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Memo

Via E-mail/Hard copy to Follow

To: Paul Van Cott
From: Thomas A. Ulasewicz
Date: 12-30-11
Re: AC&R December, 2011 Agency Meeting

The LA Group and I have reviewed executive staff's slide presentation to Agency members and designees at the December 15-16, 2011 meeting. We have also taken into consideration the comments and questions raised by various Agency members and designees. Besides attending both meetings days, I also spent considerable time reviewing the webcast. If an approval is to be given to this project (and it should, under any legal standard), the points made below in response to the December 15-16th proceedings must be considered highly relevant to the success of this type of project. With perhaps the exception of Art Lussi, the other members of the Agency Board are "cutting their teeth" on this type of a project. Their efforts at getting this right – no matter how noble – can actually do more harm than good. A relatively small group of people from a variety of disciplines have spent over 7 years molding this project into the site, the regulatory requirements and the local/regional economics for marketing and finance. This project has withstood, thus far, horrific economic times, an element of crazed opposition, and a far from perfect public adjudicatory process. Given all of this, the following information from the record needs to be both clarified and emphasized (and in some cases corrected) from what was communicated by executive staff to the Agency Board this past month:

THURSDAY, DECEMBER 15, 2011 [1]

1. 11:00 AM - 12:15 PM

A. WILDLIFE SURVEY AND HABITAT (E. SNIZEK)

[1] All comments will be topically keyed to the Agency Agenda for the December meeting. Since the slides used throughout both days were numerous and not numbered, this document will generally refer to draft Findings of Fact and/or Conditions from hearing staff's October 24, 2011 Draft Order. On occasion, I have also provided a day and time reference from the webcast.

This subject matter essentially involved Q&A nos. 50 & 41 which evolved from the November, 2011 Agency meeting.

The presentation of this material left the impression that "no wildlife survey" was done AND that there were "inadequacies in the functional assessment." While this sentient may be traceable to some of the APA hearing staff, two conclusory statements by hearing staff best summarize their position AND BOTH need to be emphasized to the Board members:

(1) The cross-examination of APA staff biologist Dan Spada:

> "Q. Do you feel that you had made it clear to the Applicant what kind of information was required regarding wildlife?
>
> A. Hindsight is always twenty/twenty. It could have been - - our - - our - - our instructions could have been clearer. But again, the state of our knowledge is different now than it was in 2006." (Tr. p. 4199, lines 22-24 and p. 4200, lines 2-6)

AND

(2) **Draft Order Conditions 29, 30 & 40** dealing with deed restrictions on the Type 2 and Type 3 Resource Management lands AND deed language restricting each Great Camp lot to one (1) principal building and no further subdivision (some 3,888± acres of RM as open space) as "**the most effective way** to provide broad habitat protection to mitigate the impacts of the project." (see APA hearing staff's Closing Statement at p. 27)

Again, with regard to the executive staff's presentation and the impression that it left, the Record is replete with what the applicant did perform with regard to both wildlife surveying and functional assessment (all at the behest of staff during the application completion process which ran between 2004 & 2007):

- the applicant was required by staff to investigate the presence and habitat of Bricknell's Thrush (Tr. 3678, lines 11-14);
- the application included 3 reports in its April 2005 submission (Exhibit 12) on the non-presence of rare and endangered species (Tr. p. 3596, lines 20-24 and p. 3597, lines 1-16): the N.Y. Natural Heritage Program, discussions and meeting with the Regional Wildlife Manager – Reg. 5, NYSDEC, and U.S. Fish & Wildlife;
- submission of a biological survey conducted for APA permit No. 94-246 (involving the alpine and sub-alpine life zones on the AC&R site) by Edwin H. Ketchledge, Ph.D. (Anthony pre-filed testimony, June 21, 2011 Transcript, Attachment A at p. 20, lines 11-15);
- Kevin Franke testified that observations of wildlife on the site were recorded by LA Group staff (Tr. 3679, line 24 & 3680, line 2) – in the aggregate, LA

Group personnel were on the site hundreds of times;

- applicant's consultants with a representative of NYSDEC Region 5 Bureau of Wildlife performed a site inspection on a reported deer wintering yard on the project site (Anthony pre-filed Testimony, June 21, 2011 Transcript, Attachment A at page 19, lines 9; see also April 2005 application submission);

- submitted to staff what it identified as the equivalent of a wildlife functional assessment in February, 2005 (Tr. p. 3777, lines 23-24);

- applicant's consultant then submitted a so-called "functional impact assessment" in October 2006 (Exhibit 35, Vol. 1); and

- applicant's consultants submitted a second "functional impact assessment" in December 2006 which focused on the eastern part of the property on the Type I and Type II open space lands (Exhibit 39, sec. 3).

