STATE OF NEW YORK SUPREME COURT
APPELLATE DIVISION THIRD DEPARTMENT

In the Matter of the Application of

No. 516901

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' REPLY BRIEF

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INTRODUCTION

This is a transferred Article 78 proceeding, except for the appeal of Justice Platkin's denial of the Petitioners' motion for leave to conduct discovery on the single issue of illegal *ex parte* contacts between the Executive Chamber and APA, and the Project Sponsors and APA. See Brief Point XI.B; pp. 28-29, infra. Contrary to the State Brief's (p. 12, fn. 2) claim, it is not the Petitioners' intent to abandon issues or arguments which were raised in their Article 78 pleadings, but which were not argued in their Brief.[1] See Brief, pp. 7-8. In large part, Petitioners' Petition and Reply can stand on their own, and the Brief serves to provide additional legal background for their 29 causes of action, all of which were briefed, as well as the responses to the Respondents' affirmative defenses which are set forth in the Reply (A. 828). Likewise, the Petitioners do not concede any of the allegations and arguments made by the Respondents in their answering briefs, but can not respond to all of them in this Reply Brief, due to space limitations. Again, Petitioners' prior papers provide an adequate basis for the Court to reject Respondents' arguments and to grant the Article 78 Petition. Petitioners' appeal should also be granted.

[1] The Petitioners' brief dated September 6, 2013 is referred to herein as "Brief". The Project Sponsors' brief dated January 24, 2014 is referred to herein as "P.S. Brief". APA and DEC's brief dated January 24, 2014 is referred to herein as "State Brief".

POINT I:

APA'S RELIANCE ON AFTER-THE-FACT STUDIES OF ADVERSE IMPACTS WAS ARBITRARY AND CAPRICIOUS AND AFFECTED BY ERROR OF LAW

The Respondents' briefs discuss, at great length, the evidence that the record does contain about adverse impacts to the Cranberry Pond wetland complex and to amphibians throughout the Project Site, and purported mitigation measures for those impacts. What they fail to meaningfully address is how much was missing from the record, which was so deficient that APA itself recognized that it lacked adequate evidence to approve the Project, and ordered that after-the-fact studies of these impacts be done to try to paper over these defects in the Applicant's proof. Brief Point I. As a matter of law, this approach was arbitrary and capricious.[2] See Pyramid Co. of Watertown v. Planning Bd. of Town of Watertown, 24 A.D.3d 1312, 1314 (4th Dept. 2005); Brander v. Town of Warren, 18 M.3d 477, 484-485 (Sup. Ct. Onondaga Co. 2007).[3]

A. The After-the-Fact Cranberry Pond Wetland Impact Study

The State Brief (pp. 27-28, 30) attempts to justify APA's postponement of the study of impacts to Cranberry Pond by balancing the economic benefit of using it for snowmaking water, instead of using Tupper Lake, against the environmental impacts thereof (see Point VII, infra), and its doing so despite what APA

[2] See also Point IV.A, infra, regarding after-the-fact studies of residential lots on Resource Management lands.

[3] Neither set of respondents addressed these persuasive authorities.

itself admitted (A. 33-34;[4] State Brief pp. 28-29; see also Brief Point I) was a lack of sufficient evidence to make a determination on this issue.[5] A. 33-34, 309-311, 879-885, 1080, 4164-4169. This was erroneous, as a matter of law.

The State Brief (p. 28) and P.S. Brief (p. 14) argue that there is no evidence that the water withdrawals for snowmaking over a decade ago, done under permits issued to a different owner, had an adverse impact. However, no monitoring for such impacts was done at that time (A. 882, 5581, 6032-6034, 6043-6044, 6046-6047), and APA's staff engineer testified that under the new ownership more water would be used, and impacts may be higher. A. 5276. More importantly, that does not overcome the fact that APA itself found that it lacked adequate evidence to make a determination as to what impacts the current proposal would have. A. 33. The P.S. Brief (pp. 11, 16) also argues that a deed restriction which will be placed on certain Resource Management lands within the Project Site will somehow mitigate impacts to Cranberry Pond. However, Cranberry Pond is located in a Moderate Intensity Use area, and is a long distance from any of the affected Resource Management lands. See Exhibit 244, Brief Attachment A. The Respondents also discuss how Cranberry Pond has been affected by beaver activity and past human alteration. However, the pond is "relatively pristine". A. 887, 6047-6049.

