STATE OF NEW YORK SUPREME COURT
APPELLATE DIVISION THIRD DEPARTMENT

In the Matter of the Application of

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

Petitioners-Appellants,

for a Judgment Pursuant to CPLR Article 78

-against-

ADIRONDACK PARK AGENCY, NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION, PRESERVE ASSOCIATES, LLC, BIG TUPPER, LLC, TUPPER LAKE BOAT CLUB, LLC, OVAL WOOD DISH LIQUIDATING TRUST and NANCY HULL GODSHALL, as Trustee of OVAL WOOD DISH LIQUIDATING TRUST,

Respondents-Respondents.

PETITIONERS-APPELLANTS' BRIEF

CAFFRY & FLOWER
Attorneys for Petitioners-Appellants
John W. Caffry, of Counsel
Claudia K. Braymer, of Counsel
100 Bay Street
Glens Falls, New York 12801
518-792-1582

Robert C. Glennon, Esq.
Ray Brook, New York

Ellen Egan George, Esq.
Saranac Lake, New York

To be argued by: John W. Caffry
Time requested: 30 minutes

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QUESTIONS PRESENTED

1. Whether each of the twenty-nine causes of action set forth in the Amended Petition should be granted pursuant to CPLR Article 78? Supreme Court transferred the case pursuant to CPLR § 7804(g) and did not rule on these claims.

2. Whether Petitioners should be granted leave pursuant to CPLR § 408 to conduct discovery regarding the Twenty-Eighth Cause of Action, which alleges that the APA engaged in improper *ex parte* communications? Supreme Court answered in the negative.

STATEMENT OF THE CASE

This CPLR Article 78 proceeding, which has been transferred to the Appellate Division pursuant to CPLR § 7804(g), seeks to annul the approval by the Adirondack Park Agency ("APA") of the Adirondack Club & Resort ("ACR") which has been proposed to be built in the Town of Tupper Lake, Franklin County (the "Project"). The Project is the largest project ever reviewed or approved by the APA pursuant to the Adirondack Park Agency Act, Executive Law Article 27 ("APA Act"), since the creation of the APA in 1971. A. 280, 2370.[1]

APA conducted a 19 day adjudicatory hearing on the Project application pursuant to its regulations at 9 NYCRR Part 580. A. 293. After briefing by the parties and the close of the hearing

[1] This appeal is being prosecuted using the appendix method under Rule 800.4(b). A single copy of the Record has been filed in the office of the Clerk of the Court. References to the pages of Appendix are abbreviated as "A. ___", and references to the pages of Record are abbreviated as "R. ___".

record, APA deliberated on the application and hearing record at three separate meetings, totaling 8 days, spread over three months. A. 293. On January 20, 2012 APA approved a Project Findings and Order, No. 2005-100 ("Order"), and 14 separate permits for the Project (A. 1-276), which granted approval of the Project, subject to certain conditions. A. 279-280, 293-294. The Order was issued on January 31, 2012. A. 293-294.

The Amended Petition includes 29 separate causes of action,[2] which demonstrate that, in approving the Project, APA violated the substantive requirements of the APA Act, the Freshwater Wetlands Act (Environmental Conservation Law ("ECL") Article 24), and its own regulations at 9 NYCRR Parts 574 and 578, and violated the procedural requirements of the APA Act and 9 NYCRR Parts 578, 580 and 587, and of the State Administrative Procedure Act ("SAPA"). The claims are detailed in Petitioners' Amended Petition (A. 279-432) and their Reply (A. 828-1073).

The Parties

Petitioners Protect the Adirondacks! Inc. and Sierra Club are not-for-profit environmental protection organizations, whose missions include advocating for the protection of the Adirondack Park. Protect the Adirondacks! Inc. was a party to the APA adjudicatory hearing on the Project. A. 284-287, 832-835, 1133-1156. Petitioner Phyllis Thompson is an adjoining property owner

[2] These 29 causes of action are numbered First to Thirtieth, because Twenty-Fifth was accidentally skipped. A. 409-411, 829, 1022.

to the Project's site. Petitioners Robert Harrison and Leslie Harrison are nearby property owners to the Project's site. All three of them were parties to the APA adjudicatory hearing on the Project, and they are all members of one or both of the organizational petitioners. A. 287-289, 1141-1148.

Respondents APA and Department of Environmental Conservation ("DEC")(collectively, the "State") are Executive Branch agencies of the State of New York. A. 289-290. Respondents Preserve Associates, LLC, Big Tupper, LLC, Tupper Lake Boat Club, LLC, Oval Wood Dish Liquidating Trust, and Nancy Hull Godshall, as Trustee of Oval Wood Dish Liquidating Trust, are the applicants for the Project's permits and/or property owners of the Project's site (collectively, the "Project Sponsors"). A. 290-291.

Procedural History

This proceeding was timely commenced by the filing of the Notice of Petition and Petition with the Clerk of Albany County on March 20, 2012. A. 277-278. Answers were served by the State and by the Project Sponsors, and the State also served the 22,000+ page Return and two supporting affidavits. Petitioners then served the Amended Petition on June 18, 2012. A. 279-432. The State and the Project Sponsors served Amended Answers on July 9, 2012 and the State also served another supporting affidavit. A. 433-688, 689-827. Petitioners served their Reply, together with two supporting affidavits and a Supplemental Return, on July

16, 2012. A. 828-1156, 5010-5069.

Following service of the Petitioners' Reply, an Order of Transfer was made by Richard M. Platkin, J.S.C. on July 20, 2012 (A. 1190-1193), transferring the case to the Appellate Division, pursuant to CPLR § 7804(g) and a Stipulation that had been entered into by the parties (A. 1157-1190). Pursuant to that Stipulation, the Petitioners then made a motion to the Appellate Division for leave to conduct disclosure pursuant to CPLR § 408 regarding the illegal *ex parte* contacts with APA which are the subject of the Twenty-Eighth Cause of Action, and Respondents opposed the motion. A. 1169-1171. On November 29, 2012, the Appellate Division issued a Decision and Order remitting the proceeding to Supreme Court, Albany County and denying Petitioners' motion "without prejudice to a motion being made in Supreme Court". A. 1347.

Accordingly, Petitioners then made a motion to Supreme Court for the same relief as they previously sought in the Appellate Division, Respondents again opposed the motion, and Petitioners served a reply. A. 1161-1581. Supreme Court (Platkin, J.), by Decision and Order dated March 19, 2013, denied the Petitioners' motion. A. i-xii. By an order of Supreme Court (Platkin, J.) dated April 3, 2013, the case was re-transferred to the Appellate Division. A. xiii-xvii.

Petitioners then made a timely motion to the Appellate Division for leave to appeal from Supreme Court's Decision and

Order and for the consolidation of that appeal with the underlying transferred Article 78 proceeding. The Respondents opposed the motion. By a Decision and Order on Motion dated May 16, 2013, the motion was granted. A. xviii.

This Brief is filed in support of both the underlying transferred Article 78 proceeding and the appeal of Supreme Court's order denying Petitioners leave to conduct discovery.

STATEMENT OF FACTS

The Project was first presented to APA as a conceptual plan in 2004. A. 1582. A formal application was filed in 2005 (A. 1909), and after multiple supplementations and amendments (e.g. A. 1911-2360), APA declared the application to be complete in 2006. A. 2401. In 2007, APA ordered that an adjudicatory hearing be conducted, on some 10 different issues. A. 2453-2465. The administrative law judge assigned to the case later expanded that to 12 issues, and modified some of the original 10. A. 2727-2754. All of the Petitioners herein, except for Sierra Club, and about 40 other parties, applied for and received party status in the hearing. A. 2469-2497, 2760-2768.[3] After extensive delays caused primarily by the applicant for the permits (A. 293), respondent Preserve Associates, LLC ("Applicant"), the hearing commenced in March 2011 and concluded in June 2011. A. 5693-6802. As described above, the application

[3] See also ALJ's Ruling on Party Status, February 14, 2008; A. 2495-2497; R. 9857-9898.

was approved in January 2012.

As approved by APA, the Project would sprawl over 6,000+ acres of land and would include 659 residential units of various types, a 60 bedroom inn, a redeveloped and expanded downhill ski area, a redeveloped marina on Tupper Lake, a valet boat launching service, thousands of square feet of commercial space and restaurants, over 15 miles of public and private roads, a private sewage treatment plant, amenities including a gym, recreation center, health spa, equestrian center, amphitheater, clubhouses, and related infrastructure, maintenance facilities, and accessory structures. A. 280-281. The facts of the case are set forth in more detail in the Amended Petition (A. 279-432), Reply (A. 828-1073), and Petitioners' supporting affidavits (A. 1074-1156).

SUMMARY OF THE ARGUMENT

This Article 78 proceeding has significant implications for the future of the Adirondack Park. Not only is the Project the largest ever proposed to or approved by the APA, the potential substantive and procedural precedents that would be set if its approval is upheld will greatly affect the future administration of the APA Act, and could determine whether or not the APA will be able to meet its legislatively mandated purpose, which is:

> to insure optimum overall conservation, protection, preservation, development and use of the unique scenic, aesthetic, wildlife, recreational, open space, historic, ecological and natural resources of the Adirondack park. APA Act § 801.

When the Project was previously before the Court, the Court made it abundantly clear that APA's prime directive was to carry out its "environmental mandate" when it undertook its review of the Project's application. Association for the Protection of the Adirondacks v. Town Board of Town of Tupper Lake, 64 A.D.3d 825, 826-827 (3d Dept. 2009).[4] APA was required to "plac[e] environmental concerns above all others". Id. at 830 (concurring op.). Instead of doing so, APA bent, broke and ignored the law in order to find a way to approve the Project, despite the fact that the Project, *inter alia*, would "have an undue adverse impact upon the ... resources of the [Adirondack] park" (APA Act § 809(10)(e)), and that the Applicant had failed to meet its burden of proving otherwise.

APA's decision was not supported by substantial evidence, was arbitrary and capricious, and was largely based on additional studies to be done by the Project Sponsors after-the-fact, evidence outside the record, or no evidence at all. On many issues, the decision was contrary to the express provisions of the APA Act and the Freshwater Wetlands Act, or made in violation of lawful procedure.

In this transferred Article 78 proceeding, the Petitioners seek a ruling from the Court upon each of the twenty-nine causes of action which are set forth in the Amended Petition and Reply.

[4] Petitioner Protect the Adirondacks! Inc.'s two predecessor organizations and petitioner Phyllis Thompson were among the petitioners-plaintiffs in that case. A. 284, 288-289.

A. 279-432, 828-1073. Points I to IX of this Brief are primarily intended to support the Amended Petition and Reply, much the same as a memorandum of law would do in the trial court, rather than containing the entire argument of the Petitioners, as it would do on an appeal.

The Twenty-Eighth Cause of Action (A. 415-420) demonstrates that APA's decision should be annulled because there were illegal *ex parte* contacts between APA and the Applicant, and APA and the Executive Chamber. Defendants moved for leave to conduct discovery on that issue pursuant to CPLR § 408, but the motion was denied. A. i-xii. Petitioners aver that the Record contains sufficient proof of this claim (A. 1556, 415-420, 608-610, 1038-1050, 1123-1124, 1161-1581, 5010-5069) for the Court to grant judgment thereon. Point X.A, infra. However, if the Court does not find that the current Record provides sufficient proof thereof, it should overrule Supreme Court and grant Petitioners leave to conduct discovery on that issue. Point X.B, infra.

The Respondents raised several affirmative defenses in their Amended Answers. A. 433-434, 689-708. Those defenses were thoroughly rebutted in Petitioners' Reply and supporting affidavits (A. 828-1073, 1133-1156), and are generally not addressed in this Brief.

Finally, APA's approval of the Project was not substantially justified, and Petitioners should be awarded, against respondent APA, their legal fees and other expenses pursuant to CPLR Article

86, the New York State Equal Access to Justice Act. Point XI, infra.

STANDARD OF REVIEW

The 29 causes of action in this Article 78 proceeding are subject to various standards of judicial review, including "substantial evidence", "arbitrary and capricious", and "error of law". However, certain legal standards should inform the consideration of all of the issues herein.