Couple this information with the following statement by APA hearing staff in its Reply Brief at page 11:

> "Compared to other Resource Management subdivision projects *(citing to 9 projects between 2000 & 2007)*, including those cited by Adirondack Wild in its brief *(citing to an addition 6 projects between 1987 & 2001)*, the Project Sponsor did more here to assess wildlife impacts."

THIS IS WHAT THE SLIDE PRESENTATION SHOULD CONSIST OF, FACTS FROM THE RECORD AND NOT MERE IMPRESSION.

Finally, the Agency Board should be unequivocally told that the AC&R project was the first of its kind in which staff attempted to solicit something called a "wildlife functional assessment" – an undefined term in both Agency statutes and regulations and the agency's guidance document "Development in the Adirondack Park" (DAP). The hearing transcript contains numerous passages indicating how staff and applicant's consultants grappled with what was being sought (especially on a 6200± acre site where approximately 84% of its acreage would remain as open space and there were many pre-existing uses on the property including extensive timber harvesting for over the past 75 years). [see, for example, Tr. pp. 3597 – 3601, 3603 – 3610, 3615-3617, 3679-3681, 3777- 3778,. 3787 & 3803; see also "Applicant's Brief of the Hearing Record and Closing Statement" at pp. 93-100 under the heading "The Wildlife Functional Assessment"]

With regard to this "Wildlife Functional Assessment," it is important for Agency members and designees to be aware of the fact that the Milder empirical evaluation methodology used by expert witnesses Glennon and Kretzer was published almost **2 years <u>after</u>** the AC&R project received its Notice of Complete Application AND over **1 year <u>after</u>** the AC&R project was noticed to proceed to public hearing. In addition, the so-called wildlife assessment performed by Glennon and Kretzer did not become public until approximately **4 years <u>after</u>** the

AC&R project received its Notice of Complete Application AND approximately **3 years after** the AC&R project was noticed to proceed to public hearing. (see Applicant's Reply Brief at pp. 31 & 32) The Agency members and designees need to know that this wildlife functional assessment methodology being touted by parties in opposition to this project did not exist either at the time this project was being reviewed for application completion (2004-2007) or the time it was determined to go to public hearing (2007). [see Tr. p. 4253, lines 12-24 and p. 4254, lines 2-23] While executive staff through Mr. Snizek have advised the Agency Board that the Glennon/Kretzer wildlife functional assessment was "very valuable … these are concepts that are very important to protecting wildlife species in the Park" (see Web Cast starting at 1:32:35 timeframe), [2] there is nothing in the Record to support this statement. As a matter of fact, there are two items in the Record that refute this statement: (i) Glennon & Kretzer admitted in cross-examination that they altered the published Milder methodology in preparing their assessment (Tr. p. 4262, lines 6-24 and p. 4263, lines 2-9), and (ii) they performed their assessment in approximately 7 weeks after being asked to testify by the Adirondack Council (Tr. p.4254, line 24 and p. 4255, lines 2-5) - - clearly, not nearly enough time for peer review let alone publication.

Finally, of the 8 categories to which Glennon and Kretzer exposed the project to their so-called assessment, the project scored very well in 6 of these categories. The 2 categories in which the project scored poorly were the only 2 categories which consisted of a qualitative analysis (the other 6 being delineated as quantitative) suggesting, at the very least, the potential for bias on the part of the authors. [see Pre-filed Testimony of Glennon and Kretzer, Attachment A to June 24, 2011 transcript at pp. 33 (starting at line 6) to 39 (ending at line 8)] Why isn't this being discussed with the Agency Board in place of such generalizations as "very valuable … concepts."?

