact not compatible with any of the RM character description and purposes, policies and objectives:**

(a) Part of the character description of RM areas is "the need to protect, manage and enhance forest ... resources [] of paramount importance because of overriding natural resource and public considerations". APA Act § 805(3)(g)(1).

The project is not compatible with this criterion because, as set forth above at Point 1.A(3), it will result in significant damage to, and fragmentation of, forest habitat and in the loss of thousands of acres of working timberlands. This land will no longer be managed or enhanced. Much of it will no longer be protected.

(b) Another aspect of the character description is that "[o]pen space uses, including forest management ... are found throughout these areas." APA Act § 805(3)(g)(1).

Again, the project is not compatible with this criterion because of the loss of habitat and the elimination of forest management.

(c) Also, "[m]any resource management areas are characterized by substantial acreages of one or more of the following: ... critical wildlife habitats ... ". APA Act § 805(3)(g)(1).

As set forth above at Point 1.A(3), the project site includes critical habitats, such as vernal pools. The project is

not compatible with this criterion because these habitats will be fragmented, vernal pools will be separated from upland habitat and development activities will adversely affect the wildlife of the area far into the future.

(d) And, "[o]ther resource management areas include extensive tracts under active forest management that are vital to the wood using industry and necessary to insure its raw material needs." APA Act § 805(3)(g)(1).

The project is not compatible with this criterion because the land will no longer be under active forest management, thereby reducing the available supply of raw materials for the wood using industry. See Point 1.A(4), supra.

(e) The stated purposes, policies and objectives of RM areas include that "[t]he basic purposes and objectives of resource management areas are to protect the delicate physical and biological resources ...". APA Act § 805(3)(g)(2).

The project is not compatible with this criterion because, as set forth above at Point 1.A(3), it will result in significant damage to, and fragmentation of, forest habitat and wildlife habitat on the RM lands.

(f) They also include that "[t]he basic purposes and objectives of resource management areas are to ... encourage proper and economic management of forest resources...". APA Act § 805(3)(g)(2).

The project is not compatible with this criterion because the forest resources of the land will no longer be under proper and economic management".

(g) And, "[t]he basic purposes and objectives of resource management areas are to ... preserve the open spaces that are essential and basic to the unique character of the park." APA Act § 805(3)(g)(2).

The project is not compatible with this criterion because it will take several thousand acres of open space and chop it up into dozens of housing lots, destroying its open space character. There is nothing "unique" about that.

(h) The final clause of APA Act § 805(3)(g)(2) states that residential use is only permitted on RM land under very limited circumstances. As set forth below at Point 1.B(2), the project does not satisfy any of those conditions.

The residential development proposed for the RM lands in the project is not compatible with any of the stated purposes, policies and objectives of RM areas or with the character description for such lands. Although residential use is a secondary compatible use in RM areas, any presumption in favor of allowing it has been thoroughly rebutted, and the application must be denied pursuant to APA Act § 805(3)(g) and § 809(10)(b).

2. The Residential Sites on RM Lands Do Not Fit the Very Strict Criteria of the APA Act

Residential development is only allowed on RM lands under very limited circumstances:

> Finally, resource management areas will allow for residential development on substantial acreages or in small clusters on carefully selected and well designed sites. APA Act § 805(3)(g)(2).

This wording shows that, because the primary purposes of RM lands are:

> to protect, manage and enhance forest, agricultural, recreational and open space resources is of paramount importance because of overriding natural resource and public considerations (APA Act § 805(3)(g)(2)).

Even though single family residences are secondary compatible uses on RM lands (APA Act § 805(3)(g)(4)), they are disfavored and are only allowed under very limited circumstances.

Thus, the exceptions that allow for residences "on substantial acreages" and "in small clusters" must be strictly interpreted to favor the overriding purpose of RM lands, which is the protection of their natural resources. APA Act § 805(3)(g)(1). In addition, all such residences, whether in clusters or on substantial acreages, must be on "carefully selected and well designed sites". APA Act § 805(3)(g)(2).

Although there are some other residences proposed by the applicant for RM lands, this issue is primarily focused on the Great Camp lots, which are almost all located on RM lands. Ex. 81, p. 30. The applicant has argued that it meets these criteria because the 8 larger Great Camp lots of 111 to 770 acres (id.) are on "substantial acreage" and the 31 smaller Great Camp lots are "in small clusters".

However, the applicant has not proven in the first place that it meets the very strict requirements of APA Act § 805(3)(g) for allowing residential development on RM lands. The smaller Great Camp lots, with an average size of 27 acres, and occupying 837 acres for only 31 homes (Ex. 81, p. 31), could only be considered to be "in small clusters" in a parallel universe, not in this one. And, while the 8 larger lots are arguably on substantial acreages, they are not on "carefully selected and well designed sites". Nor, in the context of what is currently a several thousand acre block of unbroken timberland, adjoining similar large blocks of land, are the two hundred +/- to seven hundred +/- acre Great Camp lots "substantial acreages".

By any logical definition, 837 acres is hardly a "small cluster". And, even as the applicant proclaims the 111 acre Great Camp lot D (Ex. 81. p. 30) to be "substantial acreage", it simultaneously touts 837 acres as a "small cluster". This logical inconsistency, in and of itself, requires rejection of the applicant's claim.

As for the 8 larger Great Camp lots, the evidence proves that because they are sprawled out across thousands of acres, they will have an undue adverse impact on those RM lands. Point 1.A, supra. And, as shown below at Point 1.C, it would be feasible to locate these lots much closer to the existing ski area. Thus, their sites were not "carefully selected". If they had been located along the existing public Lake Simond Road near the existing residential areas, or in another such location, on "well designed sites", then perhaps they might be found to be on "carefully selected" sites. However, this is not the case.

The Agency should also consider that, after taking into account:

1. the current state of the science regarding exurban development and habitat fragmentation (Point 1.A, supra);
2. its mandate to place "environmental concerns above all others" (Association v. Town Board, supra, at 830);
3. the very limited circumstances in which residential development is allowed on RM lands (APA Act § 805(3)(g)); and
4. the legal primacy given by the Act to the protection of natural resources on RM lands over a mere secondary use such as residential development (id.),

allowing residential development "on substantial acreages" should not be allowed on RM lands, when, as it is here, clustering is an available alternative. The Act allows "residential development

on substantial acreages **or** in small clusters". APA Act § 805(3)(g)(2) (emphasis added). It does not say that the Agency has to allow both. When clustering is a viable option, as it is in this case (Point 1.C, infra), whacking up thousands of acres of working forest and valuable habitat for housing should not be permitted.

The proposed Great Camp lots are neither "on substantial acreages ... on carefully selected ... sites" or "in small clusters", as required by APA Act § 805(3)(g)(2). Therefore, the application must be denied.

3. The 80 Proposed Single Family Dwellings In RM Are Only Secondary Uses And Are Not Compatible With the RM Land Use Area

The applicant has proposed to construct 80 single family dwellings in the Resource Management area. Parker PFT #12, pp. 7-9. Single family dwellings are "secondary uses" in Resource Management areas. APA Act § 805(3)(g)(4). While land uses on the list of primary compatible uses benefit from a rebuttable presumption that they are compatible with the land use area (§ 805(3)(a), § 809(10)(b)), that is not the case with secondary uses. For secondary uses, the applicant must prove[53] that they are compatible. APA Act § 805(3)(a) provides in pertinent part that:

> The secondary uses on such list are those which are generally compatible with such area depending upon their particular location and impact upon nearby uses and conformity with the overall intensity guideline for such area. (emphasis added)

The applicant failed to meet its burden of proving that the 80 proposed residences are compatible with their locations in RM lands. In addition, because of their proposed locations and potential impacts on nearby uses, as shown at Point 1.A, supra, the residences in the project which are proposed for Resource Management lands are not compatible with the Resource Management area, and the application must be denied.

Perhaps a single residence in the RM area of the project site might be compatible, or perhaps fewer residences located close to existing roads, without several miles of roads and

[53] See pages 5 to 8, supra.

driveways breaking up the woodland habitat, might be compatible. Perhaps if the design had been truly clustered, the project might be compatible. Perhaps if all or most of the RM land would remain in timber production, some residences on these lands might be compatible.

But dozens of residences, sprawled across the landscape in RM, will not be compatible in those "particular locations". At those locations, they will have an undue impact on the wildlife habitat and other natural values of the lands in question, as well as other nearby lands, both on and off the project site. Point 1.A, supra. The visual impacts of the homes on the RM lands will have an impact on uses far beyond the project site. Point 3.C, supra. They will also prevent thousands of acres from being used for timber management. Point 1.A(4), supra.

Thus, the "particular location and impact upon nearby uses" of the proposed residences on the project site's RM lands are not compatible with those lands, and the application must be denied pursuant to APA Act § 805(3)(a) and § 809(10)(b).

C. There Are Feasible Alternatives that Would Reduce the Project's Undue Adverse Impacts

At the hearing, intervening parties proved that there are at least two alternative project designs that would both achieve the project sponsor's goals, and reduce the project's undue adverse impacts upon the resources of the park. In keeping with the Agency's mandate to place "environmental concerns above all others (Association v. Town of Tupper Lake, supra, at 830), the application must be denied pursuant to APA Act § 809(10)(e).

1. The Protect the Adirondacks! Alternative

One such alternative would involve drastically reducing the size of the 39 Great Camp lots, which are proposed for RM lands. Protect established the feasibility of this alternative on cross-examination of the applicant's witnesses. As explained below, this alternative could be adopted without affecting the marketing and finances of the project.

Currently, there are 31 smaller Great Camp lots proposed, both east and west of the ski area. These lots would average

27 +/- acres each (Ex. 81. P. 31; Tr. 3734), and range in size from about 19 acres to about 34 acres. Ex. 81, p. 30.[54] They would occupy a total of about 837 acres. There are also 8 larger Great Camp lots proposed, which would occupy the entire middle and the eastern end of the site. They would range in size from 111 to 770 acres, for a total of 2,781 acres. Ex. 85, p. 30. Thus, the total acreage affected by the proposed Great Camps would be about 3,618 acres.

In the alternative, if the Great Camp lots were reduced to about 2 to 5 acres each for the smaller ones, and 85.25 acres each for the 8 larger ones, they would only occupy about 837 total acres instead of about (Tr. 3742) 3,600 total acres. Tr. 3738-3748. As the applicant's own witnesses admitted, if this were done, then there would be an additional 2,800 +/- acres of additional open space left undeveloped, without homes, roads, or other permanent development. Tr. 3742-3743. This would significantly reduce the undue adverse impacts of the project. See Point 1.A, supra.

Not only would this alternative protect far more land, it would still meet the applicant's financial needs, and would not adversely affect the marketing of the project. The applicant believes that early sales of the 24 eastern Great Camp lots (16 smaller and 8 larger) will allow it to generate capital for the construction of infrastructure and the rehabilitation of the ski area. However, in the words of the principal project sponsor, Michael Foxman, himself:

> 1. From a marketing standpoint, 10 to 30 acre lots[55] are not very different from 2 to 5 acre lots and, therefore, do not adequately serve the purpose of allowing an additional product that will increase the velocity of sales. The success of the project depends as much on when sales occur (revenue is generated) as on whether. By offering variety, we increase the likelihood we will have what a prospective buyer wants and, therefore, the rate of sales. Ex. 235, p. 1 (emphasis added).

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[54] Three of these lots are located on Moderate Intensity lands. Ex. 81, p. 30.

[55] This statement was made in relation to a suggestion by APA Staff that the lot sizes of the Great Camps be changed. Ex. 235.

A copy of the e-mail chain in which Mr. Foxman made this statement (Ex. 235) is appended hereto as Attachment C[56].

Therefore, there is no real difference between the 31 current 27 acre (on average) lots, a potential alternative of 31 Great Camp lots of 2 to 5 acres each, or the 2 to 5 acre lots currently proposed for other parts of the project. In Mr. Foxman's own words, the smaller Great Camp lots would "not adequately serve the purpose of allowing an additional product that will increase the velocity of sales". **Thus, there is no reason why the 31 current smaller Great Camp lots could not be reduced in size to 2 to 5 acres each.**

Reducing the size of these lots would reduce their total footprint from 837 acres, to 62 to 155 acres, leaving at least 682 acres of land that is currently slated for these lots available for other purposes. Tr. 3739-3743.

These remaining 682 acres could be used for 8 larger Great Camp lots, in place of the 2,800 acres currently planned for them. If this were done, the 8 lots would average 85.25 acres each. Tr. 3741. In the 2006 completed application, the average size of the 24 Great Camp lots (22 in RM, 2 in Medium Density) was 80.5 acres, and the median size was 84.8 acres, with the range being 52 acres to 149 acres. Ex. 81, p. 34. Prior to the hearing, the size, number, and layout of the Great Camp lots was changed in order to (allegedly) reduce impacts to natural resources.[57] Ex. 81, p. 34. The lots were not changed to generate more sales, or to change the pace and timing of sales. See Ex. 81, p. 34.