APA's Environmental Mandate Required it to Place Environmental Concerns Above All Others

There is one unifying theme that should be applied to the Court's review of all 29 causes of action. In the prior proceeding involving the Project, the Court, while upholding the rezoning of the Project's site by the Town of Tupper Lake, held that:

> The APA is charged with the duty to ensure that certain projects within its jurisdiction "would not have an undue adverse impact upon the natural, scenic, aesthetic, ecological, wildlife, historic, recreational or open space resources of the park" ... . This environmental mandate predated SEQRA[5] and, as reflected in the APA's regulations, it is more protective of the environment [than SEQRA]. Association, 64 A.D.3d at 826-827 (internal citations omitted).

Moreover, while SEQRA requires agencies to strike a balance between social and economic goals and the protection of the environment (id. at 829 (concurring op.)),

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

> [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.
>
> Clearly, by placing environmental concerns above all others, "the APA's mandate is more protective of the environment than that embodied within SEQRA." Id. at 830.

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

> the constitutional and legislative history stretching over 80 years[6] to preserve the Adirondack area from despoliation, exploitation, and destruction by a contemporary generation in disregard of generations to come. (internal citations omitted)

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

As shown by Point VII, infra, while the APA 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" (Association, 64 A.D.3d at 829 (concurring op.)), the APA Act, unlike SEQRA, does not authorize APA to weigh and balance the alleged financial and fiscal benefits of a proposed project against its adverse environmental impacts. Id. at 826-827

[6] Now almost 130 years. See Helms v. Reid, 90 M.2d 583, 590 (Sup. Ct. Hamilton Co. 1977)(Adirondack Forest Preserve was created by the Legislature in 1885).

(majority op.), 829-830 (concurring op.). Therefore, all doubts about the Project's compliance with the law, and APA's attempts to carry out its "environmental mandate" (id.), should be resolved by the Court in favor of protecting the environment. Point VII, infra.

APA's Decision to Approve the Project Was Not Supported By Substantial Evidence and Was Arbitrary and Capricious

An administrative agency's decision following an adjudicatory hearing may only be upheld on judicial review if it is supported by substantial evidence and is not arbitrary and capricious. People ex. rel Vega v. Smith, 66 N.Y.2d 130, 139 (1985); 300 Gramatan Ave. Assoc. v. State Div. of Human Rights, 45 N.Y.2d 176, 180 (1978); Rauschmeier v. Village of Johnson City, 91 A.D.3d 1080, 1082 (3d Dept. 2012); Heinlein v. New York State Office of Children & Family Services, 60 A.D.3d 1472 (4th Dept. 2009); Dudley Road Ass'n. v. APA, 214 A.D.2d 274, 281 (1995); Green Island Assoc. v. APA, 178 A.D.2d 860, 862 (3d Dept. 1991). See also Point III, infra. "Whether or not an administrative agency determination is shored up by substantial evidence is a question of law to be decided by the courts." 300 Gramatan Ave. Assoc., 45 N.Y.2d at 181. As demonstrated below, APA's decision does not meet this test. In addition, an agency determination will be overturned if it is based upon an erroneous interpretation of the applicable law. See Lewis Family Farm v.

APA, 64 A.D.3d 1009, 1013-1014 (3d Dept. 2009); Heinlein, 60 A.D.3d at 1473; Adirondack Mountain Club v. APA, 33 M.3d 383, 390 (Sup. Ct. Albany Co. 2011).

The Burden of Proof Was on the Applicant to Prove the Allegations of the Application

In the adjudicatory hearing on the Project, the burden of proof was entirely on the Applicant to prove by substantial evidence that the Project complied fully with the law, and that it was absolutely entitled to a permit. The burden was not on the APA or the Petitioners to prove otherwise. If the Applicant did not affirmatively prove that each and every aspect of the Project complied with the law, or if it failed to meet its burden of proof on any one of the twelve adjudicatory hearing issues, or on any other legal issue, then there was not substantial evidence to support APA's ruling and the Petition must be granted.

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 APA's regulations at 9 NYCRR Part 580 also make it clear that the applicant has the burden of proof with regard to all hearing issues. 9 NYCRR §§ 580.6(a), 580.11(b), 580.14(b)(3), 580.14(b)(6)(i). Those regulations also provide, in rules that are perhaps unique to APA, that the application materials are mere allegations, which must be proven by actual admissible evidence in the hearing. Id.

The effect of these rules is that, in making its case for

approval of an application, an applicant can not rely solely on the application materials. The application is treated as mere allegations, and each claim therein 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. Nor can such unproven allegations be considered on the question of whether or not there is substantial evidence to support the decision. 25-24 Café Concerto Ltd v. New York State Liquor Authority, 65 A.D.3d 260, 265-269 (1st Dept. 2009).

In this case, the Petition must be granted 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 approve an application as being "in compliance," the APA must, among other things, determine that the proposed project would not have an undue adverse impact upon the environmental resources of the Adirondack Park. See APA Act § 809(10); 9 NYCRR § 580.14(b)(6)(i); Dudley Road Ass'n., 214 A.D.2d at 281.

The APA's determination must have a rational basis that is supported by substantial evidence in the record. See 9 NYCRR § 580.15(a)(3). 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). Otherwise, the application must be denied. See Green Island Assoc., 178 A.D.2d at 862; 9 NYCRR § 580.14(b)(3). Without that level of proof in the record, the APA would not be able to make its statutorily required findings. Pfau v. APA, 137 A.D. 2d 916, 917 (3d Dept. 1988).

In this case, 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), and so they remain unproven claims. Accordingly, since the Applicant failed to present substantial evidence "to prove that [it] had met the criteria for issuance of a permit," the application should have been denied in its entirety. Friedman, 165 A.D.2d at 37. See 9 NYCRR § 580.14(b)(3); 9 NYCRR § 580.14(b)(6)(i). Instead, APA granted the permit. The Court should annul it.

ARGUMENT

POINT I

THE ORDER MUST BE ANNULLED BECAUSE IT RELIES UPON STUDIES OF ADVERSE IMPACTS TO BE DONE AFTER-THE-FACT

When deciding whether to approve or deny the Project application, APA was required to determine whether the Project would have an "undue adverse impact" on the natural resources of the Adirondack Park. APA Act § 809(10)(e). To make this determination APA needed to identify and fully consider the Project's impacts to the land, water, air, wildlife, aesthetic, and other resources of the Park. APA Act § 805(4). A reviewing agency has a "duty" to identify environmental concerns and to "address them thoroughly" because that is the only way "that there can be any guarantee of a comprehensive review of the proposed [project's] adverse environmental effects, consideration of less intrusive alternatives to the proposed action and consideration of measures in mitigation". Town of Dickinson v. County of Broome, 183 A.D.2d 1013, 1014 (3d Dept. 1992).

As established by the Second, Fourth, and Sixth Causes of Action, APA's decision to approve the Project, while at the same time requiring the Project Sponsors to conduct studies of the Project's adverse impacts after the approval was granted, was arbitrary and capricious and affected by error of law. A. 305-331, 846-915, 1078-1097.[7] The apparent need for after-the-fact

[7] The State failed and refused to provide a transcript of the deliberations of the APA Members at their meetings in 2011 and 2012 at which they reviewed and approved the application. A. viii-ix, 1161-1165, 1180-1182,

studies shows that APA failed in its duty to make reasoned, rational conclusions about the Project's impacts, prior to approving the Project. See APA Act § 805(4); id.

The burden of proving that there would be no "undue adverse impact" under APA Act § 809(10)(e) rests with the applicant, and must be met "before" the application is approved. APA Act § 805(4); see SAPA § 306(1); 9 NYCRR 580.6(a); pp. 12-14, supra; A. 301-304, 844-846, 1087. If there is a "need for further analysis" of a project's impacts, then the project should not be approved. Pyramid Co. of Watertown v. Planning Bd. of Town of Watertown, 24 A.D.3d 1312, 1314 (4th Dept. 2005).

Here, the Applicant never met its burden, and APA made its determination without the necessary information to make the findings required by the APA Act. A. 301-307, 317, 326, 4136-4139. Approving the Project without the information to support such a decision was arbitrary, capricious, and lacking in substantial evidence, thus requiring annulment of the decision. See Point III, infra (discussing why APA's decision was lacking in substantial evidence); A. 313-348, 877-941.

Rather than requiring the Applicant to supply the needed information during the permit application process, or during the adjudicatory hearing process, APA approved the Project, and allowed the Project Sponsors to conduct studies of the Project's

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1358-1359, 1390-1392, 1502-1503, 1538-1543. Accordingly, Petitioners' co-counsel listened to the entire 8 days of webcasts of these meetings (A. 4712) and transcribed the most important parts, setting them forth in an affidavit which was filed with the Reply. A. 1074-1132.

potential environmental impacts after the approval was granted. The after-the-fact studies required by the APA's Order include:

> 1. Identifying and monitoring impacts to wetlands and their associated functions, fish, wildlife and other biota within Cranberry Pond as a result of the project's snowmaking activities. A. 33-34, 49, 307-314, 877-885.
>
> 2. A comprehensive amphibian survey and impact analysis to identify critical amphibian habitat areas and amphibian migration corridors which require additional protection. Inexplicably, APA mandated this study for some Project elements (West Face Expansion subdivision, Small Western Great Camp Lots, and Small Eastern Great Camp Lots), but not for others, that would be located within "critical terrestrial habitat" for amphibians. A. 33, 96-97, 217-218, 236-237, 319-330, 891-899.

These after-the-fact studies demonstrate that APA failed in its duty to conduct a "coherent evaluation" of these impacts, and that its determination must be annulled. Purchase Envt'l. Protection Ass'n. v. Strati, 163 A.D.2d 596, 597 (2d Dept. 1990).

Requiring these studies was irrational since they will have little, if any, effect on the design of a project that has already been approved. A. 1095. These studies should have been conducted prior to the approval of the Project so that the Project could have been designed in a way that would have eliminated or mitigated the Project's impacts. A. 901, 1087-1088, 1094, 2458, 5216-5231, 5592-5593, 5867.

APA's Order requires the Project Sponsors to use the studies to employ "low cost" mitigation measures (A. 33), but there is no rational basis to establish that these "low cost" or "non-material" (A. 4531) mitigation measures will prevent undue adverse impacts when it is possible that the studies will show

that whole Project elements need to be redesigned, or even eliminated, in order to avoid undue adverse impacts. A. 901, 1087-1088, 1094, 2458, 5216-5231, 5592-5593, 5867.

Any claims that the future measures could adequately mitigate the Project's adverse impacts were based on speculation, conjecture, and unsupported conclusions, which were contained in conclusory testimony that was not supported by any actual evidence. See e.g., A. 6055 (witness testified that he did not analyze the impact of the Project's roads on migrating amphibians, but proceeded to testify in conclusory fashion that he "would suspect that the mitigation that is going to occur . . . will, to some degree, offset those other impacts"); see generally Fleck v. Town of Colden, 16 A.D.3d 1052 (4th Dept. 2005) (finding that conclusory decision of no adverse effects was arbitrary and capricious).

Requiring after-the-fact studies of the Project's impacts, and then relying upon "tentative plans for mitigation measures", was arbitrary and capricious. Pyramid Co. of Watertown, 24 A.D.3d at 1314. The review, "implementation and enforcement of these mitigation measures will be pursuant to the permit conditions" after the approval of the Project, and as such improperly "denies the petitioners and other members of the public their intended input with respect to whether such analysis and mitigation is appropriate or acceptable". Brander v. Town of Warren Town Bd., 18 M.3d 477, 481-482 (Sup. Ct. Onondaga Co.

2007).

In addition, the process of approving the Project and then requiring after-the-fact studies and tentative mitigation measures, is "substantively defective" and arbitrary and capricious because it improperly postponed APA's review of environmental impacts. Id. at 484-485. Therefore, the Second, Fourth, and Sixth Causes of Action should be granted, and the Order should be annulled.