2. 1:00 PM – 2:45 PM

A. RESIDENTIAL STRUCTURE LOCATIONS, FOOTPRINTS AND HEIGHTS (R. WEIBER)

(1) **Finding of Fact # 21** states:

> "The Project Sponsor proposed that vegetative clearing for all residential development, including accessory structures, shall not exceed twenty-five feet from exterior walls of structure or ten feet from the outside edge of grading, whichever is less."

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[2] Giving personal opinions of this nature is offering information outside of the Record. It deteriorates objectivity, could appear to prejudice the decision-maker and is the sort of action that gives rise to claims of arbitrary, capricious, etc… legal fodder to be avoided at all costs. To keep this in perspective with regard to its gravity, Mr. Snizik also said: "everyone who reads it [*the application*] would agree that there was no wildlife survey" (Webcast starting at 1:31:20 timeframe) and that the Glennon and Kretzer functional assessment "wasn't new for the U.S. but was relatively new for the Adirondacks." (Webcast starting at 1:31:55 timeframe) There is no basis in the Record for either of these statements and they are most misleading and prejudicial.

The following statements were made by Agency members with regard to this proposed finding:

> √ "not practical" … "gargantuan lots" and owners will want "gardens and fields"… "this is not practical for the Great Camp Lots" and enforcing it would be "a bad use of staff time." (Art Lussi)
>
> √"could effect the ability to sell lots" … "too severe a limitation" … could result in a potential buyer to "look elsewhere." (Frank Mezzano)

The Applicant has always agreed with these statements. While accepting this condition, the Applicant (and hearing staff) anticipates that individual lot owners would seek an amendment (letter of compliance?) to this restriction. One approach which would alleviate these concerns is to require a 200 foot buffer (no cutting zone) around the periphery of the 3 acre envelope (excluding driveways) for all of the Great Camp lots. This would satisfy the intent of the condition while giving flexibility to the homeowner on the use of its land and minimize use of staff's time in subsequent reviews.

(2) **Condition # 18** reads: "The maximum footprint measurement of such structures shall include all covered and uncovered attached porches, decks, exterior stairs and attached accessory components (such as an attached garage or shed), except that the measurement of the maximum building footprint for any multiple family dwelling shall not include the front door entry stair."

The following exchange took place between Art Lussi and Rich Weber.

> Lussi: has the Agency routinely included an "uncovered deck" as a building footprint.
> Weber: "yes, it's been our practice"
> Lussi: "why stairs?"
> Weber: "I don't know … I will find you an answer."

As you and I both know, the Applicant has opposed these restrictions since they first surfaced. [3] Applicant's architectural renderings did not include covered and uncovered attached porches, decks and exterior stairs as part of the building footprint or building foundation. The Applicant's architects never included these components of the various buildings as part of the overall "structure footprint" square footage set forth in Condition # 20. The Applicant has consistently taken the position with staff that the "building footprint" only included: (i) fully enclosed components of a structure, and (ii) those components of a structure that rested on an excavated

[3] The conditions objected to by the Applicant are contained in Appendix 6 of its Reply Brief. Specific objections with annotations to hearing staff's latest Draft Order are delineated at pages 58, 59, 60, 63, 65 and 80 of that document. While this language regarding what is to be included in the "building footprint" was stricken from Condition #21 (non-residential structures), it was inadvertently left unstricken from Condition # 20 (residential structures) in the Project Sponsor's Reply Brief… our opposition is still well recorded.

foundation. I have repeatedly mentioned to you in the past that if this condition prevails, the Applicant will have to seek an amendment … why not avoid this up front (now)?

Finally, with regard to "attached accessory structures (such as an attached garage or shed)," the Applicant has always opposed this part of the condition because: (i) it is not living space, and (ii) it could be read to include a free standing garage or shed with a covered walkway to the residence … hence, "attached". In my opinion, this is not the intent of the Condition but that is what it effectively does. I also expressed this concern to you in the past. Again, why not address it now by eliminating this language from the condition?

(3) **Condition # 19** reads, in part: "Structure height shall be measured from the highest point on the structure, **including the chimney**, … " (emphasis added)

The following exchange took place between Art Lussi, Rich Weber and John Banta:

> Lussi: "What are the Applicant's "opinions and wishes" regarding the chimney being included in the height measurement?
> Weber: "This reflects consultation with the Town and the Applicant"
> Lussi: "I know the chimney is in contention … it is not fair to say the applicant agrees"
> Banta: "The revised staff Order was accepted by the Town and the Applicant and therefore represents the application before you."