Since 80 to 85 acre lots were suitable for the applicant's needs as of 2006, and there is no evidence that they are not currently suitable, then Protect's alternative of 85.25 acre lots is an eminently suitable size to meet the applicant's alleged need for larger Great Camp lots. **Thus, there is no reason why the 8 current larger Great Camp lots could not be reduced in size to about 85 acres each.**

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[56] The discussion in this e-mail message about the potential rate of sales of the Great Camp lots is no longer valid. This e-mail is from 2005, before the real estate market crashed and the market changed radically. See Point 5/6, supra.

[57] This reduction in impacts was supposedly to be achieved by reducing the length of the roads and driveways and by other means. Ex. 81, pp. 34, 36-38.

The result of this resizing of the Great Camp lots would be that all 39 of them would fit on the 837 acres in the vicinity of the ski area that are currently slated for the 31 smaller Great Camp lots. Tr. 3743. The entire 2,781 acres that is currently slated for the 8 larger Great Camp lots would be preserved, and could be devoted to uses such as timber management, passive recreation and preserving wildlife habitat, all of which are compatible with RM lands under the APA Act. This would reduce the project's undue adverse impacts by reducing the mileage of roads and driveways (Ex. 81, pp. 32, 34) and reducing habitat fragmentation. Point 1.A, supra.

There is nothing in the record that proves that this alternative would not meet the alleged financial needs[58] of the applicant. Indeed, in 2004, Mr. Foxman stated, in a memo to the Read Family, that: "[w]e are attempting to cluster development west of your road so that we can create a 4,000 acre preserve east of it" and that any different site plan would be "less desirable". Ex. 237, p. 1.[59] Preserving 2,800 acres by consolidating the Great Camp lots, as discussed above, would allow the applicant to achieve much of this goal.

2. The Adirondack Council Alternatives

The other alternative proposed in the hearing was more elaborate. The Adirondack Council ("Council") presented a highly qualified expert witness who designed three entire conceptual alternate layouts for the project. Tr. April 26, 2011; Prefiled testimony of Harry Dodson. These alternatives contained the same elements as the applicant's design, and the same number of residential units. What differed was that they were much more tightly clustered, thereby reducing the footprint of the project, and its adverse environmental impacts.

The Council's witness testified that his alternative designs were both feasible and permitable. On rebuttal, the applicant's witnesses pointed out that on the conceptual drawings of the

[58] The applicant may claim that it would receive a lesser price for these alternative lots than it would for the currently proposed Great Camp lots. However, its projected pricing for those lots is grossly overinflated and it would not receive those claimed revenues from the Great Camp lots anyway. See Page 24, supra.

[59] A copy of this memo is appended hereto as Attachment D.

Council's alternative designs, the locations of some of the buildings were not actually buildable, due to the presence of wetlands and steep slopes. They also pointed out that the drawings of the alternative designs may have shown multi-family houses and/or other uses in RM areas, where they would not be on the list of compatible uses under APA Act § 805.

However, since the Council's alternative designs were only conceptual designs, and because it would be possible to change the conceptual locations of the buildings in question to more suitable locations, the applicant's nitpicking of the alternative designs did not change the fact that, if the project were to be redesigned to cluster all development to the east of the Read property, closer to the ski area, its adverse impacts would be greatly reduced.

Adopting a design based on the Council's alternative would also allow the applicant to achieve its goal of creating a 4,000 acre preserve east of the Read property. Ex. 237, p. 1 (Attachment D hereto).

Because the project's adverse impacts could be reduced by adopting one of the alternative designs discussed above, APA Act § 809(10)(e) require that the application must be denied. It is not feasible to comprehensively redesign the project by approving a permit, with conditions. However, if, after denial, the applicant still wishes to proceed with the project, it could submit a new application, based on one or more of the alternatives presented in the hearing.

D. The Application Does Not Comply With the Adirondack Park Land Use and Development Plan

For the reasons set forth throughout this brief, the project, including, but not limited to, those parts of it that would be located on RM lands, does not comply with the Adirondack Park Land Use and Development Plan. The applicant has failed to prove that its proposal complies with the law. Thus, APA Act § 809(10)(a) requires that the application be denied.

E. Issue #1 Conclusion

The application does not comply with any of the requirements of APA Act § 809(10)(a), (b) and (e). It will have significant undue adverse impacts on the natural resources of the park, particularly wildlife and wildlife habitat. It will also

eliminate thousands of acres of productive timber land from the park's resource base. Therefore, as a matter of law, the application must be denied.

ISSUE #3

The Application Must be Denied Because the Applicant Did Not Prove That the Upper Elevation Developments Would Not Have an Undue Adverse Impact on the Water, Land, Wildlife and Aesthetic Resources of the Park

Issue #3, as revised by the Hearing Officer in his Issues Ruling of November 16, 2010 (Ex. 87, Appendix B., p. 1) states:

Issue #3. What are the impacts of the proposed upper portions of the West Slopeside, and the Westface developments on the existing topography, vegetation and soils [DC (a)(2), (c)(1), (e)]; will the development as proposed cause excessive stormwater run-off, erosion and slippage in these areas [DC (a)(2)]; what will be the visual impacts during the day and night of these proposed sections [DC (a)(7)]?

The application should be denied because the applicant failed to meet its burden[60] of proving:

(1) that the project will not have an undue adverse impact on the topography, vegetation and soils on the upper portions of the proposed West Slopeside and Westface developments;

(2) that the stormwater run-off, erosion and slippage caused by the project will not have an undue adverse impact on the water, land and wildlife resources of the proposed upper portions of the West Slopeside, and the Westface developments; and

(3) that the visual impacts will not have an undue adverse impact on the aesthetic resources of the Park. Therefore, the application must be denied because the Agency cannot make the determination that the project will not have an undue adverse impact on the resources of the Park. APA Act § 809(10)(e).

The applicant's proposed West Slopeside development is located in a Moderate Intensity land use classification area and consists of 23 triplexes, 16 quads, and 17 single family homes, ranging in elevation from 1,970 feet to 2,170 feet. Taber PFT, pp. 8-9.[61] The applicant's proposed Westface development is

[60] Pages 5-8, supra.

[61] Prefiled Testimony of Mark Taber, 5/3/11, Tr. 1981, Attachment D (hereinafter "Taber PFT").

located in both Resource Management and Moderate Intensity land use classification areas and consists of 18 quads and 46 single family homes, ranging in elevation from 1,760 feet to 2,060 feet. Taber PFT, pp. 10-11.

As for the impacts on the topography, vegetation and soils caused by proposed upper portions of the West Slopeside and Westface developments, the applicant failed to reveal any substantive details about those impacts to these specific areas of the project site. The applicant did offer that its conceptual plans were specifically designed to minimize impacts. Despite these planning efforts by the applicant, Agency Staff suggested further eliminating or scaling back much of the applicant's proposal, as well as adding numerous permit conditions, to lessen the ill-defined impacts on the topography, vegetation and soils of this portion of the project.

Additionally, the record reflects the applicant's intentions to institute stormwater management, erosion and sediment controls plans that comply with DEC guidelines. However, Agency Staff, considering the shallow depth to bedrock and the steep slopes near the proposed project areas, questioned the applicant's ability to construct and implement the necessary stormwater management, erosion and sedimentation practices. Furthermore, the applicant's plans are incomplete and will need to be significantly revised before they can be implemented.[62]

Finally, the visual impacts associated with the project would not be compatible with the character of the surrounding land and would create an undue adverse impact upon the natural, scenic and aesthetic resources of the Park. The project would be visible from off-site locations, and in particular from the Village of Tupper Lake, during the daylight hours, as well as during the nighttime hours. Multiple factors, some of which are irreversible, contribute to the overall visibility of these portions of the project.

To approve the upper portions of the proposed West Slopeside and Westface developments, the Agency must determine that the project would not have an "undue adverse impact" on the natural, scenic, aesthetic, ecological and wildlife resources of the Park. APA Act § 809(10)(e). In making that determination, § 809(10)(e) requires the Agency to take into account the Development

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[62] See DEC Notice of Incomplete Application dated October 18, 2010, attached to Stipulation on Hearing Issues #3 and #9, May 9, 2011, between DEC and the applicant. This stipulation does not appear to have an exhibit number.

Considerations ("DCs") found in APA Act § 805(4). These DCs apply to each aspect of Issue #3.

A. There Would Be Undue Adverse Impacts on the Topography, Vegetation and Soils of the Upper Portions of these Developments

The DCs relevant to the topography, vegetation and soils aspect of Issue #3 include:

- § 805(4)(a)(1) - "Water"
- § 805(4)(a)(2) - "Land"
- § 805(4)(a)(5) - "Critical resource areas"
- § 805(4)(a)(6) - "Wildlife"
- § 805(4)(c)(1) - "Natural site factors"
- § 805(4)(e) - "Government review consideration"

Taking into account these considerations, the record shows that the project would have an undue adverse impact on the natural resources at the site because of the nature and scale of the project and the unavoidable consequences to the site's topography, vegetation and soils.

The applicant offered no explicit hearing testimony about how the upper portions of the proposed West Slopeside and Westface developments would impact the existing topography, vegetation and soils. See Taber PFT, pp. 4-5. The applicant did provide an inventory of the existing forest in those areas and how those forests can be expected to change over time, but the applicant did not describe proposed developments' impact on the forest inventories. Ex. 35, Applicant's Response to 2nd NIPA, dated October 2006, Vol. 1, pp. 77-81. The applicant acknowledged that impacts "vary by location," but failed to specifically identify topography, vegetation or soils impacts for the West Slopeside and Westface developments. Ex. 35, Applicant's Response to 2nd NIPA, dated October 2006, Vol. 1, p. 85.

Despite the applicant's failure to enumerate the actual impacts, it is clear from the description of the process and the various mitigation strategies that the applicant intends to use, that there would be a variety of impacts to the topography, vegetation and soils from the upper portions of the proposed West Slopeside and Westface developments.

According to Agency guidance, development activities should be located on slopes less than 15%, should minimize cuts and

fills, especially on north-facing slopes, and should not be located on soils with shallow depth to bedrock. DAP[63] 13A-2, 17-1, 25-1; 9 NYCRR Appendix Q-8, (A)(7), (B)(1),(2),(3).

The applicant explained that "cuts," "fills," "grading," and "clearing" of the land would be necessary to construct the project's buildings and roads and that some construction would take place on steep slopes. Taber PFT, pp. 4-5, 9-11. Agency staff also noted that "extensive clearing and blasting [would be] required for the installation of infrastructure and the structures themselves," as well as for the construction of the stormwater management, erosion and sedimentation practices. Lalonde PFT, #3[64], pp. 2-3. DC (a)(2)(a),(b); DC (c)(1)(a),(b),(c).

Agency Staff expressed concern that the proposed project is "located where bedrock is at or near the surface and/or adjacent to very steep slopes," thus making it "difficult to re-establish vegetation in disturbed areas." Lalonde PFT #3, p. 2. The applicant also acknowledged that "shallow depth to bedrock" is present on the site. Taber PFT, p. 10; Ex. 11, ACR Application, Vol. 1, pp. 2-9, 2-12-2-13; Ex. 13, ACR Application, Vol. 3, App. 15, p. 2 (bedrock was encountered at a depth of 5 inches at one test pit location). DC (a)(2)(a),(b),(h); DC (c)(1)(a),(b),(c).

Furthermore, the soils on the upper portions of the site consist of "mostly coarse textured glacial till soils" that generally "have a very firm fragipan," (Ex. 14, ACR Application, Vol. 4, App. 18, p. 1), which Agency guidance indicates is a soil type that is not suitable for development (DAP, p. 13A-2). DC (a)(2)(a),(b); DC (c)(1)(a),(b),(c).

Although the lots of most concern to the Agency have been eliminated from the applicant's proposal, there are still many lots located at high elevations on steep slopes. The buildings in these two developments would reach elevations of approximately 2,170 feet and 13 of the structures would be located on slopes of 15% or greater, with 7 of those located on slopes greater than 25%. Taber PFT, p. 9. The construction of roads and the stormwater management, erosion and sedimentation practices incidental to the project also remain fixtures of the project that would be problematic to implement.

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[63] APA guidance manual "Development in the Adirondack Park".

[64] Prefiled Testimony of Shawn Lalonde for Issues #3 and #9, 5/14/11, Tr. 2050 (hereinafter "Lalonde PFT #3").

In summary, the large-scale construction required for the proposed development of 120 structures (including triplexes, quads, and single family homes) would have irreversible impacts on the topography, vegetative cover, geology, slopes and soil characteristics on the site. DC (a)(2)(a),(b),(h); DC (c)(1)(a),(b),(c). Furthermore, the resulting changes to the topography, and the loss of vegetation and intact soils would also have an affect on the water resources and wildlife in the area. DC (a)(1); DC (a)(5)(c),(e); DC (a)(6).

Finally, the project, including the proposed West Slopeside and Westface developments, has not been granted all of the permits and approvals required by other state, federal and local jurisdictions. Future approvals for development aspects of the project will be required from the New York State Department of Transportation and the New York State Department of Health. Additionally, approvals from the Village and Town of Tupper Lake Planning Board, as well as the Franklin County Planning Department are necessary. DC (e)(1)(a).