[4] References to the Appendix are abbreviated as "A. ___". References to the Record are abbreviated as "R. ___".

[5] "The impact, if any ... has not been determined". A. 33. See also A. 316, 459, 716, 731-733, 887, 6045, 6048-6049, 5583.

Regardless of how the pond came to be in its current condition, APA decided that it was an important enough ecological resource that further study of potential adverse impacts to it was warranted. A. 33. APA's action was arbitrary and capricious and the Second Cause of Action should be granted. Brief Point I. Pyramid Co. of Watertown, 24 A.D.3d 1312; Brander, 18 M.3d at 484-485.

B. Violations of the Freshwater Wetlands Act

In addition to its APA Act jurisdiction over wetlands, APA also had jurisdiction over Cranberry Pond under the Freshwater Wetlands Act, ECL Article 24 ("FWA").[6] A. 315-317. The State Brief (p. 30) argues that the cost of using Tupper Lake would be "prohibitive", so that Cranberry Pond was "'the only alternative which reasonably can accomplish' [9 NYCRR § 578.10(a)(2)(ii)] the project sponsor's goals".[7] However, none of the evidence cited by the State Brief (pp. 28, 30) in support of this claim[8] reached those conclusions, so this argument must be rejected by the Court.[9] The State also argues that APA "unquestionably has the

[6] In contrast to APA's powers under the APA Act, when APA applies the FWA, it is permitted to weigh economic benefits against ecological values. ECL § 24-0801(2); 9 NYCRR §§ 578.9, 578.10(a). Compare Point I.A, supra, Point VII, infra.

[7] Contrary to the State Brief's (pp. 30-31) assertion, the Petition did raise this issue. A. 317.

[8] See also A. 30, 316-317. Nor is there any evidence that Cranberry Pond is "the only alternative that provides an essential public benefit". 9 NYCRR § 578.10(a)(2)(iii).

[9] See A. 2235, 2561, 2587, 5116, 5267-5268, 5275, 5579-5581. At most, this evidence shows that the Applicant had a "concern" about costs, that there was indeed a cost difference, and that this was the primary reason for its choice of Cranberry Pond over Tupper Lake, but apparently not the only reason.

statutory authority ... to issue permits for trial periods." APA Act § 809(13) makes no mention of any such authority.[10]

The State Brief (p. 30) argues that APA satisfied its FWA regulations by making a "conclusion" about the lack of alternatives to using Cranberry Pond. However, it does not cite to anywhere in the record where this alleged conclusion was made.[11] Instead of making such a finding, APA found only that the Applicant chose to use Cranberry Pond because the cost of using Tupper Lake would be "significantly higher". A. 23. APA did not go so far as to find that there was no alternative, or even that the cost was "prohibitive" (State Brief p. 30), as would have been required by 9 NYCRR § 578.10(a)(2) in order to allow the use of Cranberry Pond. See also A. 885-889, 1030-1031. Similarly, the State Brief (p. 31) claims that the "[r]ecord evidence supports the finding that the withdrawal of water will have a minimal impact on the wetlands and their functions. APA made no such finding (see A. 35-39), and instead found that "[t]he impact, if any ... has not been determined". A. 33.

The cited application materials did not make any claim that Tupper Lake was cost-prohibitive, such that Cranberry Pond was the only feasible alternative, as claimed by the State Brief, and as required by 9 NYCRR § 578.10(a)(2).

[10] Also, this section of the APA Act, regarding implementation of the Adirondack Park Land Use and Development Plan, does not apply to APA's actions under the FWA.

[11] The Court "must judge the propriety of such action solely by the grounds invoked" by APA. Barry v. O'Connell, 303 N.Y. 46, 50 (1951). Neither the APA counsel or the Attorney General's Office can create grounds for a decision after-the-fact if APA did not do so. Id. In addition, "[i]t will not do for a court to be compelled to guess at the theory underlying the agency's action; nor can a court be expected to chisel that which must be precise from what the agency has left vague and indecisive." Id. at 52.