POINT II

APA'S DECISION WAS ARBITRARY AND CAPRICIOUS BECAUSE IT APPROVED THE PROJECT WITHOUT REQUIRING THE PROJECT SPONSOR TO CONDUCT WILDLIFE STUDIES, BEFORE OR AFTER THE APPROVAL

As shown in the Eighth Cause of Action, with respect to wildlife and its habitat, APA approved the Project without substantial evidence because it allowed the Applicant to simply ignore these adverse impacts. A. 331-348, 916-941. Although APA Staff asked the Applicant, on at least three occasions, to provide comprehensive wildlife and habitat studies, the Project Sponsor never provided such studies. A. 1080, 1914, 2197, 2352, 2376, 5791, 5809, 5833, 5851, 5971, 6649, 6657.

The APA Staff's Closing Brief, filed after the close of the adjudicatory hearing (A. 3758), pointed out that the Applicant could have and should have done more to identify wildlife species and assess habitat impacts, and that these impacts were "only cursorily assessed" by the Project Sponsor. With regard to

amphibian habitat,[8] the Staff Brief (A. 3760) conceded that:

> **due to the lack of information in the record it is impossible to make complete conclusions about protection of this specific habitat in RM.** (footnote omitted)

The Staff Brief (A. 3818) stated that "not enough was done to identify biological resources or to assess the impacts of the proposed project on those resources." These admissions demonstrate conclusively that APA's decision, purportedly finding no undue adverse impacts, was arbitrary and capricious because there was no evidence upon which to assess the impacts.

Rather than including a condition in the Order and Permits requiring worthless, after-the-fact comprehensive wildlife and habitat studies as it did for Cranberry Pond and amphibian impacts, APA's decision glossed over this gaping hole in the evidence. A. 1094 ("there's a hole - a big hole - that the applicant left in this application"). APA covered this hole by stating in the final Order that historical records for threatened and endangered species had been reviewed, and that, other than one deer wintering yard, no "other wildlife habitat . . . containing threatened, endangered or species of special concern" had been seen on the 6,000+ acres Project site. A. 21.

APA claimed that the so-called "site investigations" that

[8] The record contains a great deal of discussion about amphibian habitat. This occurred because Adirondack Wild's expert ecologist is a specialist in amphibians. Tr. 105; A. 2962. Because he testified about these species, that became a focus of discussion. However, that does not mean that other types of wildlife should be ignored. Instead, the same lack of data on amphibians that plagues the record (see Point I, supra) also affects the record regarding other types of animals, such as birds and mammals. See e.g. A. 5671-5692, 6410-6413.

were conducted followed APA's "Guidelines for Biological Surveys" (hereinafter "Guidelines"). A. 21. However, the "Guidelines" document, which was written in 1993 (A. 4803), is not in the hearing record, and was not relied upon, or testified about, during the adjudicatory hearing (A. 343-344, 920-922, 1086) so it can not be relied upon by APA to justify its decision. See SAPA § 302; SAPA § 306; 9 NYCRR § 580.15(a)(3); Simpson v. Wolansky, 38 N.Y.2d 391, 395-396 (1975); Beverly Farms v. Dyson, 53 A.D.2d 720, 721 (3d Dept. 1976).

Further, the "Guidelines" document was not available to the public on APA's guidance website[9] as required by SAPA § 202-e and 19 NYCRR § 265.1, was not legally adopted pursuant to APA Act § 809(14), and the parties were not given notice of its use (A. 343-344, 922-932) so APA could not take official notice of it (see 9 NYCRR § 580.15(b)). Therefore, the use of this document, in the context of approving a Project that was the subject of an adjudicatory hearing, was improper (A. 343-347). See 9 NYCRR § 580.15(b)(1),(2).

Even assuming that the "Guidelines" document was a legitimate APA policy guidance, and that APA's use of it in the context of this adjudicatory process was proper, the "Guidelines" document was not followed. A. 345. The "Guidelines" state that "[e]ach application will be judged on its particular merits". In judging this Project "on its merits", the APA Staff had requested

[9] See http://apa.ny.gov/Documents/Guidelines.html.

a comprehensive wildlife and habitat study, but the study was never done. A. 1080, 1086-1087.

As set forth in the "Guidelines", several smaller, but similar, projects had previously been required to undergo full scale biological surveys (A. 4806-4807). The same should have been done for this enormous, precedent-setting Project, but APA provided no reason for not requiring full scale biological surveys. Failure to actually follow the "Guidelines" and require a comprehensive biological survey, or explain why prior agency precedent was not followed, was arbitrary and capricious, and requires annulment of APA's decision. See Charles A. Field Delivery Service, Inc., 66 N.Y.2d 516, 520 (1985). Therefore, the Eighth Cause of Action should be granted.

POINT III

APA'S DECISION ABOUT THE PROJECT'S IMPACTS TO THE PARK'S NATURAL RESOURCES LACKED SUBSTANTIAL EVIDENCE

As established by the First, Third, Fifth, and Seventh Causes of Action (A. 305-348), APA's decision approving the Project was not supported by substantial evidence with regard to the Project's impacts on critical resource areas and wildlife (see APA Act § 805(4)(a)(5), (6)). APA nonetheless approved the Project even though the Project Sponsors failed to provide "such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact". People ex. rel Vega v. Smith, 66 N.Y.2d 130, 139 (1985) (quoting 300 Gramatan Ave.

Assoc. v. State Div. of Human Rights, 45 N.Y.2d 176, 180 (1978)).

Therefore, as demonstrated below, APA's conclusion in the Order that the Project "complies with the applicable approval criteria" (A. 36) was "not borne out by the record". Rauschmeier v. Village of Johnson City, 91 A.D.3d 1080, 1082 (3d Dept. 2012). Therefore, APA's decision "was not supported by substantial evidence, and [its] determination must be annulled". Id. at 1083.

A. APA Lacked Substantial Evidence to Support Its Decision Regarding the Use of Cranberry Pond for Snowmaking

As shown in the First Cause of Action, APA's decision - that there would not be undue adverse impacts on Cranberry Pond, its wetlands and their associated functions, and the fish, wildlife and other biota within Cranberry Pond caused by the drawdown of the water in Cranberry Pond from the Project's snowmaking activities - was not supported by substantial evidence. A. 307-314, 877-885, 1077-1097, 4164-4169.

Adverse impacts upon waters, wetlands, fish and wildlife must be considered before APA approves a project. APA Act § 805(4). However, APA's "findings of fact" admitted that the impacts to Cranberry Pond had "not been determined" (A. 33). A. 5229, 6096. Therefore, under the circumstances here, APA's decision must be annulled because it is not supported by any evidence. See County of Nassau v. State Bd. of Equalization, 80 A.D.2d 9, 11 (3d Dept. 1981); Hoch v. New York State Dept. of

Health, 1 A.D.3d 994, 994 (4th Dept. 2003).

Additionally, there was evidence in the record that withdrawing water from Cranberry Pond would result in "a whole host of potential impacts" to wetlands, fish, wildlife and other biota, including "loss of vegetation", and "high mortality" of turtles, frogs and invertebrates. A. 6055; see also A. 880, 888, 5230, 5276-5277, 5583, 5876-5877, 6031-6032, 6044-6045, 6054-6055, 6065, 6095. Therefore, the "record did not allow [APA] to find that the project would not have an undue adverse impact upon the natural, scenic, ecological or wildlife resources of the Adirondack Park". Green Island Assoc. v. APA, 178 A.D.2d 860, 862 (3d Dept. 1991); see Pfau v. APA, 137 A.D.2d 916, 917 (3d Dept. 1988).

Having essentially admitted that it had "no evidence in the record to support the determination", and there being evidence to the contrary, APA's conclusion, with respect to the Project's compliance with APA Act § 809(10)(e) - that the Project's snowmaking activities would not have an undue adverse impact under APA Act § 805(4) - was not supported by substantial evidence, or by any evidence at all. County of Nassau, 80 A.D.2d at 11. Therefore, the First Cause of Action should be granted.

B. APA Lacked Substantial Evidence to Support Its Decision Regarding the Project's Compliance with the Freshwater Wetlands Act

As shown in the Third Cause of Action, APA's decision that

the Project complied with the Freshwater Wetlands Act was not supported by substantial evidence. A. 315-318, 885-890, 1077-1097, 4164-4169. APA "shall not issue a permit" under APA's Freshwater Wetlands Act regulations unless it determines that the "proposed activity would result in minimal degradation or destruction of the wetland or its associated values; and . . . is the only alternative which provides an essential public benefit." 9 NYCRR § 578.10(a)(2); see 9 NYCRR § 578.5(a).

APA's "findings of fact" admitted that "Cranberry Pond is not a reliable long-term source of snowmaking" (A. 24, see A. 5276), that "Tupper Lake represents a more reliable long-term source of water that minimizes impacts" (A. 24; see A. 5277), and that the impacts to Cranberry Pond from using it as a source of snowmaking water had "not been determined" (A. 33; see A. 5276). Therefore, APA's decision must be annulled because it is not supported by any evidence. See County of Nassau, 80 A.D.2d at 11.

Additionally, there was evidence in the record that withdrawing water from Cranberry Pond would result in "a whole host of potential impacts" to the wetlands including "loss of vegetation" and "introduction of oxygen into the organic matter and release of nutrients". A. 6055; see also A. 5876-5877, 6031-6032, 6044-6045, 6054-6055, 6065, 6095. Therefore, the "record did not allow [APA] to find that the project would not have an undue adverse impact upon the natural, scenic, ecological

or wildlife resources of the Adirondack Park". Green Island Assoc., 178 A.D.2d at 862; see Pfau, 137 A.D.2d at 917 (upholding APA's denial of wetlands permit on the grounds that the evidence was not adequate for it to make requisite findings under 9 NYCRR § 578.10).

Further, having admitted that Tupper Lake is a better alternative than Cranberry Pond and that the impacts to Cranberry Pond and its wetlands had not been determined (and the record containing evidence that there would be adverse impacts) APA's conclusion, with respect to the Project's compliance with APA's Freshwater Wetlands Act regulations - that the Project's snowmaking activities would result in minimal degradation of the Cranberry Pond wetlands, and is the only alternative for snowmaking (see 9 NYCRR § 578.5(a); 9 NYCRR § 578.10(a)(2)) - was not supported by substantial evidence, or by any evidence at all. See County of Nassau, 80 A.D.2d at 11. Therefore, the Third Cause of Action should be granted, and APA's decision should be annulled.

C. APA Lacked Substantial Evidence to Support Its Decision Regarding Amphibians

As shown in the Fifth Cause of Action, APA's decision that the Project would not have undue adverse impacts on amphibians and their habitat was not supported by substantial evidence. A. 319-330, 891-915, 4167. Adverse impacts upon wildlife and their habitat must be considered before APA approves a project. APA

Act § 805(4). However, APA's "findings of fact" admitted that "a comprehensive amphibian survey" was still needed in order to identify the amphibian species on the Project Site and their migration routes. A. 33. After this information is collected, it would then be used to analyze and potentially "reduce impacts to amphibian populations" on some of the Project's elements (West Face Expansion subdivision, Small Western Great Camp Lots, and Small Eastern Great Camp Lots). A. 33, 96-97, 217-218, 236-237.

APA's requiring of "a comprehensive amphibian survey" (A. 33) is tantamount to an admission that it did not possess the information needed to make a conclusion about the Project's impacts to amphibians. A. 319-320; Point I, supra. Even after this information is collected, APA will not have similar information across the Project Site because the survey is only required "on certain RM lands". A. 33; see also A. 896-899.

Further, there was evidence in the record to establish that there would be adverse impacts to amphibians and their habitat. Expert witnesses and APA's Staff, testified that the Project would cause adverse impacts by separating the amphibians' wetland and upland (a 750 foot radius of critical terrestrial habitat[10]) habitats. A. 319-330, 874-875, 906-907, 3562, 5223, 5229, 5862, 5863 (fragmentation of habitat would be caused by the Project's "large scale sprawl"), 5869, 5879, 6053-6054, 6692-6695. There

[10] As shown by hearing exhibit 244 (A. 3562), the "vast majority of the project will be built within the 750 foot wide 'critical terrestrial habitat zone'" for amphibians. A. 863, 4415. Because the copy of this exhibit in the Appendix is not legible, a copy thereof is annexed hereto as Attachment A.

was also testimony that the Project's lighting and roads would have adverse impacts on amphibians. A. 5223.