Even though some of the worst lots have been eliminated, the extensive clearing, cutting, filling and grading required for the upper portions of the currently proposed project would have an undue adverse impact on the topography, vegetation and soils on the site because those activities would take place on steep slopes in soils with shallow depth to bedrock and would remove critical vegetation that would be difficult to re-establish. Therefore, the application should be denied. APA Act § 805(4), § 809(e).

B. There Would be Undue Adverse Impacts from Stormwater Run-off, Erosion and Slippage

The DCs relevant to the stormwater run-off, erosion and slippage aspect of Issue #3 include:

- § 805(4)(a)(1) - "Water"
- § 805(4)(a)(2) - "Land"
- § 805(4)(a)(5)(e) - "Wetlands"
- § 805(4)(a)(6) - "Wildlife"
- § 805(4)(c)(1) - "Natural site factors"

After taking these considerations into account, the record shows that the upper portions of these proposed developments would have an undue adverse impact on the natural, ecological and

wildlife resources at the site because the West Slopeside and Westface developments would cause excessive stormwater run-off, erosion and slippage.

The applicant alleged that the "stormwater management and erosion and sediment control plans [were] designed in accordance with NYSDEC guidelines." Taber PFT, p. 5. The West Slopeside development, which is located within a Moderate Intensity Land Use classification area, and the Westface development, which is located in Resource Management and Moderate Intensity Land Use classification areas, would both use construction and post-construction best management practices to control erosion. Taber PFT, pp. 6, 9-10.

As for stormwater, the applicant opined that the "proposed stormwater managements systems [would be] capable of minimizing erosion potential, effectively treating stormwater runoff . . . and reducing post-development runoff rates." Taber PFT, p. 6. The stormwater would eventually be discharged to nearby wetlands. Taber PFT, pp. 9, 11.

However, Agency Staff, considering the shallow depth to bedrock and the steep slopes on these portions of the proposed project areas, expressed its concern about the applicant's ability to successfully construct and implement the necessary stormwater management, erosion and sedimentation practices in these areas. Lalonde PFT #3, p. 2. Even though some of the lots were eliminated from the proposal, the higher parts of the development would still take place where "shallow depth to bedrock can be expected." Taber PFT, p. 10. A breakdown in the stormwater, erosion and sedimentation practices at the top of the site would affect the effectiveness of these controls on lower portions of the development.

Left unchecked, stormwater run-off will lead to excessive erosion and slippage, destruction of vegetative cover, and changes to site geology, slopes and soil characteristics. DC (a)(2)(b),(h); DC (c)(1)(a),(b),(c). Additionally, without the ability to maintain adequate controls, downstream water resources, particularly the recipient wetlands, would be adversely impacted as a result of degraded water quality, increased sedimentation, and changing drainage, runoff and flow patterns. DC (a)(1)(a),(b),(c),(d),(e); DC (a)(5)(e). These changes can have impacts on the fish and wildlife that rely on those downstream water resources. DC (a)(6).

The Agency Staff has also indicated that the application for the project's Stormwater Management Plan is still incomplete.

Tr. 1342, 1503-1508. See DEC Notice of Incomplete Application dated October 18, 2010. The applicant concedes that its application is not complete, that the application contained only "permit level plans and not construction level documents," and that the proposed plans will need to be revised. Taber PFT, p. 15.

The fact that the application is still incomplete at this late stage of the project's review, and the looming need for more revisions to the submitted plans, show that the Agency can not definitely determine that there would not be adverse undue impacts to the natural, ecological and wildlife resources at the site, and that the applicant has not met its burden of proof (pp. 5-8, supra.)

It is submitted that, due to the unanswered questions regarding the applicant's ability and plans to successfully implement the needed stormwater, erosion and slippage mitigation measures, the Agency must deny the permit application because it cannot determine that the project would not have an "undue adverse impact" on the natural, ecological and wildlife resources of the Park. APA Act § 805(4); § 805(4)(a)(1); § 805(4)(a)(2); § 805(4)(a)(5)(e); § 805(4)(a)(6); § 805(4)(c)(1); § 809(10)(e).

C. There Would be Undue Adverse Impacts to the Aesthetic Resources of the Park from the Upper Portions of the Proposed Developments

The DC relevant to the visual impacts aspect of Issue #3 is:

- § 805(4)(a)(7) - "Aesthetics"

In considering the aesthetic factors related to the proposed construction, the Agency should conclude that the project's visual impacts during the day and night would have an undue adverse impact on the aesthetic resources of the Park.

Although the upper portions of the proposed West Slopeside and Westface developments would be near the existing ski slope, there are no comparable structures anywhere on Mount Morris. The proposed residential accommodations would represent a major change to the character of the mountain that currently has only ski trails and chairlifts.

The upper portions of the proposed West Slopeside and Westface developments would be highly visible from off-site locations, particularly from the Village of Tupper Lake (Ex. 15, ACR Application, Vol. 5, App. 23, Fig. L15-WF), "during daylight hours due to their location on the landscape . . . and the structures themselves." Lalonde PFT #3, p. 2; Ex. 157, Digital Model: Over Lake Simond viewing southwest (HD # 34). DC (a)(7(b).

In addition to views from the Village, the upper portions of the proposed project would be visible during the day from Tupper Lake between Birch and Bluff Islands (Ex. 23, Applicant's Response to NIPA, Vol. 3, App. 47, Fig. V-A) and from the north shore of Tupper Lake across from the State Boat Launch (Ex. 15, ACR Application, Vol. 5, App. 23, Fig. L3-WF; Ex. 23, Applicant's Response to NIPA, Vol. 3, App. 47, Fig. V-3). The West Slopeside and Westface developments would also be visible from the southern end of Raquette Pond (Ex. 15, ACR Application, Vol. 5, App. 23, Fig. L4-WF; Ex. 23, Applicant's Response to NIPA, Vol. 3, App. 47, Fig. V-4).

It will also be visible during the day from Tupper Lake opposite the State Boat Launch and from the north shore of Tupper Lake near Bluff Island (Ex. 15, ACR Application, Vol. 5, App. 23, Figs. L2-WF, L3-WF), from the mouth of Raquette River (Ex. 15, ACR Application, Vol. 5, App. 23, Fig. L6-WF), from the Route 30 causeway (Ex. 15, ACR Application, Vol. 5, App. 23, Fig. L5-WF), from Raquette Pond (Ex. 15, ACR Application, Vol. 5, App. 23, Fig. L4-WF), from Lake Simond north of Pilot Pond (Ex. 15, ACR Application, Vol. 5, App. 23, Fig. L7-WF), from the Mt. Arab Fire Tower (Ex. 15, ACR Application, Vol. 5, App. 23, Fig. L12-WF), from NY Route 3 across Piercefield Flow (Ex. 15, ACR Application, Vol. 5, App. 23, Fig. L11-WF), from the Town Park (Ex. 15, ACR Application, Vol. 5, App. 23, Fig. L10-WF) and from the Tupper Lake athletic fields (Ex. 15, ACR Application, Vol. 5, App. 23, Fig. L16-WF). The last revised visual analysis was conducted in 2005, before significant changes were made to the project. Ex. 21, Applicant's Response to NIPA, Vol. 3, App. 47.

It should be noted that the applicant's simulated views in the viewshed analysis assumed a 40-foot height tree canopy (Ex. 11, ACR Application, Vol. 1, p. 5-18).[65] However, this

[65] The Applicant's Viewshed Analysis Map of Post-Development conditions was manipulated to include 50-foot tree heights for forest cover areas below 2,500 feet and 25-foot tree heights for forest cover areas above 2,500 feet. Ex. 14, ACR Application,

assumption failed to consider the difficulty, as discussed above at Point 3.A, of re-establishing vegetation on the proposed project site after construction activities have taken place. Due to the difficulty of re-establishing vegetation in the disturbed areas of the project where bedrock is near the surface (Lalonde PFT #3, p. 2), it will be difficult to use native vegetation to "blend the structure[s] with the surrounding landscape" or to "blend the development with the existing natural character of the hillside." DAP, p. 2A-3.

The applicant's assumption also did not take into consideration homeowners clearing and thinning vegetation to obtain better views from their properties and the inherent difficulties in enforcing restrictions against this cutting by homeowners. Tr. 593-594 (Dodson).

These two proposed developments would also be visible from off-site locations during nighttime hours "due to interior and exterior night lighting of the residential units" (Lalonde PFT #3, p. 2), as well as the lighting on roads and from vehicles. Tr. 628-629 (Dodson). In addition, the proposed developments, located in primarily deciduous forests, would be particularly visible during winter months. Tr. 620-621 (Dodson).

The dramatic visual changes to the landscape from the upper portions of the proposed West Slopeside and Westface developments would have undue adverse impacts on the scenic and aesthetic resources of the Park. APA Act § 805(4), § 805(4)(a)(7), § 809(10)(e). Therefore, the Agency must deny the application.

D. Issue #3 Conclusion

The Agency should deny the application because: (1) the project would have an undue adverse impact on the topography, vegetation and soils on the upper portions of the proposed West Slopeside and Westface developments; (2) the stormwater run-off, erosion and slippage caused by the project would have an undue adverse impact on the water, land and other resources of the upper and lower portions of the project site; and (3) the visual impacts from the upper portions of the proposed developments would have an undue adverse impact on the aesthetic resources of the Park. APA Act § 805(4), § 809(10)(e).

Vol. 4, App. 19, "The Preserve on Tupper Lake Viewshed Analysis Map: Post-Development (With Vegetation), dated July 29, 2004. Agency staff indicated that these were not accurate tree heights for the upper elevation areas and requested a revised visual analysis. Ex. 21, Applicant's Response to NIPA, Vol. 1, p. 124.

ISSUE #4

The Application Must be Denied Because the Applicant Did Not Prove That the Proposed Sewer District # 27 Would Not Have an Undue Adverse Impact on the Ability of the Public to Provide Supporting Facilities and Services

Issue #4, as revised by the Hearing Officer in his Issues Ruling of November 16, 2010 (Ex. 87, Appendix B., p. 1) states:

Issue # 4. Is it feasible to connect the proposed Sewer District # 27 to Sewer District # 23 via a pump station and associated components, taking into account design, location, impacts (such as noise, odors and visual, among others), costs (including long-term operation and maintenance costs) and any cost-sharing arrangements between Applicant, the Town and the Village, and whether all of the small eastern Great Camp Lots (i.e., Lots No. 16-31, inclusive) should be included in Sewer District # 27?

The application should be denied because the applicant failed to meet its burden[66] of proving that the proposed Sewer District # 27 would not have an undue adverse impact on the natural, scenic, aesthetic, ecological and wildlife resources of the Park or on the ability of the public to provide supporting facilities and services. Therefore, the application must be denied because the Agency cannot make the determination that the project would not have an undue adverse impact on the resources of the Park. APA Act § 809(10)(e).

Although there was testimony that the long-term operation and maintenance costs of Sewer District # 27 would be paid by the property owners, no specific details were provided about how the costs were estimated or how these costs would be collected or managed in the future.

It appears that the proposal has been reduced to only include the 44 Lake Simon View single family dwelling lots, and Great Camp Lots No. 27 and 28 in Sewer District # 27, and that the remaining lots will employ other means of sewage treatment. Agency Staff noted that Great Camp Lots 16, 17, 18 and 19 were not included in the proposed Sewer District # 27 and that, due to "[a]reas of bedrock and uneven terrain," Great Camp Lots 22-26 and 29-31 should also be excluded from Sewer District # 27.

[66] Pages 5-8, supra.

LaLonde PFT, #4,[67] p. 4. Agency Staff and the applicant seem to be in agreement that, "with the exception of Great Camp Lots 27 and 28, none of the remaining 10 eastern Great Camp lots (Lots 20-26, 29-31) should be included in the proposed municipal Sewer District # 27." LaLonde PFT #4, p. 7; Hernandez PFT, p. 11.[68]

To approve the proposed Sewer District # 27, the Agency must determine that the project would not have an undue adverse impact on the natural, scenic, aesthetic, ecological and wildlife resources of the Park or upon the ability of the public to provide supporting facilities and services made necessary by the new sewer district. APA Act § 809 (10)(e). In making that determination, APA § 809(10)(e) requires the Agency to take into account the Development Considerations ("DCs") found in APA Act § 805(4). The DCs relevant to Issue #4 include:

- § 805(4)(a)(1) - "Water"
- § 805(4)(a)(2) - "Land"
- § 805(4)(a)(3) - "Air"
- § 805(4)(a)(4) - "Noise"
- § 805(4)(a)(5) - "Critical resource areas"
- § 805(4)(a)(6) - "Wildlife"
- § 805(4)(a)(7) - "Aesthetics"
- § 805(4)(c)(2) - "Other site factors"
- § 805(4)(d) - "Governmental considerations"
- § 805(4)(e) - "Governmental review considerations"

A. The Connection may be Mechanically Possible, but it is Not Appropriate Given the Limited Benefits and Potential Undue Adverse Impacts

Agency Staff testified that the municipal sewer system has the design capacity to accept wastewater flow from the 44 proposed Lake Simon View dwellings as well as Great Camp Lots 27 and 28. LaLonde PFT #4, pp. 9-10. Agency Staff also indicated that connecting Sewer District #27 to Sewer District #23 "may help to alleviate any existing odor problems" by decreasing retention times and improving scouring of the existing system. LaLonde PFT #4, p. 9. DC (a)(3). The Applicant provided testimony that activated carbon would be used at the pump station

[67] Prefiled testimony of Shawn Lalonde for Issue #4, 5/4/11, Tr. 2062, Attachment E (hereinafter "Lalonde PFT #4").