As you know, the position taken by Weber and Banta are erroneous. Among other things, the Applicant has always objected to the chimney being included in the height measurement. In expressing my client's objection to including the chimney in this measurement, I repeatedly made two points: (i) chimneys have been excluded on numerous occasions by the Agency in the measurement of a building height, and (ii) the average, minimum height of trees throughout this site is approximately 60 feet. You are not going to see these chimneys unless you are in a low flying aircraft. The position of the Applicant on the issue of including the chimney in the height measurement of the building needs to be made to the Agency Board for an objective decision.

3. <u>3:45 PM – 5:00PM</u>

A. VISUAL/OPEN SPACE (R.WEBER)

(1) **Condition #28** reads: "In the event of any loss of vegetation resulting in material off-site visual impacts from structures authorized herein, as determined by the Agency, the landowner shall replace the vegetation that provided such screening, to the extent practicable, within one year to a tree density and species composition similar to prior existing vegetation. Any replacement vegetation that does not survive shall be replanted annually, until such time as healthy replacement vegetation is established. Deciduous replacement trees shall be a minimum of 1 ½" in caliper at the time of planting and coniferous trees shall be a minimum of a 6-8 feet in height. This condition shall not be deemed to prevent the removal of dead or diseased vegetation or of rotten or damaged trees or of other vegetation that presents a safety or health hazard, but

rather is intended to ensure that replanting of **screening** vegetation is accomplished."

The dialogue between Lussi, Weber and Dick Booth was as follows:

> Lussi: Does this include things such as an "Act of God"?
> Weber: "I hadn't thought about it"
> Booth: "did we put language like this in other permits?"
> Weber: "I think, yes."
> Lussi: the "tree density" … "what if 60 foot trees are lost in a blow down" … do you have to create the same density?"

Once again, no one on staff advised the Agency Board that the Applicant has always opposed this condition for the very reasons raised by Art Lussi. Although you have told me that the Agency has issued permits with this (or similar) language, no one on staff has yet to identify any such permit. I also advised you on numerous occasions that this condition: (i) could negatively impact sales, (ii) is unlikely to ever get covered in a homeowners insurance policy, and (iii) is contrary as to how the APA has traditionally dealt with Acts of God, i.e., they are exempt (blow-down, ice storms, flooding, etc.) from regulatory and/or enforcement implementation and otherwise governed by the State Administrative Procedures Act. [see 9NYCRR 588.1(b) and SAPA §§202(2)(c)] As indicated at Appendix 6 to Applicant's Reply Brief, this condition should be eliminated in its entirety; it is contrary to the law AND, if in fact a landowner undertakes improper cutting or grading, it is an enforceable matter by the Agency, the HOA, and likely the municipality (as against the landowner, the Permittee and any Responsible Party!)

FRIDAY, DECEMBER 16, 2011

1. 9:45 AM – 10:45 AM

A. HABITAT/WETLANDS (E. SNIZEK)

(1) **Finding of Fact #117** states:

> "A comprehensive biological inventory of the project site was not conducted, so it is not possible to make specific findings concerning impacts to habitat from the proposed project or to indentify the presence or location of specific areas on the project site that should be prioritized for protection. However, based on project design and through the imposition of conditions, adequate habitat protection can be assured on RM lands."

A handful of Agency members essentially stated: we need a justification that connects the first sentence with the second sentence. . . . in the second sentence, the word "adequate" should be changed to "reasonable".

With regard to language setting forth a "justification" connecting these two sentences,

staff needs to revisit my 12/9/11 memo to you titled "AC&R November, 2011 Agency Meeting" at pp. 325 (D. Slide No. 8 - `Habitat – Biological Survey'" AND this memo at pp. 1 to 4, *supra* titled "11:00 AM – 12:15 PM ... A. WILDLIFE SURVEY & HABITAT (E. SNIZEK)." This presents staff with an enormous amount of information from the Record to "justify" this Finding of Fact ... this needs to be articulated fairly, objectively and thoroughly (and not what Dr. Klemens thinks, the Wildlife Conservation Society thinks or, for that matter, what RASS thinks).