Having essentially admitted that it had "no evidence in the record to support the determination", and there being substantial evidence to the contrary, APA's conclusion, with respect to the Project's compliance with APA Act § 809(10)(e) - that the Project would not have an undue adverse impact on amphibians under APA Act § 805(4)(a)(6) - was not supported by substantial evidence, or by any evidence at all. County of Nassau, 80 A.D.2d at 11. Therefore, the Fifth Cause of Action should be granted and APA's decision must be annulled.

D. APA Lacked Substantial Evidence to Support Its Decision Regarding Wildlife

As shown in the Seventh Cause of Action, the Applicant never submitted any competent proof regarding the Project's impacts to wildlife and wildlife habitat, so APA's decision regarding wildlife impacts was not supported by substantial evidence. A. 331-348, 916-941, 1077-1097, 4135-4151. In particular, the Applicant never submitted competent proof that the Great Camp lots on Resource Management lands would not cause undue adverse impacts from wildlife habitat fragmentation and other impacts to wildlife.

There was substantial, un-rebutted evidence presented during the adjudicatory hearing showing that the Project will result in undue adverse impacts from wildlife habitat fragmentation, and

other impacts to wildlife, especially on Resource Management lands. A. 331-348, 936-941, 3918-3922, 4142-4144, 5586-5591, 5621-5664, 5865 (describing adverse impacts to wildlife from decreased biotic integrity; increased wildlife mortality from vehicles, predators and domestic pets; decreased wildlife populations; disruption of wildlife dispersal and movement patters; among other impacts).

The Applicant presented no new testimony on this issue. A. 6649 (testifying that they conducted "no specific field investigations" for wildlife), 6657 (testifying that they conducted no followup fieldwork in response to APA Staff's requests for additional wildlife information). Its witnesses, who were not scientists and who lacked credibility (A. 4139-4142), admittedly did not rebut (A. 751) the testimony of Drs. Klemens, Glennon and Kretser (A. 2962, 3019-3020, 5213-5248, 5455, 5599-5670), and did not provide substantial evidence upon which APA could have based its decision (A. 332-333, 6657). Contrast Town of Preble v. Zagata, 263 A.D.2d 833, 835 (3d Dept. 1999) (finding that agency's decision was supported by testimony from applicant's geologist); Town of Candor v. Flacke, 82 A.D.2d 951 (3d Dept. 1981) (finding that agency decision was supported by expert engineering opinion that was not rebutted).

While APA's Revised Draft Order stated that a "comprehensive biological inventory of the project site was not conducted, so it is not possible to make specific findings concerning impacts to

habitat" (A. 4530), the Final Order claims that the "Guidelines" were followed and that no "key wildlife habitat" was identified on the Project site, other than a deer wintering yard (A. 21).

First, the alleged "finding of fact" in the Final Order is blatantly false. The record shows that the Cranberry Pond wetland complex is a "key wildlife habitat" (APA Act § 805(4)(a)(5)(c)) because it contains Adirondack boreal habitat and wildlife (A. 5235-5245, 5644-5646). The record also shows that the Project Site contains habitat of birds of special concern (A. 3694-3735, 3920, 5647-5648, 5682-5685), and critical amphibian habitat (A. 3562, 5228-5229), which both qualify as "key wildlife habitat" (APA Act § 805(4)(a)(5)(c)) that require special attention, consideration and protection.

Second, the alleged "finding of fact" in the Final Order that no other "key wildlife habitat" (A. 21) was identified is misleading. The Applicant identified no other "key wildlife habitat" because the Applicant never looked for it, analyzed it, or inventoried it (A. 5219-5220). The APA's statement is also misleading because impacts to "Fish and wildlife" themselves (not limited to rare and endangered species) are to be considered by APA when making an undue adverse impact determination, in addition to "habitats of rare and endangered species and key wildlife habitats". APA Act § 805(4)(a)(5), (6).

As shown above, the "Guidelines" document was not a proper guidance document for APA to rely upon in making a decision about

the impacts of this Project on wildlife (Point II, supra). As such, this internal guidance document does not provide substantial evidence in support of APA's decision. See County of Nassau, 80 A.D.2d at 11-12.

Therefore, because there was no information on wildlife and its habitat, other than one deer wintering yard, APA lacked the evidence needed to conclude that the Project would not have undue adverse impacts to wildlife in accordance with APA Act § 809(10)(e). Accordingly, APA's Order was not supported by substantial evidence, and must be annulled pursuant to the Seventh Cause of Action.

POINT IV

THE ORDER MUST BE ANNULLED BECAUSE THE PROJECT IS NOT COMPATIBLE WITH THE SITE'S RESOURCE MANAGEMENT LANDS

The Ninth to Sixteenth Causes of Action demonstrate that the Project does not comply with the APA Act's requirements for permitting residential development on lands designated as "Resource Management" under the Adirondack Park Land Use and Development Plan. The Applicant did not meet its burden of proving this and there is not substantial evidence to support APA's approval. APA incorrectly applied two of the legal criteria for approval of these residences. Therefore, the Ninth to Sixteenth Causes of Action should be granted and APA's Order should be annulled.

A. Resource Management Lands Are the Most Environmentally Sensitive and Most Strictly Protected Private Lands in the Adirondack Park

The Adirondack Park Land Use and Development Plan and the Adirondack Park Land Use and Development Plan Map ("APA Map") were adopted by the Legislature and APA in 1973 pursuant to APA Act § 805(1) and (2). The APA Map divides private lands within the Park into six different land use areas, known as Resource Management, Rural Use, Low Intensity Use, Moderate Intensity Use, Industrial Use, and Hamlet. See APA Act § 805(3)(c) to (h).

APA Act § 805(3)(a) and (c) to (h) and § 809(10)(b) provide that within each such land use area, certain listed types of land uses are considered to be "primary" "compatible uses" for the land use area. Pursuant to APA Act § 805(3)(c) to (h), other listed types of land uses are only considered to be "secondary uses" in each land use area. Primary uses "are those uses generally considered compatible", and secondary uses "are those which are generally compatible with such area depending upon their particular location and impact upon nearby uses ... ." APA Act § 805(3)(a). Thus, in order to be permitted, secondary uses must clear a higher hurdle than primary uses.[11]

Pursuant to APA Act § 805(3)(c) to (h), for each of the land use areas there is an "overall intensity guideline" that limits the number of principal buildings that may be constructed

[11] Pursuant to APA Act § 809(10)(b), all other land uses not listed as compatible uses or secondary uses are presumed to be not compatible with the land use area, although a project sponsor may attempt to rebut that presumption.

per square mile, and there is also a "character description", and a list of "purposes, policies and objectives" of the lands which are so designated.

For Resource Management areas, the lists of uses considered to be compatible uses and secondary uses are very limited.[12] Indeed, even single family houses and mobile homes are only listed as secondary uses of Resource Management lands. In all other land use areas (except for Industrial Use) they are listed as primary compatible uses. APA Act § 805(3)(c) to (h).

In Resource Management areas the "overall intensity guidelines" allow a maximum of 15 principal buildings to be constructed per square mile. APA Act § 805(3)(g)(3). This equates to approximately one principal building for every 42.7 +/- acres. The next most restrictive land use area, Rural Use, allows one principal building for every 8.3 +/- acres, a five-fold increase. APA Act § 805(3)(f)(3).

For Resource Management lands, "the character description and purposes, policies and objectives" provide, in part, that environmental protection "is of paramount importance because of overriding natural resource and public considerations" and

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[12] The compatible uses are: agriculture, open space recreation, forestry, game preserves and private parks, private roads, private sand and gravel extractions, public utilities, and hunting and fishing cabins under 500 s.f.

The secondary uses are: single family dwellings, mobile homes, larger hunting and fishing cabins, campgrounds, group camps, ski centers and related tourist accommodations, agricultural services, sawmills and similar wood using facilities, commercial mineral extractions, public works and utilities, and golf courses. APA Act § 805(3)(g)(3).

include the limitation that "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)(1), (2).

Thus, Resource Management lands are the most environmentally sensitive lands in the Park. Accordingly, they are the most strictly regulated, as they have the lowest allowable density and the most limited lists of compatible and secondary uses (with the exception of Industrial Use areas). APA Act § 805(3)(c) to (h).

Pursuant to APA Act § 809(10), no project may be approved unless it meets five "criteria", including that it "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). When the proposed land use is a "secondary use", such as residential development in a Resource Management area, APA must also consider its "particular location and impact upon nearby uses". APA Act § 805(3)(a).

Uniquely, in Resource Management areas, residential development must be "on substantial acreages or in small clusters on carefully selected and well designed sites" as mandated by APA Act § 805(3)(g)(2). This requirement is found in "the character description and purposes, policies and objectives" for Resource Management lands contained in APA Act § 805(3)(g)(2), so it is part of one of the five "criteria" that must be met under APA Act §§ 809(10) and 809(10)(b). Conformance with these standards is

not optional, nor are they mere guidance or suggestions. See Veysey v. ZBA of City of Glens Falls, 154 A.D.2d 819, 820-821 (3d Dept. 1989)(statement of policy in preamble of zoning ordinance creates a regulatory standard).[13]

Thus, in the case of residential development in a Resource Management Area, the project must be: (i) "on substantial acreages or in small clusters on carefully selected and well designed sites" under APA Act § 805(3)(g)(2) in order for it to be found to be compatible under APA Act § 809(10)(b); (ii) compatible with its "particular location and impact upon nearby uses" under APA Act § 805(3)(a); and (iii) compatible with the remainder of the character description and purposes, policies and objectives of APA Act § 805(3)(g), as required by APA Act § 809(10)(b).

B. The Great Camp Lots Do Not Comply With the APA Act's Specific Criteria for Residential Development in a Resource Management Area

The majority of the Project's site, some 4,739.5 +/- acres, is classified on the APA Map as Resource Management. A. 23. A total of 80 residential building lots were approved on those lands, including 8 "Large Great Camp" lots of 111 to 1,211 acres, 27 "Small Great Camp" lots with an average size of about 26 acres, and 45 smaller lots of 1 to 5 acres. A. 349-350. The

[13] See also A. 943-944, comparing mandatory limit ("will") on sites for residential development in Resource Management areas to the precatory suggestion ("should") for the use of similar siting concepts in the less restrictive Rural Use classification.

Ninth to Fourteenth Causes of Action (A. 349-376, 942-954) show that these 35 Great Camp lots do not comply with APA Act § 805(3)(g)(2), which only "allow[s] for residential development on substantial acreages or in small clusters on carefully selected and well designed sites." As set forth in these causes of action, the 27 smaller Great Camp lots are not "in small clusters" (A. 352-356), the 8 larger Great Camp lots are not "on substantial acreages" (A. 357-359), and many of the lots of both kinds are not "on carefully selected and well designed sites" (A. 360-362). The Applicant did not meet its burden of proof on these issues. Moreover, the hearing testimony of the parties, and the testimony and post-hearing brief of the APA's staff, show that these criteria had not been met. See A. 942-954, 1097-1105, 2527-2529, 2946-2961, 3762-3766, 3819, 3913-3924, 4144-4152, 4173-4185, 4417-4423, 5181-5184, 5319-5326, 6723-6724. APA approved the Project anyway.

Because there is not substantial evidence that the 35 lots comply with the "criteria" of APA Act § 805(3)(g)(2) and § 809(10)(b) that residential development in Resource Management areas must be "on substantial acreages or in small clusters on carefully selected and well designed sites", the Ninth, Eleventh and Thirteenth Causes of Action should be granted and APA's Order should be annulled.