[68] A stipulation regarding Issue #4 was admitted into the record on May 4, 2011. Tr. 2000. It is unclear whether or not this stipulation has an exhibit number.

to control odor, that visual impacts would be "non-existent" because all of the sewer components for Sewer District # 27 would be underground or incorporated into the pump station building and that no noise impacts are anticipated from the small aeration blowers housed inside the pump station. Hernandez PFT, p. 7.[69] DC (a)(3),(4),(7); DC (a).

Agency Staff noted that any potential benefits to the existing Sewer District # 23 from the proposed Sewer District # 27 would not be "realized until the proposed sewage pump station has been installed." LaLonde PFT #4, p. 11. Although the eastern small Great Camp Lots and the Lake Simon View lots are included in Phase I of the project, interestingly, the applicant did not include the sewage pump station in the list of components for Phase I of the project. Ex. 81, Applicant's Updated Information for Adjudicatory Hearing, Main Volume, June 2010, p. 12; LaLonde PFT #4, p. 10-11.

Furthermore, the final location of the pump station for Sewer District # 27 is yet to be determined. There have been discussions with the applicant regarding locating the pump station on Town-owned land, which "may further mitigate potential noise, odor and visual impacts to neighboring properties and provide some design benefits to the wastewater collection system." Hernandez PFT, p. 10; Tr. 2056.

Similar to the issues Agency Staff identified for the second smaller sewer treatment plant that has since been withdrawn from the proposed project (LaLonde PFT #4, p. 2), there are serious concerns related to environmental impacts and liability to the Town and Village of Tupper Lake if the pump station or its components fail and sewage effluent is released untreated. This type of failure would have an impact on the water quality (e.g., increased coliform, dissolved oxygen and total suspended solids concentrations, temperature changes and addition of other pollutants) of Lake Simond, the Raquette River (a designated Recreational River pursuant to ECL § 15-2714 and 9 NYCRR Appendix Q-6) and, ultimately, on the fish and wildlife dependent on those water bodies, as well as on the quality of those areas for recreational purposes. DC (a)(1); DC (a)(2)(i); DC (a)(5)(a); DC (a)(6).

There is insufficient evidence in the record related to these impacts and the applicant's proposals to mitigate these impacts to enable the Agency to make a favorable determination

[69] Prefiled testimony of Eduardo Hernandez, 5/4/11, Tr. 2054, Attachment D (hereinafter "Hernandez PFT #4").

with respect to Sewer District #27. See generally Ton-Da-Lay v. Diamond, 44 A.D.2d 430, 433-434, 438 (3d Dept. 1974).

B. Uncertainty Regarding the Cost Implications to the Village and Town Makes Sewer District # 27 Infeasible

As for costs, Agency Staff expressed concern that "[n]o documentation was provided on the actual capital and operation and maintenance costs associated with the newly proposed Sewer District # 27." LaLonde PFT #4, pp. 6, 11.[70] Further, Agency Staff were still "unclear" whether cost-sharing arrangements would be required. LaLonde PFT #4, p. 11. The applicant indicated that additional Village water and sewer department staff may be needed and that the Village would incur equipment replacement, routine maintenance and utility expenses annually. Ex. 85, Fiscal & Economic Impact Analysis – Updated Report, June 2010, p. 53. DC (d)(1)(a); DC (e).

The applicant offered testimony that the construction costs would be paid by the developer and long-term operation and maintenance costs would be paid by the property owners. Hernandez PFT, p. 8; Tr. 2057-2058. Infrastructure costs outside of the project area to upgrade the Village's wastewater collection and treatment systems to enable it to accept the wastewater flow were projected to total $3,636,680. Ex. 22, Applicant's Response to NIPA, Vol. 2, Att. 19, p. 10; Ex. 82, Applicant's Updated Information for Adjudicatory Hearing, Attachments, June 2010, Att. 5 (Wastewater Collection, Treatment and Disposal), pp. 7-8. DC (c)(2).

Also, as set forth above at Point 5/6.F, Protect's witness Shanna Ratner testified that this sewer district could lead to significant problems and expenses for the Town and/or Village.

C. Issue #4 Conclusion

Due to the potential impacts, the lack of information on operating costs and future cost-sharing agreements, and the uncertainty regarding the location of the pump station, the applicant has failed to demonstrate that these costs and problems would not become a burden to the Village/Town of Tupper Lake and

[70] The applicant estimated between $14,250 and $58,800 annually as total operation and maintenance costs for the first 20 years. Ex. 22, Applicant's Response to NIPA, Vol. 2, Att. 20.

ultimately the existing and future homeowners who will rely on Sewer District #23. Therefore, the Agency should deny the application because the proposed Sewer District would have an undue adverse impact upon the natural, scenic, aesthetic, ecological and wildlife resources of the Park and upon the public's ability to provide supporting facilities and services. APA Act § 805(4), DCs (a), (c), (d), and (e).

ISSUE #7

The Application Must be Denied Because the Project's Valet Boat Launch Service Would be an Illegal Use of the Forest Preserve and It Would Usurp the Entire Capacity of the State Boat Launch

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)]?

The application must be denied because the applicant failed to meet its burden[71] of proving that the project will not overwhelm the capacity of the New York State Department of Environmental Conservation ("DEC") boat launch ("Boat Launch") on Tupper Lake, thereby excluding the general public from using this facility. Therefore, the project will have an undue adverse impact on the recreational resources of the Park, and "... upon the ability of the public to provide supporting facilities and services made necessary by the project...". (APA Act § 809(10)(e)) and the application must be denied. Point 7.A, infra.

Indeed, not only did the applicant fail to meet its burden of proof, all of the evidence in the record demonstrates conclusively that the Applicant's proposed valet boat launching service will actually use up virtually all of the capacity of the Boat Launch. This problem can not be alleviated by permit conditions or by any other regulatory means. The simple fact is that the Project will overwhelm this public facility, to the point that the general public will be unable to use it. Point 7.A, infra.

In addition, the use of this public facility located on the Forest Preserve's Tupper Lake Boat Launch Intensive Use Area[72] to operate the applicant's private business is not permitted, as a matter of law. Point 7.B, infra.

Accordingly, for all of these reasons, in order to prevent the project from unduly, adversely affecting the resources of the Park and the ability of the public to provide supporting facilities and services, the application must be denied. Even if

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[71] Pages 5-8, supra.

[72] See Colleen Parker Issue #7 Prefiled Testimony, Tr. 251, Attachment B, 3/24/11 (hereinafter "Parker PFT #7"), p. 1:21-22; Bog River Unit Management Plan (2002); www.dec.ny.gov/docs/lands_forests_pdf/bogriver.pdf

all of the other problems with the project could be resolved, by permit conditions, or otherwise, this issue alone requires denial of the application.

A. ACR's Projected Level of Use Will Overwhelm the Boat Launch and Prevent the Public from Using It

The project may only be approved if the Agency determines that it will not have an undue adverse impact on the recreational resources of the Park, and "... upon the ability of the public to provide supporting facilities and services made necessary by the project...". APA Act § 809(10)(e). In addition, APA Act § 805(4) and § 809(10)(e) require that the Act's listed Development Considerations must be taken into account when making that determination.

The DCs relevant to Issue #7 include:

- § 805(4)(a)(5)(e) - "wetlands"
- § 805(4)(c)(2)(a) - "Adjoining and nearby land uses"
- § 805(4)(c)(2)(b) - "Adequacy of site facilities"
- § 805(4)(d)(1)(a) - "Ability of government to provide facilities and services"
- § 805(4)(e)(1)(a) - "Conformance with other governmental controls"

The record shows that:

- the project would unduly, adversely impact an adjoining land use, namely the Boat Launch, by usurping all of its capacity, and excluding the general public from using it (DC (c)(2)(a)); see also DAP, p. 4A-1.

- the project site's facilities, namely McDonald's Marina, are not adequate to handle the project's boat launching requirements, which will lead to the project usurping the Boat Launch (DC (c)(2)(b));

- the project would unduly adversely impact DEC's ability to provide boat launching facilities and services to the general public (DC (d)(1)(a)); and

- as shown at Point 7.B below, the proposed use of the Boat Launch is not in conformity with existing law and regulations governing the use of the Forest Preserve (DC (e)(1)(a)); see also DAP, p. 32-1.

The only waterfront facility owned by the applicant is the former McDonald's Marina on Tupper Lake. However, that site will only have about 40 boat slips (Ex. 81, p. 10) for the over 600 residences in the project, with very limited parking, and it is not suitable for a boat launch. Franke PFT #7, p.7:6-22.[73] To make up for this shortcoming, and to allow the resort residents and hotel guests to keep and launch boats, the applicant has proposed to operate the valet boat launching service at the Boat Launch, which is part of the State-owned Forest Preserve.

APA Staff testified that:

> As ACR builds out over time, 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. 3:23-4:3.

The live testimony proved that this was a valid concern, and that the project would indeed "limit or affect the ability of the general public to use the State boat launch and cause congestion and user conflicts" as the Staff had feared. Id.

The applicant estimated that the valet service will typically launch up to 47 boats per day. Tr. 195:21-196:8; Parker PFT #7, p. 3:3-9. On cross-examination, the applicant's witness admitted that the Boat Launch can only accommodate about 48 boats per day. Tr. 186-195. Prior to this testimony, the applicant had claimed that the capacity of the Boat Launch was 96 boats per day (Tr. 194:14-21), but its so-called experts had apparently forgotten that every boat that goes into the water, must also come out, thereby cutting the alleged capacity in half, to 48 per day.

The applicant's witness then conceded that the private valet service would only leave one spot per day for the general public to use:

> Q. -- if the daily capacity is forty-eight boats and the daily usage from the A.C.R. project is forty-seven boats, which you've just testified to, how many boats per day from the general public would be able to use the boat launch under those circumstances?
>
> A. Based on those numbers, one additional one.

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[73] Kevin Franke Issue #7 Prefiled Testimony, Tr. 172, Attachment A, 3/23/11 (hereinafter "Franke PFT #7").

Q. One. Very good. Thank you.

Tr. 196:16-24. Despite later attempting to back away from this math, the witness ultimately conceded that congestion at the Boat Launch was indeed possible. Tr. 231:18-23.

Even after the Town of Tupper Lake's attorney tried to rehabilitate the testimony of the applicant's witness on the capacity of the Boat Launch, the witness still admitted that its capacity is only about 50 boats per day. Tr. 239. Thus, it is unrefuted, based on the testimony of the applicant's own witness, that the capacity of the Boat Launch will be totally usurped by the project.

According to data collected by the Watershed Stewardship Program of the Adirondack Watershed Institute of Paul Smith's College in 2009 and 2010, the current daily public use of the Boat Launch is in the range of 40 to 50 boats on many summer weekends, with the highest use usually occurring on summer weekends with favorable weather. Ex. 125, pp. 62-67; Ex. 126, pp. 73-79. Thus, on those weekends, the Boat Launch is already at or near its capacity of 48 per day. Adding the project's usage of up to 47 boats per day, whether via the valet service, or otherwise, will completely overwhelm it.

While the applicant claims that its estimate of 47 boats per day being launched is only "an estimated average to maximum number" (Tr. 197:12-14), the highest usage will no doubt occur on holidays and weekends, when public usage is also at its highest (Tr. 321-322; Ex. 125, pp. 62-67; Ex. 126, pp. 73-79), thereby compounding the problem.

Also, 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; Ex. 125, pp. 62-67; Ex. 126, pp. 73-79).[74]

Even without the valet service, boating from the project would overwhelm the facility, so a permit condition to prohibit the service would not bring the project into compliance with the

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

APA Act.[75] There is nothing to prevent project residents from launching their boats at this public facility on their own. Tr. 203-206, 252; Parker PFT #7, p. 5:19-20.

It is also noteworthy that the application originally stated that "the provision of two on-site canoe launches will further reduce the demand on the Boat Launch by resort canoers and kayakers." Ex. 21, February 2006, Vol. 1, p. 28. However, in 2007, one of these on-site canoe launches was dropped from the Project. Tr. 31:20-21; Ex. 81, p. 23. The other canoe launch would be at the Marina, but parking and access there are extremely limited. Ex. 82, Attachment 17; Franke PFT #7, p. 7:16. Therefore, ACR residents and guests wanting to use car-top boats will also use the Boat Launch and the overcrowding problem there will be even worse than the applicant's witness admitted to.