Also, APA admitted that it did not make the required finding on the wetland value of Cranberry Pond. A. 315, 459, 885-889, 1030-1031.[12] APA's action was arbitrary and capricious and the Fourth Cause of Action should be granted. Brief Point I.

C. The After-the-Fact Amphibian Impact Study

Even though APA did impose some conditions to mitigate impacts to amphibians (State Brief p. 33), it recognized that these would not be adequate to prevent undue adverse impacts and ordered that an additional study be done. A. 22, 33. However, the study was not "comprehensive" (A. 22, 33), and was instead arbitrarily limited to just a few parts of the Project Site (A. 33, 96-97, 217-218, 236-237), despite the fact that the majority of the western half of the Site is critical habitat (A. 863, 3562, 4415; Brief Attachment A). Due to further limitations in the Order, the study's results can not be used to protect the vast majority of the amphibian habitat that is at risk. See A. 319-330, 891-899, 4415-4417; Brief Point III.C. The fact that none of the amphibian species so far identified on the Project Site is an endangered or threatened species (State Brief p. 31) is irrelevant. Letters from the DEC Natural Heritage Program are not dispositive on this question (A. 1095, 1744-1750), and APA was required to determine the Project's potential adverse impacts on all species of plants and animals and their habitats. APA Act §§ 805(4)(a)(2), (6). APA's action was arbitrary and capricious

[12] This was in keeping with APA's general failure to make the findings required by SAPA and its own hearing regulations. Point VIII, infra.

and the Sixth Cause of Action should be granted. Brief Point I; Pyramid Co. of Watertown, 24 A.D.3d 1312; Brander, 18 M.3d at 484-485.

POINT II:

APPROVAL OF THE PROJECT WITHOUT THE NECESSARY WILDLIFE STUDIES VIOLATED PETITIONERS' PROCEDURAL RIGHTS AND WAS ARBITRARY AND CAPRICIOUS

A. APA's Reliance on its Guidelines Was an Error of Law and and Deprived Petitioners of Their Right to a Fair Hearing

APA improperly relied upon (A. 21, 33, 1090-1092) an internal document entitled "Guidelines for Biological Surveys" ("Guidelines") (A. 4803-4807) when making its determination on the issue of adverse impacts to wildlife, and fragmentation of its habitat. The State Brief (pp. 24-25) does not dispute the fact that the Guidelines were not validly promulgated pursuant to SAPA and the APA Act. Brief pp. 21-22; A. 920-932. APA's reliance on the misbegotten Guidelines violated SAPA, and the principle that in an adjudicatory hearing, due process requires that "no essential element of a fair trial can be dispensed with". Simpson v. Wolansky, 38 N.Y.2d 391, 395 (1975). See also Giorgio v. Bucci, 246 A.D.2d 711, 713 (3d Dept. 1998). APA's reliance on the Guidelines did just that (A. 909), which was an error of law.

SAPA § 302(3) requires that "[f]indings of fact shall be based exclusively on the evidence and on matters officially noticed." The State Brief (p. 25) focuses on the argument that the Guidelines are not evidence, so that their use was somehow

acceptable. However, an agency may not base its post-hearing decision "upon evidence or information outside the record", so it does not matter whether the guidelines were "evidence" or just "information". Simpson, 38 N.Y.2d at 396. See also Korth v. McCall, 275 A.D.2d 511, 512 (3d Dept. 2000).

"Where a hearing has been held, it is improper for an administrative agency to base a decision upon information outside the record because such a procedure denies the parties an opportunity to refute the outside information." Multari v. Town of Stony Point, 99 A.D.2d 838 (2d Dept. 1984). Doing so deprives the parties of a fair hearing. Id.; see also 49th St. Mgt. Co. v. New York City, 277 A.D.2d 103, 106 (1st Dept. 2000). Here, the Guidelines were not part of the hearing record and were not unearthed until just before APA's final three days of deliberation. A. 342-347, 921, 1086, 1089-1092, 4803-4807; Brief pp. 21-22. As discussed below, the record shows unambiguously that the Applicant had not complied with APA's repeated requests for proper studies on impacts to wildlife and fragmentation of their habitat and, up until that point, APA believed that the record was inadequate. When the Guidelines materialized, APA then used them to justify ignoring the acknowledged gaps in the hearing evidence, and approved the Project, without any party having had a chance to refute them or their application to the facts that were in the record. Brief pp. 21-22; A. 21, 33, 342-347, 926-927, 1090-1092. This was arbitrary and capricious, and

denied the parties their due process right to a fair hearing. Id.; A. 909.