C. APA Committed an Error of Law in Making Its Determination on the Legality of the 35 Great Camp Lots in the Resource Management Area

Not only did the Applicant fail to meet its burden of proof on this issue, the APA applied an erroneous legal standard in considering whether to approve the 35 Great Camp lots in the Resource Management area. As set forth at Point IV.A, supra, it is mandatory that residential development in the Resource Management Area be located "on substantial acreages or in small clusters on carefully selected and well designed sites". APA Act § 805(3)(g)(2). However, APA did not apply this criteria, as shown by the following advice given to the Members by APA Associate Counsel Sarah Reynolds and APA General Counsel John Banta during APA's deliberations on January 19, 2012:

> REYNOLDS: Part of issue #1. Agency's long-standing practice in interpreting that provision is that substantial acreage/small clusters is a factor to be considered, but not a determinative factor. It never has been in any decision of the Agency. Has been taken into account. January 19, 2012; 00:58.
>
> BANTA: It's something to weigh, but not prescriptive. January 19, 2012; 00:59. A. 1102.

Not only was this advice contrary to the plain meaning of the statute (Point IV.A, supra),[14] but there is no evidence that the alleged "long-standing practice in interpreting that provision" (A. 1102) was part of any duly adopted regulation. APA's unwritten past practices carry no weight and are entitled to no

[14] See Lewis Family Farm v. APA, 64 A.D.3d 1009, 1013-1014 (3d Dept. 2009); Heinlein v. New York State Office of Children & Family Services, 60 A.D.3d 1472, 1473 (4th Dept. 2009); Adirondack Mountain Club v. APA, 33 M.3d 383, 390 (Sup. Ct. Albany Co. 2011).

deference from the courts. Zelanis v. APA, 27 M.3d 1229(A), *6-7 (Sup. Ct. Essex Co. 2010).

The State's Answer denies that this requirement of APA Act § 805(3)(g)(2) is a mandate and is not optional.[15] The Project Sponsors' Answer relies heavily upon this erroneous position taken by the APA. A. 694-697. However, as set forth above, this position was legally erroneous, and APA's decision must be annulled. See Lewis Family Farm, 64 A.D.3d at 1013-1014; Heinlein, 60 A.D.3d at 1473; Adirondack Mountain Club, 33 M.3d at 390. The Tenth, Twelfth and Fourteenth Causes of Action should be granted.

D. The 80 Residential Subdivision Lots Approved for the Resource Management Lands Are Not Compatible With Those Lands

A total of 80 residential subdivision lots, including most of the Great Camp lots, were approved for the 4,739.5 +/- acres of Resource Management lands on the site. A. 349-350. The Fifteenth Cause of Action shows that the Applicant failed to meet its burden of proof, and that there is not substantial evidence that these 80 lots are compatible with the Land Use and Development Plan and with "the character description and purposes, policies and objectives of" Resource Management areas, as required by APA Act § 809(10)(a) and (b). A. 349-375, 942-

[15] Amended Petition ¶310 states that "There is nothing optional about this statutory language. It is not just conceptual guidance. It is a mandate. The APA can not read discretion into the statute where none exists." A. 355. ¶310 of the State's Answer denies this. A. 483. The State's Answer repeats this erroneous response at ¶¶ 288, 292, 295, 308, 311, and 335. A. 481-483, 486.

954. See also A. 3913-3924, 4144-4152, 4172-4173, 4417-4423.

The Amended Petition shows that the Project is not compatible with these requirements because, *inter alia*: (i) the Great Camp lots are in not small clusters or on substantial acreages, and they are not on carefully selected and well-designed sites as required by APA Act § 805(3)(g)(2) (A. 352-359); (ii) a line-by-line review of the character description and purposes, policies and objectives of Resource Management areas shows that the 80 lots approved therein are not compatible (A. 364-367); (iii) the proposed housing is a "secondary use" on Resource Management lands but the Applicant failed to prove that the housing was compatible with its specific proposed locations and nearby uses as required by APA Act § 805(3)(a) (A. 371-376); and (iv) the subdivision of these lands will eliminate thousands of acres of managed timber lands from the timber resource base of the Adirondack Park, which is contrary to the statutory purposes of Resource Management lands (A. 367-371). See also A. 942-954, 1097-1105, 3913-3924, 4144-4152, 4173-4185, 4417-4423.

Because the Applicant did not meet its burden of proof and there is not substantial evidence that these 80 lots comply with the requirements of APA Act § 805(3)(g)(1) and (2), and § 809(10)(a) and (b), that they conform to the Adirondack Park Land Use and Development Plan, and that they will "be compatible with the character description and purposes, policies and objectives of the [Resource Management] land use area", the

Fifteenth Cause of Action should be granted and APA's Order should be annulled.

E. APA Committed an Error of Law in Making Its Determination on the Compatibility of the 80 Residential Lots in the Resource Management Area

As set forth above at Point IV.A, residential development in a Resource Management area is a "secondary use", as defined in APA Act § 805(3)(a). In order for a secondary use to be found to be compatible with the land use area in which it is proposed (in all land use areas), as required by APA Act § 805(3)(a) and § 809(10)(b), in addition to the criteria applicable to primary uses, APA must take into consideration its "particular location and impact upon nearby uses" under APA Act § 805(3)(a).

Both the State (A. 497)(denying ¶¶ 397-400 of the Petition) (A. 371-372) and the Project Sponsors (A. 768, 779) claim in their answers that the standards for approval of primary uses and secondary uses are identical, thereby ignoring the question of the proposed lots' "particular location and impact upon nearby uses" under APA Act § 805(3)(a). See also A. 950-951. Because it ignores the plain meaning of APA Act § 805(3)(a), this claim is erroneous and contrary to the plain language of the APA Act. Point IV.A, supra.

Because APA applied an incorrect legal standard to the approval of the 80 residential units in the Resource Management area, its decision must be annulled. Lewis Family Farm, 64 A.D.3d at 1013-1014; Heinlein, 60 A.D.3d at 1473; Adirondack

Mountain Club, 33 M.3d at 390. The Sixteenth Cause of Action should be granted.

POINT V

THE VALET BOAT LAUNCHING SERVICE WOULD USURP ALL OF THE CAPACITY OF THE DEC BOAT LAUNCH, AND VIOLATE ARTICLE 14, § 1 OF THE CONSTITUTION, THE ECL, AND APPLICABLE DEC REGULATIONS, AND THEREFORE IT DOES NOT CONFORM TO THE APA ACT

As part of the Project, the Project Sponsors propose to operate a "valet" boat launching service for the benefit of the resort's residents and guests. This service would utilize the DEC-operated boat launch which is located on State Forest Preserve lands on the shore of Tupper Lake. As established in the Seventeenth to Twentieth Causes of Action (A. 377-397, 954-972), APA's approval of this part of the Project violated the APA Act (A. 4152-4163, 4426-4427), and the approval of the Project should be annulled.

The only waterfront facility owned or controlled by the Project Sponsors is the former McDonald's Marina on Tupper Lake. A. 2-3. However, that facility, when redeveloped, will only have about 40 boat slips (A. 9-10, 2507) for the 659 residences and the 60 room inn in the Project (A. 3-6), will have very limited car parking, and is not physically suitable for a boat launch. A. 5100.

To make up for this shortcoming, and to allow the resort's residents and hotel guests to use their private boats on Tupper Lake, the Project Sponsors have proposed to operate the valet

boat launching service as part of their marina operation, but to do so on State land instead of on their own land. The boats would be stored at the resort, and resort staff would trailer them to the State boat launch and put them into the water. The residents and guests would be chauffeured from the resort to the boat launch by the staff. At the end of each boating outing, the process would be reversed. A. 5098, 5741-5744.

A. APA's Approval of the Private Valet Boat Launching Service Violated the APA Act Because it Will Usurp the Entire Capacity of this Public Facility

As demonstrated in the Seventeenth and Eighteenth Causes of Action (A. 377-387, 954-972), the hearing record established that the valet boat launching service would usurp the entire capacity of this State facility, leaving no opportunity for the general public to use it. A. 2377-2378, 2421-2422, 2427, 2438, 2455, 2461, 2901-2936, 5094-5102, 5725-5733, 5739-5760, 5761-5780, 5781-5784. The Applicant's own witness conceded that the operation of this private service would only leave one spot per day for use by the general public at this public facility:

> 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.
>
> Q. One. Very good. Thank you. A. 5743.

An application before APA may only be approved if APA

determines, *inter alia*, 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 ("DCs"), as set forth in APA Act § 805(4), must be taken into account when making that determination. The DCs relevant to the approval and operation of the valet boat launching service include:

- § 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 this case, the Applicant presented no proof that the Project would not have an undue adverse impact upon the recreational resources of the Adirondack Park, including the nearby boat launch on State land, and upon DEC's ability to provide boat launch services on Tupper Lake for the general public. It admitted that its on-site facilities were not adequate for its boat-launching needs. A. 5100. To the contrary, the record proves that the Project would usurp the entire capacity of the public boat launch facility. A. 377-397, 954-972, 2901-2936, 4152-4163, 4426-4427, 5094-5102, 5725-5733, 5739-5760, 5761-5780, 5781-5784.

Therefore, the application did not conform to APA Act § 805(4) and § 809(10)(e). The Seventeenth and Eighteenth Causes

of Action (A. 377-387, 954-972) should be granted, and APA's approval of the Project should be annulled.

B. APA's Approval of the Operation of the Commercial Valet Boat Launching Service On the Adirondack Forest Preserve Violated The APA Act Because it Is Not Permitted by The Constitution and Other Applicable Laws

As shown by the Nineteenth and Twentieth Causes of Action (A. 377-385, 387-397, 954-972), the hearing record established that the valet boat launching service would constitute the illegal operation of a commercial business on State Forest Preserve land. A. 2377-2378, 2421-2422, 2427, 2438, 2455, 2461, 2901-2936, 5094-5102, 5725-5733, 5739-5760, 5761-5780, 5781-5784. Because the Applicant failed to prove that it would be in "[c]onformance with other governmental controls" pursuant to APA Act § 805(4)(e)(1)(a), APA's approval of this activity violated the APA Act.

Article 14 § 1 of the New York State Constitution[16] states:

> 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.

This "Forever Wild" clause of the Constitution prohibits the operation of a private facility on the Forest Preserve by a

[16] The consent of the Appellate Division is not required to make this claim in this proceeding because it is not an action pursuant to NYS Constitution Article 14, § 5 that seeks to directly restrain a violation of Constitution Article 14, § 1. The claim herein is part of a proceeding seeking to annul an action that was improperly taken under the APA Act. A. 377, 387, 393-396, 957-958. See The Adirondack Council v. APA, (Sup. Ct. Albany Co., Oct. 7, 2011, Devine, J., Index No. 7991-101, at 4-5), a copy of which is attached hereto as Attachment B.

private corporation. See Slutzky v. Cuomo, 128 M.2d 365, 367-368 (Sup. Ct. Albany Co. 1985), aff'd 114 A.D.2d 116 (3d Dept. 1986).

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). ECL § 9-0301(1) mandates that the Forest Preserve "... shall be forever reserved and maintained for the free use of all the people ...". Private persons or corporations cannot deprive the State of possession of facilities on Forest Preserve lands that are held "in trust for the people." People v. Baldwin, 113 M. 172, 176 (Sup. Ct. Hamilton Co. 1920). See generally Saranac Land & Timber Co. v. Roberts, 195 N.Y. 303, 319-323 (1909); People ex rel. Turner, 18 Bedell at 26-27.

The valet boat launching service is not permitted by law because it would completely take over the boat launch, leaving little or no room for the public to use the facility. A. 5743. As such, the resort's use of the facility would dispossess the People of the State from the use of the boat launch. See Baldwin, 113 M. at 176. With the predicted amount of use of the valet boat launching service, the resort's usage would make it the *de facto* operator of the State-owned facility, which it is not permitted to be. See Slutzky, 128 M.2d at 367; see also 1941 Op. Atty. Gen. 280 (private organization is not permitted to use buildings in the Forest Preserve for the operation of a boys'

camp).

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...".[17] More specifically, 6 NYCRR § 190.24(d) provides that "[n]o person shall conduct any business ... at a boat launching site."