The applicant apparently never asked DEC what the design capacity of the ramps at Boat Launch is. Nor did it rely upon any form of engineering analysis of the launch's capacity or other professional standards. Instead, it merely assumed that parking was the limiting factor on the use of the Boat Launch, as DEC had apparently stated. Franke PFT #7, p. 7:1-5. This analysis was completely flawed because the valet service would not use any parking spots. The launch ramp itself obviously does not have infinite capacity, yet the Applicant failed to take this into consideration at all. Tr. 197-198.

The applicant and the Town argued that the overcrowding problem will only occur at full build-out of the project (Tr. 255, 287). However, in making its decision, the APA must take into account the full life of the project, and not just its early years.

APA Staff also argued that DEC could expand the Boat Launch to accommodate the project's overwhelming usage of this public facility. Tr. 252-253. However, there are no plans in the applicable Unit Management Plan to expand the boat launch (Tr.

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[75] In addition, the applicant has made it quite clear that it would not accept any permit conditions that redesign the project, and that the APA's only role is to approve or disapprove the project. Tr. 28:6-22. "[T]he Applicant alone defines its project...". Tr. 28:15. "In the case of the A.C.R. project, what is proposed by the Applicant is what is before you." Tr. 28:21-22.

252-253)[76], and the applicant has not proposed to pay for any such expansion. Given the State's fiscal realities, the chances of the State paying to expand the facility are slim to none. Therefore, it is highly unlikely that this problem can be mitigated.

Protect is also concerned that, due to the substantial expense of operating this service (Tr. 206-212)[77], the resort may not actually operate it, forcing its 47 customers per day (Tr. 196) to trailer their own boats to the Boat Launch, and quickly filling all 27 (Parker PFT #7, p. 2:1-2) of the trailer parking spaces available there.

Also, the use of the valet launch service will be slow and inconvenient, with patrons being locked into rigid schedules. Tr. 214-215, 326-328. Some guests may just ignore its availability and launch their own boats, again overwhelming the parking capacity of the Boat Launch. Tr. 203-206. See also Ex. 21, February 2006, Vol. 1, p. 28. The Applicant provided absolutely no analysis, only guesswork, of whether or not people will actually use this service. Id. Common sense says that many will not.

The hearing testimony also showed that, at times, the 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. Tr. 312-318, 321-325. An experienced local boater testified that the addition of 47 boats per day from the project would create more congestion at the launch site and in the parking lot. Tr. 322-323. This testimony also showed that in the event of a storm on the lake, it would be difficult to get all 47 resort-based boats off the lake. Tr. 326-327.

Merely imposing a permit condition prohibiting the use of the Boat Launch by the valet launching service will not bring the project into compliance with the law. As Colleen Parker of the APA Staff testified, the members of the ACR can use the Boat Launch just like any other member of the public. Tr. 252. As

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[76] Bog River Unit Management Plan (2002); www.dec.ny.gov/docs/lands_forests_pdf/bogriver.pdf

[77] Each of the 47 launch and pick-up cycles would require three staff people, working for a total of three hours, and two vehicles, at a total cost to ACR of about $1,500 per day (Tr. 206-212), with a staff of about 15 to 17 people (Tr. 210:21-24), yet the users would not be charged for this service. Tr. 207:13-19.

the applicant's witness admitted, there is nothing to stop them from doing so (Tr. 203-206), with or without the launching service. See also Ex. 21, February 2006, Vol., p. 28. Indeed, as discussed above, with or without the valet service, the project will overwhelm the capacity of the Boat Launch and preclude public use thereof. Nor do the APA Staff's draft permit conditions do anything to address this problem.

Because the project will usurp the capacity of the Boat Launch, for all of the reasons set forth above, the application must be denied pursuant to APA Act § 809(10)(e), § 805(4)(a)(5)(e), § 805(4)(c)(2)(a), § 805(4)(c)(2)(b), § 805(4)(d)(1)(a), and § 805(4)(e)(1)(a).

B. The Proposed Private Commercial Use of of the State Forest Preserve Boat Launch By the Applicant Is Not Allowed by Law

The use of the Tupper Lake Boat Intensive Use Area of the Forest Preserve by the applicant's private commercial valet boat launching service would violate Article 14, § 1 of the State Constitution and other applicable laws and regulations. One of the Development Considerations that the Agency must consider in making its decision on this project is "[c]onformance with other governmental controls". APA Act § 805(4)(e)(1)(a). Tr. 259:22-260:7. Because the proposed valet service would not conform with numerous governmental controls, the application must be denied.

1. The Valet Boat Launch Service Would Violate the State's Constitution, Laws and Regulations

The proposed valet service is prohibited by numerous governmental controls, such that it would be illegal to operate it at the Boat Launch.

a. State Constitution Article 14. It is undisputed that the Boat Launch is part of the Forest Preserve.[78] Article 14 § 1 of the New York State Constitution provides that:

> the lands of the state, now owned or hereafter acquired, constituting the forest preserve as now fixed by law, shall . . . not be leased, sold or exchanged, or be taken by any corporation, public or private.

[78] See Bog River Unit Management Plan (2002); www.dec.ny.gov/docs/lands_forests_pdf/bogriver.pdf

DEC is vested with the power to exercise "care, custody and control," of the Forest Preserve, which includes the regulation of possession and occupancy of those lands. ECL § 9-0105; see People ex rel. Turner v. Kelsey, 18 Bedell 24, 26 (1904). Private persons or corporations cannot deprive the State of possession of facilities in forest preserve lands that are held "in trust for the people." People v. Baldwin, 113 M. 172, 176 (1920). See generally Saranac Land & Timber Co. v. Roberts, 195 N.Y. 303, 319-323 (1909); People ex rel. Turner, supra, at 26-27. Further, corporations may not operate state-owned facilities on the Forest Preserve, unless they are acting as agents of the State. See Slutzky v. Cuomo, 128 M.2d 365, 367 (1985), quoting 1947 Ops. Atty. Gen. 171, 173; aff'd 114 A.D.2d 116 (3d Dept. 1986).

ACR's proposed valet service is not permitted by law because it would completely take over the Boat Launch. As set forth at Point 7.A above, the service would use essentially all of the capacity of the Boat Launch, leaving little or no room for the public to use the facility. As such, ACR's use of the facility would dispossess the State of the use of the Boat Launch. See Baldwin, supra, at 176. With the predicted amount of use of the valet service, ACR's proposal would make it an operator of the State-owned facility, which it is not permitted to be unless it is an agent of the State. See Slutzky, supra, at 367; see also 1941 Op. Atty. Gen. 280 (noting that a private organization is not permitted to use buildings in the Forest Preserve for the operation of a boys' camp).

However, ACR cannot argue that it would be "acting as an agent of the State" because there is no agreement between DEC and ACR concerning the comprehensive management and control of the boat launch. Slutzky, supra, at 367-368. Nor would any such agreement be constitutional, because ACR's intent is to operate its valet service, and to usurp the capacity of the Boat Launch, solely for the benefit of its residents and guests, and not for the benefit of the People of the State. Id.

Therefore, as proposed, ACR's valet service at the State-owned Boat Launch would constitute an illegal occupancy, possession or operation of a State facility by a private corporation on the Forest Preserve, which is not permitted by Article 14.

b. Environmental Conservation Law. ECL § 9-0301(1) mandates that the Forest Preserve "... shall be forever reserved

and maintained for the free use of all the people ...". Allowing ACR to monopolize this facility would violate that mandate.

c. DEC Regulations. DEC's regulations for the use of State lands, including the Forest Preserve, at 6 NYCRR § 190.8(a) prohibit "...the use of State lands or any structures or improvements thereon for private revenue or commercial purposes...".[79] More specifically, 6 NYCRR § 190.24(d) provides that "[n]o person shall conduct any business ... at a boat launching site." As set forth below at Point 7.B(2), the valet service would be a private commercial business operating on State land, which is prohibited by both 6 NYCRR § 190.8(a) and § 190.24(d).

2. The Record Does Not Support the Applicant's Claim that the Proposed Private Commercial Usage of a State Facility is Legal

There was no testimony in the hearing to support the applicant's claim that the use of the Boat Launch by the proposed valet launching service would be legal. The applicant's witness attempted to do so in his prefiled testimony but the Hearing Officer ruled that these statements "require the witness to make a legal conclusion, which he is not qualified to do", and disallowed the testimony.[80] Tr. 173, 178-179.

The Applicant's witness's prefiled testimony also offered some vague double hearsay that about alleged conversations on this issue between the applicant's counsel and DEC, and suppositions that silence by DEC on this issue equated to its support for the valet launching service. Franke PFT #7, pp. 2, 8; Tr. 174-175. However, there is actually no support for this claim in the record.

The applicant's attorney did not make any effort to substantiate this hearsay. Counsel for Protect even suggested during his objection to the admission of Mr. Franke's prefiled testimony, that if the applicant's attorney had actually had such conversations with DEC, he could take the stand and testify to

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[79] The rule lists certain exceptions, none of which apply to the valet launch service.

[80] Mr. Franke's prefiled testimony, at Franke PFT #7, pp. 1:26-2:2 and pp. 8:15-9:6, was disallowed by the Hearing Officer because Mr. Franke was not qualified to address this issue, but it was not physically stricken from the document. Tr. 173-179. Nevertheless, it must be disregarded. Id.; See pp. 5-8, supra.

them. Tr. 174:19-175:8. However, the applicant's attorney failed to do so. Therefore, these alleged conversations are not credible evidence and should not be considered by the Agency.

Despite being a party to the hearing, and despite the fact that the Regional Attorney was present during this testimony (Tr. 6-7), DEC declined to testify or otherwise address this issue. Parker PFT #7, p. 2:13-15.

APA Staff testified that "[t]o my knowledge, no formal determination from NYSDEC has yet been provided regarding ACR use of the State boat launch." Parker PFT #7, p. 4:8-10. Ms. Parker also testified for APA Staff that she had discussed this question with the DEC Regional Attorney, but all that she was told was:

> that the members of the A.C.R. would be considered members of the public and thus would be able to use the State boat launch. He also explained to me that the Department does not prohibit groups of people from using a State boat launch. Tr. 252.

However, she did not testify that DEC told her that commercial businesses could use State boat launches or that the ACR resort's commercial valet service could use the Boat Launch. Tr. 275-278. DEC only told her that the ACR members could use it, not the resort itself, or its valet service. Tr. 252, 276-278. Thus, there is no first-hand, or even hearsay, testimony from an employee of the State of New York that it would be legal for a commercial service such as the applicant's valet service to use the Boat Launch. Ms. Parker confirmed that she is not aware of any current commercial use of the Boat Launch. Tr. 277-278.

The applicant's witness did testify that there are other business uses of state boat launches, such as "duck boat" tours in Albany. Franke PFT #7, p. 8; Tr. 219-221. However, those uses are all low-volume uses which would not monopolize the launch facilities in question. See Franke PFT #7, p. 8; Tr. 219-221. Nor was the witness sure whether or not any of the launches in question were on Forest Preserve lands. Tr. 219-220. Therefore, there is no precedent for such heavy commercial use of a State boat launch or other Forest Preserve facility.

The fact that money will not change hands at the Boat Launch itself (Franke PFT #7, p. 7:23-24) does not alter the commercial nature of the valet service. It will be a part of the applicant's business, operating in part out of its commercial business, the former McDonald's Marina. The applicant concedes that there will be commercial transactions involved. Ex. 11,

April 2005, Vol. 1, pp. xviii-xix, 2-52. Even if no money will change hands at the Boat Launch (Tr. 207), the valet service will still be part of the resort's business. It will be available to both homeowners and hotel guests in the project. Tr. 199. It will have significant operating costs, that will have to be paid by the resort, from the resort's business revenues or other revenue streams. Tr. 199, 207.

The record proves that the valet service will be a commercial business, which will use the Boat Launch as an integral part of its services. The operation of such a business at the Boat Launch is prohibited as a matter of law. Point 7.B(1), supra; 6 NYCRR § 190.8(a), § 190.24(d).

Even if the valet launching service was not categorically excluded from using the Boat Launch as a commercial use or business (6 NYCRR § 190.8(a), § 190.24(d)), it is prohibited because the residents and guests of its almost 700 residential units will overwhelm the capacity of the State facility and dispossess the public from its use. Point 7.B(1), supra. As set forth at Point 7.A above, ACR would usurp virtually all of the capacity of the Boat Launch. Therefore, in order to prevent the ACR project from violating Constitution Article 14, the ECL, and the NYCRR, the application must be denied.

C. Issue #7 Conclusion

The applicant had the burden of proving that its valet boat launching service would not have an undue adverse impact on the Boat Launch. Pages 5-8, supra. This, it utterly failed to do. That alone requires denial of the application. Id. Instead, its own witnesses' testimony proved that the valet service would usurp all of the capacity of this Forest Preserve facility. The applicant also failed to meets its burden of proving that it is permitted to operate its commercial business at the State-owned Boat Launch.