(2) Under "Wetlands," the 4th slide subtitled "Conditions" at **Condition #100**, Snizek was asked by at least one Agency member: "Does this mean the Project Sponsor intends to abandon Cranberry Pond for snowmaking after 5 years?" (or words to the effect). Snizek answered "yes". **HE IS WRONG** and this needs to be clarified with the Agency Board. Whether the Project Sponsor abandons Cranberry Pond for snowmaking depends on at least 1 of 2 things: (i) the data that is collected each year, and (ii) a business decision based on ski area use, expansion possibilities and costs vs. revenues at that point in time. The Project Sponsor must be given the opportunity to make those decisions in the future, not the inexperienced Agency members in January, 2012 ... not if Agency approval is intended to allow all possibilities for project success. If there is an environmental problem, the Agency retains the ability to shut the snowmaking operation down at any point in time over this 5 year period, or at any time, for that matter.

B. PROTECTION OF AMPHIBIANS (E. SNIZEK)

(1) the first slide under the subtitle "Conditions" **Condition # 89** states"

> "Subject to prior Agency review and approval, the Project Sponsor shall conduct a biological survey and impact analysis for amphibians on the project site, **except for the lands shown as open space on Drawing R-1 of Exhibit 83**. The survey shall be limited to those areas a within 800 feet of existing delineated wetlands as shown on Drawings W-1 and W-2 and any upland vernal pools identified in the survey. Based on the impact analysis, the Project Sponsor shall propose non-material adjustments to project component configuration prior to construction to further protect amphibian habitat or to provide design features to facilitate amphibian movements. If approvable, those changes will be authorized by a letter of permit compliance."

Mr. Snizek then advised the Agency members and designees that the bolded language in this slide should be eliminated. His reason(s) for this recommendation was unclear and not substantiated in any meaningful way. Be advised that this recommendation is not only **totally unacceptable** to the Project Sponsor, but it negates all that my client and its consultants worked ... and negotiated ... with hearing staff (and other parties) to reconcile a difficult hearing record on this subject matter. [4]

How does Snizek conclude this preposterous recommendation in light of the following

[4] I reluctantly must repeat what I said about Ed Snizek in footnote no. 2 *supra*. at p. 4 with regard to this issue. Too many have worked too hard to allow his misinformed analysis of this Record to have any credible influence on the decision-maker.

scenario of facts, conclusions, conditions, and agreements … all part of the hearing Record:

(a) **Finding of Fact #122**:

> "To the extent that wildlife habitat exists on the private lands shown on Drawing R-1 as Type I open space lands, that subdivision of those lands, and development is restricted to the designated 3-acre building envelope and one principal building. All development including septic absorption fields should be within the 3-acre envelope. **Habitat on Type 2 and Type 3 Resource Management lands designated as open space on Exhibit 83, Drawing R-1, will be protected as long as those lands are permanently restricted from development." (emphasis added)**

(b) **Findings of Fact #109, 111 & 112**:

> "109. The Project Sponsor has proposed to protect Type 1, Type 2 and Type 3 land depicted on Exhibit 83. Drawing R-1 as open space. However, with respect to the Type 2 and Type 3 lands, the Project Sponsor has not proposed deed restrictions to permanently preserve those lands from development."

> "111. The Resource Management portion of the Type 2 and Type 3 lands will only be adequately preserved as open space consistent with Executive Law §805(3)(g) if they are permanently restricted from development."

and

> "112. The 34-acre portion of those lands (Exhibit A hereto) that is potentially suitable for development should be excepted from those restrictions. Development on those lands should be allowed subject to an Agency permit or permit amendment."

and then,

(c) **Conditions # 89-95** which, in summary states:

> "Subject to prior Agency review and approval, the Project Sponsor shall conduct a biological survey and impact analysis for amphibians on the project site, except for the lands shown as open space on Drawing R-l of Exhibit 83."

and

(d) **Conditions # 29 and 30** which state:

"29. **Prior to any undertaking of the proposed project on Resource Management lands**, the Project Sponsor shall file deed restrictions in the Franklin County Clerk's Office that permanently prohibit any **subdivision** or new land use or development on all of the retained Resource Management lands described as Type 3 Open Space on Drawing R-1 in the June 30, 2010 project plans referenced herein except for the portion of such lands described in Condition 31 below. **The deed restrictions shall run with the land and only shall be enforceable by the Adirondack Park Agency in its sole discretion or, upon the request of the owner of such lands, may be amended as prescribed by the Agency.**"

and

"30. **Prior to the any undertaking of the proposed project on Resource Management lands**, the Project Sponsor shall file deed restrictions in the Franklin County Clerk's Office that permanently prohibit any new land use or development (except for Agency-approved, non-residential land use and development) on all of the retained Resource Management lands described as Type 2 Open Space on Drawing R-1 in the June 30, 2010 project plans referenced herein except for the portion of such lands described in Condition 31 below. **The deed restrictions shall run with the land and only shall be enforceable by the Adirondack Park Agency in its sole discretion or, upon the request of the owner of such lands, may be amended as prescribed by the Agency."**

You know, as well as anyone, the effort it took to get involved parties to agree to these conditions. Be it Ed Snizek... or executive staff ... they are apparently rejecting one of the most significant mitigative measures, if not the most significant, to be agreed to by the Project Sponsor. The position presented here by Ed Snizek is outside of the hearing Record. The consequences of his recommendation to the Agency Board is tantamount to denying this project application for the following reasons (which is not an all-inclusive list):

(i) any such amphibian inventory is unjustified by the 4,888± acres to remain as open space in the resource management lands;

(ii) any such amphibian inventory is cost prohibitive, unduly time restrictive, and, arguably, well outside of the intent of the APA Act when it comes to interpreting such terms as "undue adverse impacts" and "wildlife" as a "natural resource consideration" ... an emphasis on the "wildlife" development consideration that is overwhelming when one takes into account that another 36 development considerations must be added to the mix. An Applicant can spend a lifetime satisfying "additional information" for a complete application if the degree of information for these considerations reaches the extent that Drs. Klemens, Glennon and Kretzer would have this Agency go through for what they consider to be a "wildlife assessment." Let's not lose sight of the fact that wildlife habitat

was taken into account when the private lands were first classified with enactment of the APA Act in 1973 and that those classifications of land use areas led to the delineation of compatible uses for each land use area. This project proposal is compatible with those uses listed for Resource Management lands under the APA Act. The Agency members should be told this. [5]

(iii) no Agency precedent for what the Project Sponsor was asked to evaluate by staff, who by its own admission in the record, admitted that its directives where less than clear; and

(iv) no mitigation objective with regard to the project design and the enormous amount of acreage to remain undeveloped (especially given an unprecedented 3-acre envelope for land use disturbance on the great Camp lots.

This entire subject matter must be corrected in January or it will continue to compromise[6] what was attempted to be achieved by the adjudicatory process.

2. 11:00 AM – 12:15 PM

A. TEMPORARY USE OF CRANBERRY POND FOR SNOWMAKING (E. SNIZEK G. BENDELL)

(1) "SKI AREA" – **Findings # 155 through 158** (last 2 slides under this subject matter regarding Cranberry Pond and snowmaking).

There was discussion about establishing a condition that would require the Project Sponsor to keep the ski area open to the public indefinitely as long as residential sales have taken place and homes occupy the site. The Project Sponsor has entered into a written Agreement with the Town to keep the ski area open to the public for 50 years "so long as it is in operation." This condition is acceptable to the municipality. It is respectfully submitted that any effort to force this project to be a facility which must be open to the public in perpetuity is both a "taking" and a "forced dedication," both of which are unconstitutional as being in violation of private property rights. Why not leave well enough alone? … everyone wants to see that ski mountain be successful!

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[5] At the end of Friday's session where Agency members made final statements, Dick Booth stated that while "not for discussion today" … we will need to address "does this project propose a reasonable use of Resource Management land? … especially when we come to the Conclusions." Dick Booth and the other members should be reminded of what is set forth above in this letter.

[6] Whatever the agency Board decides in this matter, I can only assume that one of their objectives is to prevail over any subsequent litigation. If this is one of their objectives – and it should be – it was compromised by this slide and its presentation.

3. 2:15 PM – 3:00 PM

A. IMPLEMENTATION (S. REYNOLDS, R. WEBER)

There are 10 slides which make up this section of executive staff's presentation.