Allowing the Project Sponsors to usurp the entire capacity of the state boat launch and, in effect, take over its operation and exclude "all the people" from its "free use" (A. 377-395, 954-972)(ECL § 9-0301(1)), would violate Article 14, § 1 of the Constitution, ECL § 9-0301(1), 6 NYCRR § 190.8(a), and 6 NYCRR § 190.24(d). Thus, because the Applicant failed to prove that the valet boat launching service would be in "[c]onformance with other governmental controls" (§ 805(4)(e)(1)(a)), the APA's approval of this service was contrary to APA Act § 805(4), § 805(4)(e)(1)(a) and § 809(10)(e). The Nineteenth and Twentieth Causes of Action (A. 377-385, 387-397, 954-972) should be granted, and APA's approval of the Project should be annulled.

C. The Entire Order Must Be Annulled, Not Just The Approval of the Valet Boat Launching Service

Even without the valet boat launching service, boating from the Project would overwhelm the facility because there is nothing

[17] The rule lists certain exceptions, none of which apply to the valet boat launching service.

to prevent the Project's residents and hotel guests from launching their boats at this public facility on their own. See A. 5748. The State admitted that "the ACR residents could launch their boats at the boat launch on their own." A. 506. Either the valet boat launching service, or self-launching by Project residents and guests, would overwhelm the capacity of the Forest Preserve boat launch as a result of the Project's use thereof.

Therefore, it would not be a sufficient remedy for the Court to annul only the approval of the valet boat launching service. The approval of the entire Project must be annulled in order to prevent it from usurping the entire capacity of the boat launch, in violation of Article 14, § 1 of the Constitution, ECL § 9-0301(1), 6 NYCRR § 190.8(a), and 6 NYCRR § 190.24(d), and APA Act § 805(4) and § 809(10)(e).

POINT VI

APA'S APPROVAL OF THE PROJECT SHOULD BE ANNULLED BECAUSE THE APPLICANT DID NOT PROVE THAT THE PROJECT WOULD NOT HAVE AN UNDUE ADVERSE FISCAL IMPACT ON LOCAL GOVERNMENTS

As set forth in the Twenty-First to Twenty-Fourth Causes of Action, the APA Act requires that APA consider the potential for any project to have an undue adverse impact on the fiscal condition of government bodies that may be affected by the project. In this case, the sheer size of the Project threatens to create significant financial problems for the Town and Village of Tupper Lake. The Project Sponsors claimed that the property

taxes paid on the real estate that would be built and sold as part of the Project would create a financial windfall for local governments. However, they completely failed to prove this, and there is not substantial evidence to support APA's decision to approve the Project.

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

> 10. The agency shall not approve any project proposed to be located in any land use area not governed by an approved local land use program, or grant a permit therefor, unless it first determines that such project meets the following criteria: ...
>
> e. The project would not have an undue adverse impact upon the ... ability of the public to provide supporting facilities and services made necessary by the project, taking into account the commercial, industrial, residential, recreational or other benefits that might be derived from the project. In making this determination, as to the impact of the project upon such resources of the park, the agency shall consider those factors contained in the development considerations of the plan which are pertinent to the project under review.

The "pertinent" DCs 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 record shows that the Project Sponsors' claimed volume of real estate sales was fabricated out of thin air, and would not create the alleged high levels of property tax and payment-in-lieu-of-taxes ("PILOT") revenues, and so the purported means of avoiding such adverse fiscal impacts would not materialize.

In addition, APA acted on this issue after improperly receiving evidence that was outside the record. The Applicant also failed to prove that the proposed industrial development agency bonding that the Project is expressly dependent upon is actually legal.

A. The Imagined Real Estate Sales Will Not Materialize

The Twenty-First and Twenty-Second Causes of Action prove that the real estate sales which the Project Sponsors allege will prevent adverse fiscal impacts are imaginary and will not occur. A. 389-404, 972-1010. There is not substantial evidence to prove their allegations. Instead, the record shows that the Project is doomed to failure. The Applicant's projected sales revenues were conjured up out of thin air, and the only actual expert testimony in the record on this issue proved that, due to the 2008 crash in the real estate market and the inherent limitations of the Project's location and site, it would never achieve anything close to its claimed sales. A. 972-1005, 4097-4134, 4389-4411. See also A. 2287-2291, 2672, 2689-2704, 3084-3193, 3246-3278, 5397-5432, 5457-5516, 6100-6184, 6185-6355, 6496-6532, 6533-6537.[18]

Local governments will be left to cover the costs for roads, sewers, water and other public services. A. 1005-1010, 4130-

[18] The Applicant also artificially inflated the projected skier numbers for its Big Tupper Ski Area and the ski area's revenues to bolster its false claims of financial benefits. A. 399, 997-1004, 4122-4127. See also A. 2101, 2186, 3358-3375, 5491, 6295, 6525-6528, 6535.

4134, 4404-4410. See also A. 3034-3071, 5397-5432, 6100-6184, 6399-6405. Therefore, the Twenty-First and Twenty-Second Causes of Action should be granted and the approval of the Project should be annulled.

B. APA's Decision Was Based on Evidence From Outside of the Record and Must Be Annulled

It is axiomatic that an agency's decision following an adjudicatory hearing must be based solely on the evidence in the record and may not be based on information from outside the record. Simpson v. Wolansky, 38 N.Y.2d 391, 396 (1975). See also Point II, supra. Despite this, the APA Members relied upon financial and fiscal impact testimony and data that was created by the APA staff and presented to the Members after the close of the hearing record. A. 402, 981-983, 1106-1111, 5001-5009.

Perhaps recognizing that the Applicant had failed to meet its burden of proof on this issue (Point VI, supra), a Mr. Kelleher of the APA staff presented to the APA Members, during their deliberations, testimony (A. 1106-1111) and a financial analysis (A. 5001-5009) on this subject. This occurred without the hearing parties having any opportunity for cross-examination or rebuttal.

Mr. Kelleher posited that even if there were to be a 70% reduction in the dollar value of the sales of real estate in the Project, the Project would still create adequate PILOT revenues to avoid undue adverse fiscal impacts to local governments. A.

1107, 5002, 5004. In obvious reliance on this testimony, APA's Order (A. 30) stated:

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

Because APA improperly relied upon this evidence, for this reason alone, the Twenty-First and Twenty-Second Causes of Action should be granted and APA's decision should be annulled.

C. The Applicant Did Not Prove That the Necessary IDA Funding Is Legal as Proposed

The success of the Project, including its ability to avoid undue adverse fiscal impacts to municipalities (see APA Act § 805(4)(c),(d),(e), § 809(10)(e)), hinges on the Project Sponsors obtaining tax-exempt bond financing from the County of Franklin Industrial Development Agency ("CFIDA"). A. 28-30, 2695-2699, 2702-2704. However, as shown by the Twenty-Third and Twenty-Fourth Causes of Action, the Applicant failed to prove that this funding can actually be obtained. Instead, the record shows that it can not be obtained because the planned structure of the financing is unprecedented and is not legally approvable by the CFIDA. A. 404-409, 1011-1021, 4114-4122. See also A. 3208-3242, 3543, 5452-5454, 6425-6428, 6437-6440, 6444-6453. The CFIDA's executive director stated in a letter to the Applicant that "we have not determined the legal basis, precedent or workability of

it" (A. 3453) and its bond counsel had similar doubts about its legality (A. 3239). See also A. 3208-3242. The Applicant provided no evidence to the contrary.

The Project Sponsors' failure to obtain such funding will create undue adverse fiscal impacts on the affected local governments. Point VI.A, supra; A. 1005-1010, 4130-4134, 4404-4410. See also A. 3034-3071, 5397-5432, 6100-6184, 6399-6405. Therefore, there was not substantial evidence to support APA's decision, the Twenty-Third and Twenty-Fourth Causes of Action should be granted, and APA's decision should be annulled.

POINT VII

APA EXCEEDED THE SCOPE OF ITS STATUTORY AUTHORITY BY WEIGHING AND BALANCING THE PROJECT'S ALLEGED ECONOMIC BENEFITS AGAINST ITS ADVERSE IMPACTS ON THE RESOURCES OF THE ADIRONDACK PARK

As set forth in the Twenty-Sixth Cause of Action,[19] when making its statutorily required determinations on a project application under the APA Act, APA may not weigh and balance that project's economic benefits against its adverse impacts on the resources of the Adirondack Park. A. 297-301, 410-411, 837-843, 1022-1025. See also A. 4389-4399. The State admits that APA did this when it approved the Project (A. 520) and the State and the Project Sponsors affirmatively argue that it is mandatory for APA to do so (A. 447-448, 451, 456, 469, 527, 702-704, 813-814). However, as a matter of law, this is not allowed, and APA's

[19] The Twenty-Fifth Cause of Action was accidentally skipped. A. 409-411, 829, 1022.

approval of the Project must be annulled.

Unless an agency is authorized by statute to do so, it may not take on the legislative function of attempting to strike a balance between regulatory concerns and economic concerns. Boreali v. Axelrod, 71 N.Y.2d 1, 12 (1987). See also HLP Properties v. NYSDEC, 21 M.3d 658, 669 (Sup. Ct. N.Y. Co. 2008).

> While it is true that many regulatory decisions involve weighing economic and social concerns against the specific values that the regulatory agency is mandated to promote, the agency in this case has not been authorized to structure its decision making in a "cost-benefit" model and, in fact, has not been given any legislative guidelines at all for determining how the competing concerns of public health and economic cost are to be weighed.

Boreali, 71 N.Y.2d at 12 (cites omitted). When an agency does so, it is "operating outside its proper sphere of authority." Id.

In this case, the APA Members clearly engaged in such a cost-benefit analysis and operated outside their "proper sphere of authority." Id. In at least four of the meetings at which they deliberated, the APA Members discussed this type of weighing and balancing. A. 1116-1120. This included such statements as "[o]ur job is to weigh the benefits against the impacts" (A. 1117), and "my focus right now is on trying to maximize the economic benefit" (A. 1119). The Project was described by one Member as "a project that doesn't just balance economic benefits against environmental benefits. It really does play one off against the other and maximizes both." A. 1119. One Member

specifically tried to justify avoiding clustering of the Great Camp lots (see Point IV, supra) by claiming that "[e]conomically, it may be appropriate." A. 1103. A full page of the Order was devoted to a discussion of "Project Benefits", almost all of which were economic in nature. A. 30-31. APA's post-decision press release prominently touted this aspect of the decision. A. 4781.

Just as the Department of Health in Boreali had no authority to weigh and balance economic concerns against public health concerns, APA has no authority to weigh and balance economic concerns against environmental impacts and other adverse impacts to the resources of the Adirondack Park. The value that APA "is mandated to promote" (id.) is

> to insure optimum overall conservation, protection, preservation, development and use of the unique scenic, aesthetic, wildlife, recreational, open space, historic, ecological and natural resources of the Adirondack park. APA Act § 801.

Nothing in the APA Act's "Statement of Legislative Findings and Purposes" so much as mentions the promotion of economic benefits, let alone the balancing thereof against protection of the Park's resources. APA Act § 801.

Nor does anything else in the APA Act grant or imply this authority. The post-hearing "Reply Brief and Closing Statement of [petitioner] Protect the Adirondacks! Inc." contains a section by section analysis of the APA Act which shows that the Act does

not allow APA to do this type of balancing. A. 4388-4399.[20] This Brief also shows that, to the extent that such balancing was intended to occur, it was done when APA's Adirondack Park Land Use and Development Plan ("Plan") was approved by the Legislature. A. 4391-4393. The APA drafted the Plan and then submitted it to the Governor and the Legislature for their approval. Its report to them expressly stated that it had engaged in such balancing. A. 4392-4393.[21] The Plan was then duly approved and became law. Laws of 1973, Chapter 348, § 1; APA Act § 805.

That having been done, APA is not permitted to undertake any further balancing of these competing interests on a project-by-project basis. A. 4393-4399. For the APA to do so would be for it to perform a "uniquely legislative function" (Boreali, 71 N.Y.2d at 12) that the Legislature already performed in 1973. A. 4391-4393.