Therefore, the applicant is prohibited from using the Boat Launch for its valet launching service because it would overwhelm the capacity of the Boat Launch in violation of APA Act § 809(10) and the following DCs:

- § 805(4)(a)(5)(e) - "wetlands"
- § 805(4)(c)(2)(a) - "Adjoining and nearby land uses"
- § 805(4)(c)(2)(b) - "Adequacy of site facilities"
- § 805(4)(d)(1)(a) - "Ability of government to provide facilities and services"

- § 805(4)(e)(1)(a) - "Conformance with other governmental controls"

In addition, the valet service would be an unconstitutional and illegal commercial use of the Boat Launch. With or without the valet service, the project would have an undue adverse impact on this State facility. Therefore, the application must be denied.

ISSUE #8

The Application Must be Denied Because the Applicant Did Not Prove That the Impacts on Wetlands from the Project Would Not Have an Undue Adverse Impact on the Wetland and Wildlife Resources of the Park

Issue #8, as clarified by the Hearing Officer in his Issues Ruling of November 16, 2010 (Ex. 87, Appendix B., p. 3) states:

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 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.

The application should be denied because the applicant failed to meet its burden[81] of proving project would not have an undue adverse impact on the wetland values and functions in the areas of the Cranberry Pond wetland complex, the marina and the base lodge footprint. The evidence in the record demonstrates that the applicant did not assess the impacts to these areas. Therefore, the application must be denied because the Agency cannot make the determination that the project would not have an undue adverse impact on the resources of the Park. APA Act § 809(10)(e); see Matter of Pfau v Adirondack Park Agency, 137 A.D. 2d 916, 917 (3d Dept 1988).

The impacts to Cranberry Pond from the proposed development and from the proposed use of Cranberry Pond as a source of water for snowmaking were not fully defined. Similarly, the impacts to the wetlands in the marina and base lodge footprint areas were virtually ignored in the hearing. Thus, the applicant has not adequately addressed the need for alternatives and/or mitigation measures that would reduce the impacts on the wetland values and functions in the areas of the Cranberry Pond wetland complex, the marina and the base lodge footprint. Because the applicant did not meet its burden of proof, the Agency must deny the

[81] Pages 5-8, supra.

application because the project would have an undue adverse impact on the wetland values and functions in the areas of the Cranberry Pond wetland complex, the marina and the base lodge footprint. APA Act § 809(10)(e).

In making that determination, APA Act § 809(10)(e) requires the Agency to take into account the Development Considerations ("DCs") found in APA Act § 805(4). The DCs relevant to Issue #8 include:

- § 805(4)(a)(1) - "Water"
- § 805(4)(a)(2) - "Land"
- § 805(4)(a)(5) - "Critical resource areas"
- § 805(4)(a)(6) - "Wildlife"
- § 805(4)(c)(1)(d) - "Depth to groundwater and other hydrological factors"

A. The Applicant Provided No Impact Analysis

Aside from pointing out that the project would result in filling a certain amount of wetland acreage (Ex. 11, ACR Application, Vol. 1, p. 4-8), the applicant did not identify the true impacts to the wetland areas on the project site.[82]

The project's effects on Cranberry Pond are unclear and not specifically identified with respect to the impacts on fish, birds, mammals and wildlife habitat. Tr. 1860, 1863 (Spada); Tr. 1747-1756 (Franke). The applicant did not identify, evaluate or inventory birds, fish, mammals or aquatic invertebrates in the Cranberry Pond wetland complex. Tr. 1761, 1769, 1773, 1789 (Franke); Tr. 1846, 1848, 1882 (Spada).

Nor did the applicant identify vernal pools, a "major key habitat" (Tr. 1130 (Klemens), or amphibian or reptilian migration routes in the Cranberry Pond wetland complex (Tr. 1870, 1882 (Spada); Tr. 1090 (Klemens); Tr. 1986 (Taber).

Further, the impacts "to fish, wildlife and other biota within Cranberry Pond and to the value and benefits of existing wetlands associated with the pond" resulting from a reduction in the volume of Cranberry Pond due to water withdrawals for

[82] The applicant did identify and delineate the wetlands on the portions of the site that "appeared to be suitable for development." Ex. 11, ACR Application, Vol. 1, p. 3-8.

snowmaking were not determined.[83] LaLonde PFT #8,[84] p. 10; Tr. 1165 (Klemens); Tr. 1787-1789 (Franke); Tr. 2033 (LaLonde). Even though the applicant acknowledged that the impacts of winter drawdowns are "species specific," no inventory of the species in Cranberry Pond was conducted. Ex. 35, Applicant's Response to 2nd NIPA, Vol. 1, p. 109.

In the future, the applicant may be required to "prepare a study plan for the fish inventory and impact assessment" on existing pond biota from Cranberry Pond's use as a source of snowmaking water. Ex. 81, Applicant's Updated Information For Adjudicatory Hearing, Main Volume, p. 66.

As for the marina and base lodge wetlands, little was done to evaluate the impacts in those areas. Only a casual evaluation was conducted of marina and base lodge wildlife. Tr. 1773-1774 (Franke); Tr. 1845 (Spada). Although the applicant identified that there would be a "shift" or "loss" of wetland vegetation (Ex. 11, ACR Application, Vol. 1, p. xv), the impacts to amphibians, water fowl and mammals at the marina were not considered (Tr. 1743-1744). Impacts from activities in the area of the base lodge on wetland values and functions, wildlife and amphibians were not considered. Tr. 1744-1745 (Franke).

In fact, the applicant considered this wetland as having very little value because it had been historically mowed and previous attempts had been made to "channelize flow of water out of the wetland and away from the base lodge." Ex. 21, Applicant's Response to NIPA, Vol. 1, p. 147; Ex. 11, ACR Application, Vol. 1, pp. 4-9 to 4-10.

Therefore, due to the applicant's failure to provide a full impact analysis for these wetlands, there is simply "insufficient data" to make a determination that the project would not have an undue adverse impact on the Cranberry Pond, marina and base lodge wetlands and their associated values and functions. Tr. 1161 (Klemens, April 27, 2011); Tr. 1863 (Spada, May 3, 2011). The applicant failed to meet its burden of proof and the application

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[83] Although required as a condition in the previous permit for snowmaking withdrawals from Cranberry Pond, the impact on Cranberry Pond, and its associated wetlands, from water drawdowns was never determined; no monitoring was ever completed. Prefiled Testimony of Daniel Spada for Issue #8, 5/3/11, Attachment B (hereinafter "Spada PFT #8"), p. 4.

[84] Prefiled testimony of Shawn Lalonde for Issue #8, 5/4/11, Tr. 2009, Attachment B (hereinafter "Lalonde PFT #8").

must be denied. APA Act § 809(10)e), DCs a(1), a(2), a(5), a(6) and c(1)(d).

B. There Would be Undue Adverse Impacts on the Cranberry Pond Wetland Complex, the Marina and the Base Lodge Footprint

Although the impacts have not been fully identified, it is clear that the values and functions of the Cranberry Pond wetland complex, which contains "key" boreal Adirondack habitat, would be adversely affected by various aspects of the proposed project. Glennon PFT #8,[85] pp. 5-11. DC (a)(5)(c),(e). The applicant's own witness, Mr. Taber, admitted that there would be impacts to species composition and diversity and wetland values and functions from the use of the Cranberry Pond wetland complex as a recipient of the stormwater from portions of the site and the wastewater from the site's wastewater treatment plant. Tr. 1985-1986. DC (a)(1)(a),(b),(c),(d),(e),(f); DC (a)(6).

The project's upland developments and roads would disconnect amphibians from their critical wetland breeding areas. Tr. 1079-1080, 1186-1187. DC (a)(6). The APA Staff testified that the project's roads would cause some wetland areas to be filled and wetland vegetation cut. Tr. 1890 (Spada, May 3, 2011). DC (a)(2)(f),(h); DC (a)(5)(c),(e); DC (a)(6). See also Spada PFT #8, Tr. 1811. This testimony was strongly supported by the testimony of Dr. Klemens. Tr. 1002-1198, 3134-3225; Prefiled Testimony of Michael Klemens, 4/27/11, Attachment A; Supplemental Prefiled Testimony of Michael Klemens, 6/7/11, Tr. 3137, Attachment A.

Withdrawing water from Cranberry Pond for snowmaking purposes may result in the loss of vegetation from freezing effects, the crowding and stressing of species that are active in the winter, such as newts, fish, tadpoles, bullfrogs and green frogs, and in "significant mortality" of those species that tend to hibernate in the mud at the edge of the pond or in mud in shallow waters of the pond. Tr. 1164, 1794-1795, 1844, 1849, 1887-1889. DC (a)(5)(c),(e); DC (a)(6). These losses would affect other species higher up the food chain. Tr. 1930-1931 (Glennon). DC (a)(6).

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[85] Prefiled Testimony of Michale Glennon, 5/3/11, Tr. 1912, Attachment D (hereinafter "Glennon PFT #8"). See also Supplemental Prefiled Testimony of Michale Glennon, 5/3/11, Tr. 1912, Attachment E.

Agency Staff also testified that snowmaking water withdrawals from Cranberry Pond may lead to additional impacts to wetlands, fish, wildlife and other biota, but that these impacts and the impacts to the value and benefits of the Cranberry Pond wetlands are still unknown. LaLonde PFT #8, p. 10; Tr. 2033 (LaLonde). The applicant did nothing to meet its burden of proof on this question.

Development of the base lodge would cause fragmentation of the wetlands in that area and would likely cause alteration of the surface water and groundwater hydrology. DC (a)(1)(d),(e),(f); DC (a)(5)(c),(e). It is submitted that the historic efforts to effectively destroy the base lodge wetland (e.g., mowing of the vegetation and channelization) should not minimize the value that the wetland in that area serves, particularly considering the shallow groundwater level in that area (Ex. 21, Applicant's Response to NIPA, Vol. 1, p. 147) and the hydrogeologic connectivity of the entire location (Ex. 11, ACR Application, Vol. 1, pp. 3-2 to 3-3). DC (c)(1)(d).

Additionally, impacts to the marina area would include not only physical impacts to wetland vegetation from boat traffic, but also disruption of fish spawning patterns and possible sedimentation in the wetland. Tr. 1742-1743 (Franke); Tr. 1858 (Spada). DC (a)(1)(a),(b),(c); DC (a)(5)(c),(e).

C. Alternatives that May Lessen the Impacts Were Not Adequately Developed or Considered

The applicant's proposal did not mitigate impacts to the wetlands, but "[m]erely avoided placing fill in those wetlands." Tr. 1138 (Klemens). It was also revealed that the buildings were placed 100 feet from the wetlands only inadvertently and that locating the buildings farther from the wetlands would be a better alternative. Tr. 1882 (Spada). Additionally, an "alternate plan," such as development more tightly clustered than the current proposal, would provide greater amounts of natural habitat, promote connectivity between habitat areas and "would result in less overall impact to the boreal wetland complex surrounding Cranberry Pond." Glennon PFT #8, pp. 12-13.

As for snowmaking water, Cranberry Pond contains only a limited amount of water that can not support the proposed project. Tr. 2028-2032 (LaLonde). Agency Staff testified that "Cranberry Pond is not a reliable long-term source of snowmaking water which is essential to the viability of the Ski Center portion of the project." LaLonde PFT #8, p. 10. This is

particularly the case due to the fact that the volume of Cranberry Pond is heavily dependent on beaver activity to maintain the existing beaver dam, which maintains the current water level. LaLonde PFT #8, pp. 9-10. Agency Staff concluded that "Tupper Lake represents a more reliable source of water that minimizes impacts to wetlands, fish, wildlife and other biota and would ensure the long-term viability of the Ski Center." LaLonde PFT #8, pp. 9-11.[86]

It should be noted that ARC has not obtained all of the permits and approvals required by other state and federal jurisdictions for these aspects of the project. DC (e)(1)(a). The project will need a permit from DEC for the construction work at the marina. ECL § 15-0503. The project also requires a SPDES permit for the stormwater management activities, in addition to a Water Quality Certification from DEC and a permit from the Army Corps of Engineers for the wetland activities. ECL § 17-0803; Clean Water Act §§ 401, 404. The applicant is still in the process of obtaining these permits. Ex. 81, Applicant's Updated Information For Adjudicatory Hearing, Main Volume, p. 15.

D. Issue #8 Conclusion

The Agency should deny the application because the applicant, by failing to document the impacts on the wetland values and functions in the areas of the Cranberry Pond wetland complex, the marina and the base lodge footprint, failed to prove that the project would not have an undue adverse impact on the natural, ecological and wildlife resources of the Park. APA Act § 805(4), § 809(10)(e). Further, the viability of the entire project relies on an unstable and finite source of water for making snow. Therefore, recreational or other benefits that might be derived from the ski area are tenuous and should not be given weight in the Agency's consideration of this project.

[86] If Cranberry Pond were utilized and withdrawal rates were restricted to inflow rates, snowmaking could be prioritized for a limited number of trails or less snow could be made on a higher number of trails. Franke PFT #8, p. 18.