(1) Slides #3 ("Subdivision Plats"), 5 ("Water Supply"), 6 ("Wastewater Treatment"), and 7 ("Ground and Surface Water Resources") all reference the Project Sponsor or its successor being required to submit to the Agency "**plans**" for the various subdivision and infrastructure components of the project "**for the associated phase.**" I am assuming that "plans" would actually be "**plats**" intended to be submitted to the joint Planning Board for final approval. I am also assuming that "associated phase" means a **portion** of an entire phase and not the entire phase. Thus, there would be several plats associated with one entire phase of the project that would be submitted to the Agency for approval over the 3 to 4 year expectancy of that phase's build-out.[7] Yet, in slide # 8 – "INFRASTRUCTURE," it states:

"Prior to the conveyances of any lot, unit, or structure on the project site, the Project Sponsor or its successor shall submit to the Agency for review and written approval documentation from the independent Environmental Monitor that all wastewater treatment and water supply infrastructure, stormwater management, roads, electric and cable systems, grading and landscaping **for that phase of the project have been completed according to the approved plans.**" (emphasis added)

Here, there is no reference to an "associated phase," but rather it states "for that phase of the project." **I cannot emphasize enough the two major concerns my client has with this language**:

> (i) all of the parties involved in negotiating the approval process to be implemented over the 15-year project build-out intended the plat plan process to be utilized numerous times for component portions of an entire phase - - this slide # 8 appears to eliminate that approach, and
>
> (ii) this series of slides appears to have eliminated the "build or bond" mechanism for infrastructure that is established in the hearing staff's Draft Order at Conditions 47 thru 54. Executive staff have for no explainable reason recommended that infrastructure be built – not bonded – before closing on sales. The Project Sponsor spent years working with the Town to set-up a "bond or build" infrastructure approach which was intended to allow conveyance for lots before infrastructure construction for two very significant purposes: a). buyers would be able to start construction of their homes sooner and, b). to raise capital

[7] This is precisely how the construction process is intended to work as formulated over multiple meetings among you, me, Bob Sweeney and Kirk Gagnier (Mark Sengenberger was involved early on and there was occasional participation by Mitch Goroski and Shaun Lalonde). I trust this is not changing, but cannot be sure at this point.

for cash flow as early as possible. **Executive Staff's alteration of this approach would have particularly devastating consequences with respect to the sales of Great Camp Lots that are necessary as an essential financing device in this very difficult economy. Even HUD (Interstate Land Sales Act) and consumer protection laws recognize the sophistication of the buyers of such lots.**

Why would staff ... or the Agency members ... want to do this? What authority does the Agency have to take such a dramatic departure from what the hearing Record otherwise supports, especially in light of its own enabling statute at §809.13:

> "The agency shall have authority to impose such requirements and conditions with its granting of a permit as are allowable within the proper exercise of the police power. The agency shall have specific authority in connection with its project review jurisdiction: a. To impose reasonable conditions and requirements, including the posting of performance bonds in favor of the local government as obligee, to ensure that any project for which a permit is granted will be adequately supported by basic services and improvements made necessary by the project. The cost of any such services or improvements may be imposed by requiring that the project sponsor provide the service or improvement or reserve land, or any interest therein, or contribute money in lieu thereof to the local government where in the project is proposed to be located if such local government consents thereto. In the exercise of the authority contained in this provision, the agency shall consult with the affected municipalities and give due consideration to their views."

The AC&R "build or bond" proposal as articulated in conditions 47 thru 54 (and most specifically at condition # 52) comports in virtually every way with this statutory provision ... the municipality concurs with this approach ... and legal counsel for both the Tupper Lake Town Board and Joint Planning Board has also expressed this concurrence to APA hearing staff (specifically, Kirk Gagnier to you on several occasions; see also Town of Tupper Lake and Joint Town & Village of Tupper Lake Planning Board – Reply Post Hearing" at pp. 2, 7, 8 & 9).

In summary, the Project Sponsor must retain its flexibility in determining the segments of development to occur within each Phase in order to respond to fluctuating market demands over the next 15+ years, AND the project must be able to advance a "build or bond" approach to infrastructure in order to meet early (years 1 thru 3) capitol cost demands and attract investors; nothing could be more important to the success of this project.

Once again, I trust this is helpful. At this juncture in the Agency's deliberations, the points being offered herein are most important to the commencement of a project in which, assuming Agency approval, will result in a permit to which all parties can work collectively to

achieve success for this Adirondack Resort. Please do not hesitate to call me should you want to discuss any of these comments further.