In support of its argument that APA does have the delegated authority to engage in this legislative function, the State relies upon APA Act § 809(10)(e), which requires a determination by APA that:

the project would not have an undue adverse impact upon

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[20] This analysis is too lengthy to reproduce in full in this Brief, as it fills over 11 single-spaced pages. A. 4388-4399. See also A. 1022-1025.

[21] "Adirondack Park Land Use and Development Plan and Recommendations for Implementation", Adirondack Park Agency, March 6, 1973. A copy of the pertinent part of this report is set forth at R. 21014-21020, but was inadvertently omitted from the Appendix. Therefore, a copy thereof is attached hereto as Attachment C.

> 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.

However, the discussion of "taking into account" the commercial and other economic benefits of a project is clearly set apart from the rest of the review criteria in § 809(10)(e) by the word "or", and by its isolation in the separate clause of the sentence regarding "the ability of the public to provide supporting facilities and services", rather than being in the primary clause of the sentence that ensures that the natural resources and similar ecological resources of the Adirondack Park are protected from undue adverse impacts.

Thus, this section of the APA Act does not grant APA the authority to weigh and balance economic benefits against adverse impacts on natural resources. It only requires that they be considered in the context of impacts to "the ability of the public to provide supporting facilities and services made necessary by the project...". APA Act § 809(10)(e). This makes complete sense, as it requires that a project must offset the costs of the services that it will require the community to provide. See also APA Act § 805(4)(d)(1)(a), which is the DC regarding "[a]bility of government to provide facilities and services." However, it does not allow a project's benefits to be used to offset its environmental damage.

As set forth above at pp. 9-11, the Court's decision in Association for the Protection of the Adirondacks v. Town Board of Town of Tupper Lake, 64 A.D.3d 825 (3d Dept. 2009) makes it clear that APA "is mandated to promote" (Boreali, 71 N.Y.2d at 12) environmental concerns above all others when reviewing projects. This leaves no room for such weighing and balancing. Further, as shown by Petitioners' Reply (A. 837-843), comparing § 809(10)(e) to SEQRA makes it even clearer that APA does not have the authority to engage in weighing and balancing harm to the environment against commercial benefits. This is in keeping with the unique place that the preservation of the Adirondack Park occupies in the laws of the State. See e.g. Constitution Art. 14, § 1. See also Wambat Realty Corp. v. State, 41 N.Y.2d 490, 495 (1977). SEQRA, on the other hand, is a law of statewide applicability.

That § 809(10)(e) does not grant this authority to APA is also supported by the lack of any legislative guidance in its language as to how such a complex function might be performed. See Boreali, 71 N.Y.2d at 12. On the other hand, it is somewhat easier to balance economic benefits against municipal costs, as discussed at page 56, supra, so no such guidance is needed.

Just like the Department of Health in Boreali, APA has no authority to ignore the plain language of the law. See Lewis Family Farm v. APA, 64 A.D.3d 1009, 1013-1014 (3d Dept. 2009); Heinlein v. New York State Office of Children & Family Services,

60 A.D.3d 1472, 1473 (4th Dept. 2009); Adirondack Mountain Club v. APA, 33 M.3d 383, 390 (Sup. Ct. Albany Co. 2011). By weighing and balancing the real or imagined economic benefits of the Project against its adverse impacts on the "natural, scenic, aesthetic, ecological, wildlife, historic, recreational or open space resources of the park" (APA Act § 809(10)(e)), APA exceeded its authority. The Twenty-Sixth Cause of Action should be granted and APA's approval of the Project should be annulled.

POINT VIII

APA'S APPROVAL OF THE PROJECT SHOULD BE ANNULLED BECAUSE IT FAILED TO MAKE THE REQUIRED FINDINGS

As established by the Twenty-Seventh Cause of Action (A. 412-415, 1026-1037), APA was required by APA Act § 809(10) and 9 NYCRR §§ 578.10 and 580.18(c) to make detailed findings of fact, supported by specific references to the Record, and to provide a clear written discussion of why the proposed action complied with the required statutory criteria. SAPA § 307(1) requires, in pertinent part, that an agency's final decision following an adjudicatory hearing:

> shall include findings of fact and conclusions of law or reasons for the decision, determination or order. Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting the findings. If, in accordance with agency rules, a party submitted proposed findings of fact, the decision, determination or order shall include a ruling upon each proposed finding.

In addition to general principles of administrative law, the

APA Act and APA's regulations require it to make such findings. "The agency shall not approve any project proposed ... or grant any permit therefore, unless it first determines that such project meets the following criteria... ". APA Act § 809(10). Regarding the issuance of permits under the Freshwater Wetlands Act (see Point III.B, supra) 9 NYCRR § 578.10(a) requires that "the agency shall not issue a permit for regulated activities in the following wetlands unless the findings set forth below are made." Consistent with SAPA § 307(1), APA"s hearing regulations require that, following an adjudicatory hearing, the "decision, determination or order shall be in writing and shall include findings of fact and conclusions of law or reasons for the decision, determination or order. The making of findings of fact shall constitute a ruling upon each finding proposed by the parties".[22] 9 NYCRR § 580.14(b)(9)(iii).

An issue by issue review of APA's decision showed that it utterly failed to make the findings required by law or to rule upon the findings proposed by the parties.[23] A. 20-36, 1029-1033, 1120-1132. Its approval of the Project should be annulled. See Quiver Rock, LLC v. APA, 93 A.D.3d 1135, 1137 (3d Dept. 2012); Green Island Assoc. v. APA, 178 A.D.2d 860, 862 (3d Dept.

[22] Pursuant to 9 NYCRR § 580.14(b)(9)(iii), the hearing parties may propose such findings and conclusions in their post-hearing briefs. The State's Answer (¶589 and ¶590)(A. 529) basically admits ¶589 and ¶590 of the Petition (A. 413), which allege that petitioners Protect the Adirondacks! Inc. and Phyllis Thompson made proposed findings in their post-hearing briefs. A. 3912-3942, 4096-4170, 4171-4202, 4388-4429.

[23] This analysis is too lengthy to reproduce in full in this Brief, as it fills over 5 pages. A. 1029-1033.

1991).[24] See also Pfau v. APA, 137 A.D.2d 916, 917 (3d Dept. 1988)(court upheld APA's denial of wetlands permit on the grounds that the evidence was not adequate for it to make requisite findings under 9 NYCRR § 578.10).

In addition, the APA's Order was conclusory and did not make findings in a manner that would allow the Court to conduct a meaningful review (A. 1026-1029, 1035-1036). Simpson v. Wolansky, 38 N.Y.2d 391, 396 (1975). The Twenty-Seventh Cause of Action should be granted and APA's approval of the Project should be annulled. See Simpson, 38 N.Y.2d at 396; Gitlin, 27 N.Y.2d at 935; Barry, 303 N.Y. at 51-53; Rauschmeier, 91 A.D.3d at 1082.[25]

POINT IX

APA'S APPROVAL OF THE PROJECT SHOULD BE ANNULLED BECAUSE PETITIONERS' PROCEDURAL RIGHTS WERE VIOLATED DURING APA'S DELIBERATIONS

As established by the Twenty-Ninth Cause of Action[26] (A. 420-423, 1051-1057), the APA's staff violated Petitioners' rights

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[24] See also Gitlin v. Hostetter, 27 N.Y.2d 934, 935 (1970); Barry v. O'Connell, 303 N.Y. 46, 51-53 (1951); Rauschmeier v. Village of Johnson City, 91 A.D.3d 1080, 1081 (3d Dept. 2012); Millpond Mgt., Inc. v. Town of Ulster ZBA, 42 A.D.3d 804, 805 (3d Dept. 2007); Matter of Bader v. Board of Educ. of Lansingburgh Cent. School Dist., 216 A.D.2d 708, 709 (3d Dept. 1995); Bowers v. Aron, 142 A.D.2d 32, 35-36 (3d Dept. 1988); Central NY Coach Lines v. Larocca, 120 A.D.2d 149, 152 (3d Dept. 1986); Kirk-Astor Dr. Neighborhood Ass'n. v Town Bd. of Town of Pittsford, 106 A.D.2d 868, 870 (4th Dept. 1984); Gilbert v. Stevens, 284 A.D. 1016 (3d Dept. 1954); Scudder v. O'Connell, 272 A.D. 251, 253-254 (1st Dept. 1947).

[25] See also Langhorne v. Jackson, 206 A.D.2d 666, 667 (3d Dept. 1994); Koelbl v. Whalen, 63 A.D.2d 408, 412-413 (3d Dept. 1978); Compare Burstein v. Public Serv. Commn., 97 A.D.2d 900, 902 (3d Dept. 1983).

[26] The Twenty-Eighth Cause of Action is addressed at Point XI, infra, in connection with the appeal on the motion for leave to conduct discovery on that claim.

by providing the APA Members, during their deliberations, with summaries of the hearing record (A. 4584-4623, 4646-4711, 4723-4728), without the staff or Members giving the parties to the adjudicatory hearing an opportunity to comment on the accuracy thereof. This violated 9 NYCRR § 580.18(a), which mandates that such an opportunity be given. Due to the one-sided nature of these summaries (A. 1053-1056, 4584-4623, 4646-4711, 4723-4728), this failure was highly prejudicial to Petitioners. A. 1053-1056. In addition, these summaries and other information were provided to the Members after the closing of the hearing record (A. 402-403, 420-422, 1051-1056), contrary to 9 NYCRR § 580.14(b)(11) and § 580.14(g).

The import of 9 NYCRR § 580.18(a) is clear:

> As written, the regulation unambiguously affords petitioner the opportunity to make written comment regardless of whether the hearing record summary was oral or written, or provided by hearing staff or other staff. Id. at 863.

Green Island Assoc. v. APA, 178 A.D.2d 860, 863 (3d Dept. 1991). When the APA staff violates this rule, APA's decision will be annulled. Id. at 862-863. In this case, APA unambiguously violated the rule. A. 420-423, 1051-1057, 4584-4623, 4646-4711, 4723-4728. Therefore, the Twenty-Ninth Cause of Action should be granted and APA's decision should be annulled.

POINT X

APA'S APPROVAL OF THE PROJECT SHOULD BE ANNULLED BECAUSE IT DID NOT ADHERE TO THE RULES REQUIRED FOR THE PROJECT TO ACHIEVE "IN EXISTENCE" STATUS

As established by the Thirtieth Cause of Action (A. 423-431, 1058-1065), APA did not adhere to its own procedures and its approval of the Project should be annulled. APA improperly attempted to define the Project being "in existence" for purposes of the Project obtaining vested rights and avoiding permit expiration, as being the conveyance of a single lot in the Project. A. 1.

This violated APA Act §§ 802(25) and 809(7)(c), and 9 NYCRR § 572.20, which require a far greater level of construction to have occurred for a project to obtain that status. In addition, APA did not follow the proper procedure required by APA Act § 809(7)(c) and 9 NYCRR § 572.20 in order to extend the period that the Project had in which to achieve "in existence" status from 2 years to 10 years, and did not include mandatory language required by 9 NYCRR § 572.20(d)(3) in the Order and Permits, in violation of those same rules. A. 1, 423-431, 1058-1065, 1120-1132.

APA can not ignore the plain meaning of the APA Act, and its interpretation thereof is not entitled to judicial deference. Lewis Family Farm v. APA, 64 A.D.3d 1009, 1013-1014 (3d Dept. 2009); Heinlein v. New York State Office of Children & Family Services, 60 A.D.3d 1472, 1473 (4th Dept. 2009); Adirondack

Mountain Club v. APA, 33 M.3d 383, 390 (Sup. Ct. Albany Co. 2011). If its interpretation is not correct, it will be overturned. Id.[27] Likewise, when APA's interpretation of its own regulations is not rational, it is entitled to no deference, and if it fails to follow those regulations, its action will be annulled. Green Island Associates v. APA, 178 A.D.2d 860, 862-863 (3d Dept. 1991); Zelanis v. APA, 27 M.3d 1229(A), *6-8 (Sup. Ct. Essex Co. 2010); Simonson v. APA, 21 M.3d 775, 784-785 (Sup. Ct. Warren Co. 2008). Unwritten past practices carry no weight at all. Zelanis, 27 M.3d at *6-7. Therefore, the Thirtieth Cause of Action should be granted and APA's decision should be annulled.