ISSUE # 9

The Application Must be Denied Because the Applicant Did Not Prove That the Project's Stormwater Runoff Would Not Have an Undue Adverse Impact on the Water, Land, Wetland, and Wildlife Resources of the Park

Issue # 9. Are there undue adverse downstream stormwater impacts associated with the base lodge subcatchment area; specifically, the water quality components (i.e., overbank flood and extreme flood) included in the stormwater pond designs?

The application should be denied because the applicant failed to meet its burden[87] of proving that the stormwater runoff from the base lodge area would not have undue adverse impacts downstream. Therefore, the application must be denied because the Agency cannot make the determination that the project will not have an undue adverse impact on the resources of the Park. APA Act § 809(10)(e).

Although the record reflects the applicant's intentions to institute stormwater management controls plans that comply with DEC guidelines, the applicant's plans are incomplete and will need to be significantly revised before they can be implemented. See DEC Notice of Incomplete Application dated October 18, 2010, attached to Stipulation on Hearing Issues #3 and #9, May 9, 2011, between DEC and the applicant.[88]

To approve the Project's base lodge, the Agency must determine that the project would not have an "undue adverse impact" on the natural, scenic, aesthetic, ecological and wildlife resources of the Park. APA Act § 809 (10)(e). In making that determination, APA Act § 809(10)(e) requires the Agency to take into account the Development Considerations ("DCs") found in APA Act § 805(4). The DCs applicable to Issue #9 include:

- § 805(4)(a)(1) - "Water"
- § 805(4)(a)(2) - "Land"
- § 805(4)(a)(5) - "Critical resource areas"
- § 805(4)(a)(6) - "Wildlife"

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[87] Pages 5-8, supra.

[88] It is unclear whether or not this stipulation has an exhibit number.

Runoff from the base lodge and proposed development in and around the base area would be conveyed through channels and culverts to the Cranberry Pond wetland complex. Taber PFT,[89] p. 7. DC (a)(5)(e). The development activities around the base lodge may lead to increased volumes of runoff that may result in increased frequency and magnitude of downstream peak flows, out of bank flooding and an increased risk of flood damage from large storm events. DC (a)(1)(d),(e),(f); DC (a)(2)(c). Stormwater runoff can also lead to decreased water quality from increased pollution loading and increased sedimentation, nutrient enrichment and eutrophication. DC (a)(1)(a),(b),(c).

Additionally, spring snowmelt from the ski slope that would be collected in the base lodge subcatchment area may cause excessive volumes of runoff that cannot be properly treated and could lead to site disturbances. Ex. 21, Applicant's Response to NIPA, Vol. 1, dated February 2006, pp. 97-98. DC (a)(1)(a),(b),(c),(d),(e),(f); DC (a)(2)(a),(b). All of these changes can negatively impact the fish and wildlife that depend on the Cranberry Pond wetland complex. DC (a)(6).

The applicant asserts that its stormwater management plans meet DEC guidelines, including those for overbank flood and extreme storm criteria. Taber PFT, pp. 5, 8. However, as discussed at Issue #3, Agency Staff and DEC have indicated that the application for the project's stormwater management plan is still incomplete. Tr. 1342, 1503-1508. The applicant concedes that its application is not complete, that the application contained only "permit level plans and not construction level documents," and that the proposed plans will need to be revised. Taber PFT, p. 15.

Based upon a review of the relevant DCs, the Agency should conclude that the base lodge subcatchment area would have undue adverse downstream stormwater impacts. Therefore, the application must be denied because the Agency cannot make the determination that the project will not have an undue adverse impact on the water, land, wetland and wildlife resources of the Park. APA Act § 805(4), § 805(4)(a), § 809(10)(e).

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[89] Prefiled Testimony of Mark Taber, 5/3/11, Tr. 1981, Attachment F (hereinafter "Taber PFT").

ISSUE #10

The Proposed Enforcement Mechanisms Are Inadequate

Issue #10. What are the appropriate mechanisms to coordinate and ensure project compliance with application commitments and permit conditions as the project is undertaken over time? [§809(13)(b)]

The proposed project compliance and enforcement mechanisms proposed by the Agency Staff are, so far, inadequate because there is nothing in them to ensure that the environmental monitors are actually independent of the project sponsor. They will be dependent on the project sponsor for their jobs and their paychecks. Unless mechanisms are created to guarantee that they are insulated from influence by the project sponsor, the proposed monitoring system will fail.

ISSUE #11

The Application Must Be Denied Due to
the Project's Undue Adverse Visual Impacts
on the Aesthetic Resources of the Park

Issue #11, as approved by the Hearing Officer in his Issues Ruling of November 16, 2010 (Ex. 87, Appendix B., p. 3) states:

Issue No. 11: What will be the potential visual impacts of the project during the daylight and nighttime hours on the Resource Management and Moderate Intensity land use areas of the project site?

Because the project will have unmitigated undue adverse visual impacts on the aesthetic resources of the park, the application should be denied for the reasons set forth above at Point 3.C, supra.

In addition, the applicant never provided any visual impact analysis for the Transport Lift, a new chairlift that was first proposed in 2007. Compare Ex. 7, Sheet MP-0 (2005) to Ex. 83, Sheets MP-0 and MP-1 (2010)

Also, many of the house sites on the Great Camp lots were relocated (Ex. 81, pp. 19-20), but no new visual impact analysis was performed for those lots.

As a result, the applicant failed to meet its burden of proving[90] that the project would not have any undue visual impacts on the aesthetic resources of the Adirondack Park, and the application must be denied. APA Act § 805(4), § 805(4)(a)(7), § 809(10)(e).

[90] Pages 5-8, supra.

Issue #12

The Application Must be Denied Because it Proposes the Transfer of Principal Building Opportunities to a Non-contiguous Parcel, in Violation of the Overall Intensity Guidelines and APA Act § 809(10)(c)

Issue #12, as approved by the Hearing Officer in his Issues Ruling of November 16, 2010 (Ex. 87, Appendix B., p. 3) states:

Issue No. 12: How many principal buildings are proposed to be located on Moderate Intensity and Resource Management land use areas? The fact question may be resolved with a stipulation. There is a legal issue about the transfer of principal building rights across Read Road.

That legal issue could be framed as follows:

> Does the project violate the overall intensity guidelines for Resource Management Areas set forth in APA Act § 805(3)(g)(3), therefore requiring that the application must be denied pursuant to APA Act § 809(10)(c)?

The law and the facts show that the application must be denied because its approval would result in the transfer of principal building opportunities ("PBOs") among four (4) different non-adjacent Resource Management ("RM") parcels on the project site, across three (3) different intervening private ownerships. Because the applicant's RM lands are not all in adjacent parcels, the PBOs from the applicant's four RM parcels must be counted separately and can not be aggregated. Therefore, the proposal violates the overall intensity guidelines ("OIGs")(APA Act § 805(3)(g)(3)) and APA Act § 809(10)(c).

Section 809(10)(c) of the APA Act provides, in pertinent part, that for an application to be approved, the Agency must find that:

> c. The project would be consistent with the overall intensity guideline for the land use area involved. A landowner shall not be allowed to construct, either directly or as a result of a proposed subdivision, more principal buildings on the land included within the project than the overall intensity guideline <u>for the given land use area in which the project is located</u>. In determining the land use area upon which the

intensity guideline is calculated and which is included within a project, the landowner shall only include land under his ownership and may include all adjacent land which he owns within that land use area irrespective of such dividing lines as lot lines, roads, rights of way, or streams ... . (emphasis added)

The project site contains approximately 4,739.5 acres of Resource Management ("RM") land. Each principal building in RM requires an average of 42.7 acres. Parker PFT #12,[91] p. 1:17-20. Thus, in RM, the applicant has up to 111 PBOs under the OIGs. APA Act § 805(3)(g)(3); Parker PFT #12, p. 6:9, See also Tr. 4273-4287 (Parker). However, these RM lands are divided into four (4) separate non-adjacent pieces by three (3) intervening private ownerships. As shown on the June 30, 2010 map entitled "Overall Site Development Plan", Ex. 83, Sheet MP-0, from east to west, these seven parcels of land are as follows:

Owner[92]	**Resource Management Parcel Size**	**General Location**	**PBOs**	**Principal Buildings Proposed**	**Unused PBOs**
Applicant	450 acres (Lot I)	east of Moody Pond	11	0	11
reputedly Paul Smith's College[93]	strip of land 100 feet wide (about 20 acres)	east of Moody Pond	NA	NA	NA
Applicant	775 acres (Lot A)	surrounding Moody Pond	18	1	17

[91] Prefiled Testimony of Colleen Parker for Issue #12, Tr. 349, March 23, 2011, Attachment E (hereinafter "Parker PFT #12").

[92] Data for this table was derived from Exhibit 81, pp. 20, 30, 34; Ex. 83, Sheets MP-0, SO-2, SO-3; and Parker PFT #12, pp. 6-9. See also Tr. 4273-4287 (Parker).

[93] From its straight-line appearance on the maps at Ex. 83, Sheets MP-0 and SO-3, this appears to be a utility corridor. It is clearly shown as being a separate property from the OWD lands that are part of the project site.

The Nature Conser-vancy[94]	strip of land 450 feet wide (about 94 acres)	west of Moody Pond	NA	NA	NA
Applicant	about 1,889 acres	east and south of Lake Simond	44	18	26
LSP[95] & Birchery Camp ("Read Family")	strip of land 50 feet wide (about 18 acres)	south of Lake Simond and west of Big Tupper Ski Area	NA	NA	NA
Applicant	1,625.24 acres	east of Big Tupper Ski Area	38	63	- 25
Total RM Lands	4,739.25	NA	111	82	29

This proposal violates APA Act § 805(3)(g)(3) and § 809(10)(c) because the applicant proposes to build 63 principal buildings on the western-most 1,625.24 acre parcel of RM land, where only 38 principal buildings are allowed. (Parker PFT #12, p. 9:9-17). This could only be done if the applicant could transfer 25 PBOs from its non-adjacent parcels, across the intervening private ownerships (Parker PFT #12, p. 9:9-17), but this it can not do.

The applicant will no doubt argue that its proposal complies with the OIGs because APA Act § 809(10)(c) provides that "such dividing lines as ... roads..." may be disregarded when calculating the acreage for determining the number of PBOs available on each non-adjacent parcel under the OIGs. However, the context of this exception ("...the landowner shall only include land under his ownership and may include all adjacent land which he owns within that land use area irrespective of such dividing lines as lot lines, roads, rights of way, or streams ... ") makes it clear that the reference is to internal dividing lines within an applicant's property, and not to external dividing lines, such as other peoples' property lines.

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[94] Also referred to as the "Follensby Road" or "McCormick Road" parcel. Tr. 142-145, 3533-3534, 3562-3563.

[95] Little Simon Properties, Inc.

Also, none of the three intervening properties is a mere "road". The 100 foot wide Paul Smith's College property on the east does not even appear to contain a road. Ex. 83, Sheets MP-0, SO-3. The Nature Conservancy property is 450 feet wide, and while it does contain a road, that road is only about 10 to 20 feet wide, and does not appear to be contiguous to the project site. Ex. 83, Sheets MP-0, SO-3. The Read Family property is 50 feet wide, and while it does contain a road, that road is only about 20 feet wide, and does not appear to be contiguous to the project site. Ex. 83, Sheets MP-0, SO-2. Therefore, the "roads" exception does not apply to any of the three intervening ownerships that divide the applicant's RM lands into four non-adjacent parcels.

The applicant also proposes to assign 28 of its 29 "unused" PBOs to "the Type 3 lands, as shown on Drawing R-1 (Exhibit 83)".[96] Tr. 4278-4282. However, as shown by the table above, these unused PBOs are located on three entirely separate parcels of land, which are separated from the proposed receiving parcel by anywhere from one to three intervening private ownerships. Thus, these unused PBOs can not be transferred across these other properties, and they may not be associated with the "Type 3 lands". Even if the Read Family property was found to be a mere road, across which PBOs could be transferred, the unused 28 PBOs associated with the two easterly RM parcels can not be transferred or assigned across the Nature Conservancy property and the Paul Smith's College property to the 1,060 acres of "Type 3 lands".

Any such claim by the applicant that it is entitled to transfer PBOs across the 18 +/- acre Read Family property is contradicted by the admissions of its principal, Mr. Foxman, in a September 4, 2004 memorandum to members of the Read Family (Exhibit 237; Tr. 140-142, 3829-3836; Attachment D hereto) in which he stated:

> There are two discrete areas in which we need your help.
>
> 1. Transfer of Building Rights
>
> We are attempting to cluster development west of your road so that we can create a 4,000 acre preserve east of it. To accomplish that, we must transfer some of

[96] These are 1,060 +/- acres of undeveloped recreational and open space lands located east of the ski area, on both sides of the Read Family property. Tr. 4278-4282.

> our building rights to the west. An APA policy prevents the transfer of our building rights across your road without your consent.
>
> That consent will not affect your camp or its own building rights in any way. The rights to be transferred relate solely to our property.
>
> It will be a great help to us if your family will consent to the transfer. We are in a position in which we must either develop a different and less desirable site plan or delay our APA application. (Attachment D, p. 1)(emphasis added)

Thus, it is clear that Mr. Foxman knew that he did not have the right to transfer PBOs across the Read Family property, so he sought their consent.[97]

The application must be denied because the applicant proposes to transfer 25 Resource Management PBOs across the Read Family property and because it proposes to transfer 28 unused Resource Management PBOs across the Paul Smith's College property, the Nature Conservancy property, and the Read Family property. These transfers are prohibited by APA Act § 809(10)(c), so the application can not be approved.

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[97] This consent was apparently sought under APA Act § 809(10)(c), which provides, in part, that:

> As between two or more separate landowners in a given land use area the principal buildings on one landowner's property shall not be counted in applying the intensity guidelines to another landowner's project, except that two or more landowners whose lands are directly contiguous and located in the same general tax district or special levy or assessment district may, when acting in concert in submitting a project, aggregate such lands for purposes of applying the intensity guidelines to their lands thus aggregated. (emphasis added)

However, this section of the APA Act does not allow PBOs to be transferred across intervening ownerships, unless the other owner wished to aggregate their lands and act in concert with the first owner. APA Act § 809(10)(c). Mr. Foxman's request specifically disavowed any intent to affect the Reads' building "rights" [sic], so no such transfer was legally possible. Moreover, the Read Family never granted that consent (Tr. 3832:18-20), and so no such aggregation or transfer of PBOs among the applicant's non-adjacent parcels can occur.

CONCLUSION

The applicant had the burden of proving in the hearing, by introducing evidence that the allegations of the application materials were true, that there was substantial evidence that the project complies with the APA Act in all respects. This it failed to do, despite having 19 days of adjudicatory hearing in which to do so. See pages 1 to 8.

At least three legal issues mandate denial of the application. See Points 7 and 12.

On the hearing issues, the applicant's proof was incomplete and its witnesses were not credible. Although the intervenors were not required to do so, on many of the issues, they proved that the application did not comply with the APA Act. See Points 5/6, 1, 3, 4, 7, 8, 9, and 11. There was not substantial evidence supporting the application on any of these issues. All of these issues require denial of the application.

Despite the applicant's grandiose claims, and the legitimate desires of the community of Tupper Lake for a revived local economy, there is no market for the project, its IDA financing can not be approved, and it will not provide the promised jobs, revenues and revitalized ski area. Instead, it will impose fiscal burdens on local governments, unduly damage the environment, particularly wildlife habitat, and erode the forest resource base of the timber industry.

The application should be denied, so that someone with a new vision can step up and develop a sound plan for the revitalization of the town and the ski area.

/S/ *John W. Caffry*

Dated: September 23, 2011

JOHN W. CAFFRY
CLAUDIA K. BRAYMER
CAFFRY & FLOWER
Attorneys for Protect
the Adirondacks! Inc.
100 Bay Street
Glens Falls, New York 12801
(518) 792-1582
jcaffry@caffrylawoffice.com

TO: Terry Martino
Executive Director
Adirondack Park Agency
1133 State Route 86
PO Box 99
Ray Brook, NY 12977
(hand delivered (15 copies))

Hon. Daniel P. O'Connell
Administrative Law Judge
Office of Hearings and Mediation Services
NYS Department of Environmental Conservation
625 Broadway, First Floor
Albany, New York 12233-1550
(e-mail)

Service List (e-mail)

APPENDIX A

APPEALS OF EVIDENTIARY RULINGS BY THE HEARING OFFICER

Protect hereby appeals to the Agency members the following three (3) evidentiary rulings by the Hearing Officer:

1. The Agency Should Reverse the Hearing Officer's Denial of Admission into Evidence of an Exhibit Regarding Unpaid Income Taxes Owed by One of the Applicant's Principals

On June 2, 2011, Protect offered for admission two exhibits which showed that the applicant and one of its principals had unpaid local and federal tax obligations. Tr. 2666-2692. One of these exhibits consisted of original tax searches showing that the applicant and/or various limited liability companies that it controlled owed, as of May 26, 2011, $221,438.03 in unpaid local real property taxes on four (4) parcels of real property making up the project site, dating back as far as 2007. Tr. 2674-2692. These documents were admitted into evidence as Exhibit #196. Tr. 2692. Exhibit 196 also showed that, by contrast, the Oval Wood Dish company was current on the taxes on the lands that it controlled that were under option to the applicant.

At that same time Protect also offered into evidence a copy of an Internal Revenue Service Notice of Federal Tax Lien against Thomas Lawson, a principal of the applicant (Tr. 2667), dated April 25, 2011, in the amount of $88,713.80, which had been filed with the Franklin County Clerk on May 2, 2011. Tr. 2673; Ex. 195.

The applicant objected to this document being admitted into evidence, and the Hearing Officer excluded it. Tr. 2674. As set forth at Tr. 2666-2674, Protect offered this document for two purposes: (1) to impeach the credibility of a witness who had just testified that the applicant, and Mr. Lawson, were financially credible, and (2) to demonstrate that because Mr. Lawson was the subject of such a lien, the ability of the applicant to fund the project was questionable, thereby calling into question the project's financial viability.

For instance, the application materials state that the project's housing and infrastructure will be funded in part by "private debt and equity" and "developer equity". Ex. 81, pp. 45, 46. Thus, this federal tax lien was relevant to the question of whether or not the applicant would actually have the ability

to fund the project, and so it was clearly relevant to Issues #5 and #6.

Protect hereby appeals the Hearing Officer's ruling, submits that this document should have been admitted into evidence for the reasons set forth herein and at Tr. 2666-2674, asks that the Agency members reverse the ruling of the Hearing Officer, and that the Agency admit Exhibit 195 into the hearing record.

2. The Agency Should Reverse the Denial of Protect's Motion to Preclude Certain Testimony Offered by the Applicant Due to the Applicant's Persistent Failures to Produce Documents and Its Abuses of the Discovery Process

On May 26, 2011, Protect made a written motion to preclude the applicant from using any prefiled and live testimony by Jeffrey Anthony and Kevin Franke of the LA Group on Issue #1. Ex. 90. The grounds for this motion were that the applicant repeatedly failed and refused to produce records during the discovery process that it was obligated to produce to Protect, pursuant to the rules of the Agency and the rulings of the Hearing Officer. Ex. 90. This motion was a renewal of a motion that had been made on April 29, 2011 (Tr. 1694-1722), on which the Hearing Officer had not yet ruled.

Various parties answered the motion and Protect replied on June 16, 2011. Ex. 90. Oral argument on some aspects of the question was heard on June 8, 2011. Tr. 3424-3437. In a ruling dated June 20, 2011, the Hearing Officer denied the motion and allowed the witnesses to testify.[98] See also Tr. 3477.

Given the applicant's repeated abuses of the discovery process, preclusion of the testimony was the proper remedy. See Wilson v. Galicia Contracting, 10 N.Y.3d 827, 830 (2008); Matter of Estate of Scaccia, 66 A.D.3d 1247, 1250 (3d Dept. 2009); DuValle v. Swan Lake Resort Hotel, 26 A.D.3d 616, 617-618 (3d Dept. 2006); Matter of William Wolf, Ruling of DEC Chief ALJ McClymonds, April 28, 2011 (www.dec.ny.gov/hearings/74085.html).

Protect hereby appeals the Hearing Officer's ruling, submits that this testimony should have been precluded for the reasons set forth herein, in its motion papers and in the cited transcripts, asks that the Agency members reverse the ruling of

[98] It is not clear from the Hearing Exhibit List which exhibit contains this ruling.

the Hearing Officer, and asks that all testimony by Jeffrey Anthony and Kevin Franke regarding Issue #1 be stricken from the record.

3. The Agency Should Reverse the Hearing Officer's Denial of Admission into Evidence of an Exhibit That Impeached the Credibility of the Applicant's Witnesses' Consulting Firm

On June 22, 2011, Protect cross-examined Jeffrey Anthony, a key witness for the applicant, and one of the 3 partners who are the owners of the LA Group, the applicant's principal consultants and source of hearing witnesses on the project. Mr. Anthony had testified in his prefiled testimony, and in his live testimony, about his firm's work on the APA's Visitor Interpretative Center siting study, which was used by APA to help it find locations for those facilities. Tr. 3705-3709.

Protect began to ask Mr. Anthony questions about some sworn testimony in another administrative adjudicatory hearing by Russell Pittenger, who at the time of that testimony was a partner of Mr. Anthony's in the LA Group. Tr. 3709. In that prior sworn testimony, Mr. Pittenger stated that the LA Group had "fudged" the APA's siting study. Tr. 3709. Protect offered to introduce the transcripts of that testimony into the record. Tr. 3710-3711. On the objection of the applicant (Tr. 3709-3711), the Hearing Officer did not allow either the line of questioning or the admission of those transcripts into evidence. Tr. 3712.

On cross-examination, a witness's credibility and testimony may be impeached with his prior inconsistent statement. Nappi v. Falcon Truck Renting Corp., 286 A.D. 123, 126-127 (1st Dept. 1955), aff'd w/o op. 1 N.Y.2d 750 (1956). Statements by someone's partner, that are admissions by another partner regarding something within the scope of their business, are binding on them. McCallen v. Sherwin, 2001 WL 1791514, *9 (Sup. Ct. Nassau Co. 2001). "An admission or representation made by any partner concerning partnership affairs within the scope of his authority ... is evidence against the partnership." Partnership Law, § 22.

Therefore, Mr. Pittenger's prior sworn testimony is binding on Mr. Anthony, and is proper grounds for impeachment of his testimony. Given that the study in question, for which his own partner said he had "fudged" the work, was done for the APA, the same agency now hearing this case, Mr. Pittenger's sworn testimony was particularly relevant to the impeachment of Mr. Anthony as a witness.

Protect hereby appeals the Hearing Officer's ruling, submits that the transcripts and questions were proper grounds for impeachment of the witness and of the LA Group, for the reasons set forth herein and at Tr. 3705-3712, asks that the Agency members reverse the ruling of the Hearing Officer, and that APA reconvene the hearing for purposes of introduction of those transcripts into the record and for the continued examination of Mr. Anthony regarding same.

APPENDIX B: CORRECTIONS TO TRANSCRIPTS

The following errors in the hearing transcripts should be corrected:

186:4 - change "safe" to "State".
198:22 - change "weight" to "wait".
213:23 - change "NEPA" to "NIPA".
244:13 - Change "Beejee" to "B.G.".
290:14 - change "Jack" to "John".
2066 - change "Lke" to "Lake".
2068:4 - change "Thomopson" to "Thompson".
2068:7 - change "Elseworth" to "Elsemore".
2130:21 - change "seeker" to "SEQR".
2509:15 - change "Ski Hold Village" to "Ski Bowl Village".
2511:24 - change "Grant" to "Brandt".
2659:3 - change "profession" to "professional".
2562:12 - change "bon" to "bond".
2562:21 - change "Norton" to "Norden".
2648:10 - change "2006" to "2010".
2692:5 - change to "A.L.J. O'CONNELL: Okay...".
2992:2 - change "CAFFRY" to "VAN COTT".
2992:7 - change "CAFFRY" to "VAN COTT".
3002:21 - change "seeker" to "SEQR".
3031:13 - change "sewer pants" to "sewer plants".
3013:14 - change "Speedys" to "SPDES".
3043:17 - change to "A. Yes. Q. And then...."
3043:24 - change "Q. Yes." to "A. Yes.".
3044:2 - change "A." to "Q.".
3044:5 - change "Q." to "A.".
3044:8 - change to "... whole thing. Q. But if they don't...."
3047:2 - change "seeker" to "SEQR".
3099:6 - change "ULASEWICZ" to "CAFFRY".
3125:10 - change "Ray Brook" to "Tupper Lake".
3281:12 - change "polling" to "poling".
3286:9 - change "plan" to "point".
3301:23 - change "one" to "two".
3424:16 - change "McClemens" to "McClymonds".
3600:9 - Change "land vest" to Landvest".

3654:22 - change “seeker” to “SEQR”.
3674:6 - change “seeker” to “SEQR”.
3705:7 - change “Bellaire” to “Belleayre”.
3771:21 - change “Bellaire” to “Belleayre”.
3772:2 - change “Bellaire” to “Belleayre”.
3772:15 - change “Bellaire” to “Belleayre”.

APPENDIX C: COMMENTS ON AGENCY STAFF’S DRAFT PERMIT CONDITIONS

Because the application must be denied as a matter of law, and because no permit conditions could make the project legally approvable, Protect has no comments on the Agency Staff’s draft permit conditions (Ex. 96) at this time. Protect reserves the right to reply to any other party’s comments on this subject in its written reply.

APPENDIX D: ATTACHMENTS

A. Point 5/6.B(2) - David Norden graphs (Ex. 218, 219).

B. Point 5/6.C(2) - Letter from FCIDA Executive Director to Thomas Ulasewicz, Esq., February 1, 2011 (Ex. 227).

C. Point 1.C(1) - September 2005 e-mail chain among Michael Foxman, Kevin Franke, and Mike Damp (Ex. 235).

D. Points 1.C(1) and 12 - Memorandum from Michael Foxman to Read Family, September 12, 2004 (Ex. 237).

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