POINT XI

APA'S EX PARTE COMMUNICATIONS WITH THE APPLICANT AND THE EXECUTIVE CHAMBER REQUIRE ANNULMENT OF APA'S DECISION, OR DISCLOSURE WITH RESPECT TO THOSE COMMUNICATIONS

Petitioners brought the Twenty-Eighth Cause of Action because there is evidence that the strict *ex parte* rules applicable to adjudicatory hearings had been violated. Pursuant to CPLR § 408, Petitioners sought leave to conduct disclosure regarding the *ex parte* communications that took place. A. 1161. Supreme Court denied Petitioners' motion. A. i. While it is Petitioners' position that the existing evidence of *ex parte*

[27] Compare Jones v. APA, 270 A.D.2d 577, 578 (3d Dept. 2000) and Crater Club v. APA, 86 A.D.2d 714 (3d Dept. 1982) (APA strictly applied definition of "in existence" in APA Act § 802(25) and was upheld by court).

communications requires annulment of APA's decision, if the Court is not fully convinced, then it should reverse Supreme Court's decision and grant Petitioners leave to conduct disclosure in order to allow them to fully prosecute this Cause of Action.

A. The Ex Parte Communications Require Annulment of APA's Decision

As established by the Twenty-Eighth Cause of Action, APA's approval of the Project should be annulled because there were improper *ex parte* contacts between the Applicant and the APA, in violation of SAPA and the APA's regulations. A. 415-420, 1038-1050, 1123, 5022-5062.

SAPA prohibits the APA Members from having *ex parte* communications "directly or indirectly" with any person, party, or their representative. SAPA § 307(2). APA's regulations for adjudicatory hearings contain strict rules prohibiting *ex parte* communications with Agency Members or with an "employee responsible for rendering a decision or findings of fact and conclusions of law". 9 NYCRR § 587.4(c). The regulations do allow for APA Members to communicate with one another and with those APA staff who provide "aid and advice" to the APA Members. 9 NYCRR § 587.4(c)(2).

During the APA Members' deliberations on this Project, APA General Counsel John Banta was discussing the deliberations with APA Hearing Staff attorney Paul Van Cott. A. 1400. Mr. Van Cott was then having discussions with the Applicant's attorney, Thomas

Ulasewicz, about the proposed permits upon which the APA Members were deliberating (A. 417, 1409-1410, 5036-5052), and then relaying that information back to Mr. Banta.[28] Mr. Banta, who provided "aid and advice" (9 NYCRR § 587.4(c)(2)) to the APA Members, was also discussing his communications with the APA Members. A. 1400-1401. Additionally, there were at least two communications sent from the Applicant's representatives directly to Mr. Banta regarding the content of the Order and Permits. A. 5054-5062.[29] Thus, there was an open channel of communication between the Applicant and the Agency Members. Compare Concerned Citizens Against Crossgates v. Flacke, 89 A.D.2d 759, 761 (3d Dept. 1982) (noting that there was no evidence that the applicant's communications were with staff members who "were acting as representatives of the . . . decision-mak[er]").

As a result of these *ex parte* contacts, the advice and draft decision documents given by the APA Staff to the APA Members were affected by agreements and evidence outside of the record. A. 418-420, 1038-1050, 1171-1180, 4775-4780. The fact that the communications involved the specific language of the approved Order and permits, particularly the language regarding the deed

[28] During the deliberations, APA acknowledged that the APA Members and the APA "aid and advice" staff were not to "talk to hearing staff about conversations they may have had with the [Applicant]" (A. 1129), but communications between Mr. Banta and Mr. Van Cott about Mr. Van Cott's discussions with Mr. Ulasewicz took place anyway. A. 1400, 1409-1410.

[29] Mr. Banta claimed that he "did not engage in any substantive discussions" (A. 1401) directly with the Applicant's attorney, but without further disclosure, the actual substance of these "ongoing talks between the developer and the staff, the senior staff" (A. 417) remains unknown.

restrictions and the time frame for the project to be "in existence" (A. 1042-1046, 1062-1065) (Point X, infra), "hardly permits characterizing" the communications as not "substantive" or not prohibited (A. 605, 1041, 1401). Goldfinger v. Lisker, 68 N.Y.2d 225, 232 (1986); see Britt v. DiNapoli, 91 A.D.3d 1102, 1102 (3d Dept. 2012); Cantone v. DiNapoli, 83 A.D.3d 1259, 1260 (3d Dept. 2011).

"Such contacts are in violation of administrative procedural due process and mandate an annulment of [APA's] determination." Signet Constr. Corp. v. Goldin, 99 A.D.2d 431, 432 (1st Dept. 1984); see Rivera v. Espada, 3 A.D.3d 398, 398-399 (1st Dept. 2004) (annulling determination "tainted by the *ex parte* communication" with an attorney who participated in the hearing on behalf of a party). The other hearing parties had no opportunity to respond to the Applicant's proposed edits to the draft order and permits. While the Respondents may argue "that petitioner[s] [were] in no way prejudiced by this procedure, the fact remains that this method of drafting final determinations not only plainly violates [SAPA] § 307(2) but, further, creates the appearance of impropriety." Kaiser v. McCall, 262 A.D.2d 920, 921 (3d Dept. 1999).

Even an appearance of impropriety is sufficient to "warrant an annulment of the determination" by APA to approve the Project. LePore v. McCall, 262 A.D.2d 919, 920 (3d Dept. 1999). Therefore, the Twenty-Eighth Cause of Action should be granted,

and APA's decision must be annulled because there were prohibited *ex parte* communications with "aid and advice" staff in violation of APA regulations (9 NYCRR § 587.4), and there were indirect *ex parte* communications between the Applicant and the APA Members in violation of SAPA § 307(2).

Further, after this Article 78 proceeding was commenced, the Petitioners discovered evidence indicating that were additional *ex parte* communications between APA and the Executive Chamber. A. 1176-1177, 1556. Since the APA's decision was made following a formal adjudicatory hearing (A. 293), subject to strict *ex parte* contact rules, the communications to APA by the Project Sponsors and the Executive Chamber cannot be characterized as merely "legitimate advocacy" efforts, which are generally permissible in non-adjudicated matters. Matter of London Terrace Assoc., L.P. v. New York State Div. of Hous. & Community Renewal, 35 M.3d 525, 537 (Sup. Ct. New York Co. 2012). Moreover, none of the other adjudicatory hearing parties were ever notified of these communications. Compare id.

B. The Appearance of Impropriety Warrants Granting Disclosure to the Petitioners

As shown above, the prohibited *ex parte* communications serve as a basis for annulling the APA's decision approving the Project. However, if the Court is not satisfied that the Petitioners have proven the Twenty-Eighth Cause of Action by the evidence already provided, disclosure, including depositions, is

necessary to obtain additional evidence on this issue because "there [is] no other way" that the Petitioners can determine the full substance, extent, or impact of the prohibited communications. A. 1038-1050, 1171-1180, 1351-1354, 1484-1488. Chapman v. 2 King St. Apts. Corp., 8 M.3d 1026(A), *12 (Sup. Ct. New York Co. 2005); see generally Boisson v. 4 E. Hous. Corp., 129 A.D.2d 523 (1st Dept. 1987). The communications are solely within the knowledge of the individuals, both party and non-party witnesses, who took part in the conversations. See Plaza Operating Partners v. IRM (U.S.A.) Inc., 143 M.2d 22, 24 (Civil Ct. City of New York 1989).

Disclosure would not be a "fishing expedition" because Petitioners have already provided "some factual predicate" showing that disclosure is "reasonably likely" to produce new evidence of *ex parte* communications. A. 1489-1493. Niagara Mohawk Power Corp. v. Town of Moreau Assessor, 8 A.D.3d 935, 937 (3d Dept. 2004). The new evidence sought by the Petitioners is more than "marginally relevant" to the question of *ex parte* communications - the information sought is at the heart of the Twenty-Eighth Cause of Action. General Elec. Co. v. Macejka, 117 A.D.2d 896 (3d Dept. 1986).

Therefore, in the event that the Court does not grant Petitioners' relief under the Twenty-Eighth Cause of Action, full disclosure regarding these communications would be "material and necessary to the prosecution" of the Petitioners' petition, and

should be granted in light of the Court's "important responsibility to protect [against] arbitrary or discriminatory conduct". Stapleton Studios v. City of New York, 7 A.D.3d 273, 275 (1st Dept. 2004); Dougherty v. Bahou, 67 A.D.2d 739, 741 (3d Dept. 1979); see Freidus v. Guggenheimer, 57 A.D.2d 760 (1st Dept. 1977). Accordingly, the Court should overturn Supreme Court's decision (A. i) denying Petitioners' motion for leave to conduct disclosure, and should grant Petitioners leave to do so pursuant to CPLR § 408.

POINT XII

PETITIONERS SHOULD BE AWARDED THEIR LEGAL FEES UNDER CPLR ARTICLE 86

APA's approval of the Project was not substantially justified. Petitioners should be awarded, against respondent APA, their legal fees and other expenses incurred in this Article 78 proceeding pursuant to CPLR Article 86, the New York State Equal Access to Justice Act. Among APA's many errors was the fact that some of the procedures that it used in reaching its decision were expressly disapproved in prior rulings by this same Court against APA, yet it failed to correct its procedures, and/or it continues to argue in this proceeding that these procedures were proper. E.g. Quiver Rock, LLC v. APA, 93 A.D.3d 1135, 1137 (3d Dept. 2012)(lack of specific findings in determination); Green Island Associates v. APA, 178 A.D.2d 860, 862-863 (3d Dept. 1991)(lack of findings and staff giving summary

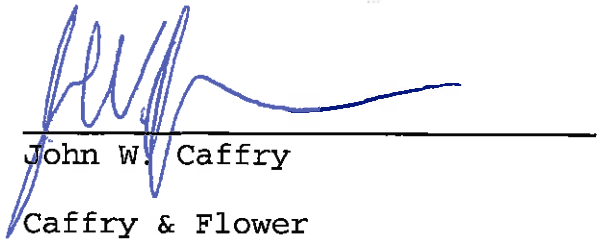
of adjudicatory hearing record to Agency Members without allowing hearing parties to comment on the summary). See Points VIII, IX, supra. APA also ignored the substantive holding of the Court in Association for the Protection of the Adirondacks v. Town Board of Town of Tupper Lake, 64 A.D.3d 825 (3d Dept. 2009). See pp. 6-7, 9-11 and Point VII, supra. Therefore, Petitioners should receive an award of their legal fees and other expenses under CPLR § 8601(a) against respondent APA.

CONCLUSION

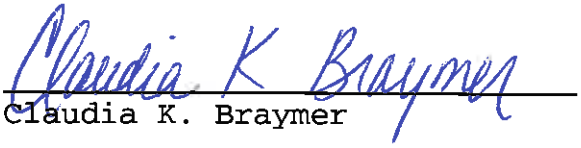
The 29 causes of action of this Article 78 proceeding should be granted, and APA's approval of this unprecedented Project should be annulled, because its decision was not supported by substantial evidence in the record, it contained multiple violations of the plain language of the APA Act, and it was arbitrary and capricious. In addition, the decision-making procedures that APA applied repeatedly violated both general standards of administrative due process and its own regulations. These actions were not substantially justified, and Petitioners should be awarded their legal fees and expenses.

If the Court believes that there is not yet sufficient evidence in the record to grant the Twenty-Eighth Cause of Action, it should reverse Supreme Court and grant Petitioners leave to conduct disclosure regarding the illegal *ex parte* contacts that APA participated in.

Dated: September 6, 2013



John W. Caffry



Claudia K. Braymer

Caffry & Flower
Attorneys for Petitioners
John W. Caffry, of Counsel
Claudia K. Braymer, of Counsel
100 Bay Street
Glens Falls, New York 12801
518-792-1582

Robert C. Glennon, Esq.
Ray Brook, New York

Ellen Egan George, Esq.
Saranac Lake, New York

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