B. APA's Assessment of Wildlife Habitat Fragmentation and Related Impacts Was Arbitrary and Capricious

APA (A. 21) and the State Brief (p. 23) claim that, other than a single deer yard, there is no "key wildlife habitat" on the Site. This is not true, as vernal pools are key habitat for amphibians. A. 320-322, 345-346, 903-908, 2376, 3562, 6974.[13] Although APA did look at impacts to this habitat (see Point I.C, supra), APA's failure to recognize it as "key wildlife habitat" was an error of law which means that APA failed to properly assess its importance under APA Act § 805(4)(a)(5)(c) and § 809(10)(e) and APA's guidance document "Development in the Adirondack Park" ("DAP").[14] A. 1091-1092, 4784-4786.

Respondents argue (State Brief pp. 22-24; P.S. Brief pp. 10-11) that the minimal studies done by the Applicant were adequate to support APA's decision. However, when APA decided to send the application to a hearing, it specifically found that the wildlife studies were inadequate. A. 899-904. Despite that, the Applicant did no more wildlife studies, presented no rebuttal witnesses, and relied only on the unproven allegations of the application materials. A. 916-920. The Applicant failed to meet

[13] See also additional Appendix page cites in Brief Point III.D.

[14] The DAP is a duly promulgated APA guidance document which APA relies upon to interpret the development considerations of APA Act § 805(4). See 9 NYCRR § 574.2; A. 904, 924-925, fn 53, apa.ny.gov/Documents/Guidelines.html.

its burden of proof on these issues and APA's arbitrary and capricious decision must be annulled. Brief pp. 12-14.

The record also shows that the APA staff, and many of the APA Members, knew that the evidence on the question of wildlife habitat fragmentation was unequivocally inadequate because the Applicant had failed and refused to do the additional detailed studies of this issue that APA had repeatedly requested. A. 339-343, 346, 899-904, 916-919, 1077-1097, 2375-2376, 2391-2394, 2420-2421, 2426-2427, 2442, 2444, 2449, 2460, 4412-4414; R. 9214.[15] It was only when the misbegotten Guidelines were improperly interjected into APA's deliberations that a rationale for ignoring this lack of evidence was created by APA's Counsel, inserted into the revised draft Order (A. 1090), and adopted by the Members. A. 1090-1092.

The State Brief (p. 26) argues that APA was not required to "address every conceivable environmental impact". While this is virtually black-letter law, it is not applicable to an issue that was deemed by APA to be so important that it was designated as Hearing Issue #1 when APA decided that it needed more evidence before it could decide on the application, and sent it to a hearing (A. 2460), which issue was then the subject of multiple days of testimony, and for which APA recognized (as discussed above) that the record was inadequate. Points I.A, I.C, supra.

The P.S. Brief (p. 11) and the State Brief (pp. 16, 24) rely

[15] See also additional Appendix page cites in Brief Point III.D.

heavily on the proposed deed covenants to protect wildlife habitat. The lands in question can not be further developed, with or without the deed restrictions, so they are meaningless. A. 373-374, 938-940. These restrictions would only protect Resource Management lands, so they do nothing to protect amphibian habitat in Moderate Intensity Use areas, where the majority of the impacts to amphibians will occur. A. 892-899, 938-940. In addition, the covenants are only aimed at preventing future development, and won't help to avoid the adverse impacts from the current project. Despite requiring these covenants, APA still found that an after-the-fact amphibian study was needed to identify mitigation measures in Resource Management areas for the development that would occur despite the covenants. Point I.C, supra. It was arbitrary and capricious for APA to rely on these covenants when it also found that the record was inadequate to make the required finding Project would avoid undue adverse impacts without more studies being done.

APA's decision was rendered in violation of lawful procedure, affected by multiple errors of law, and was arbitrary and capricious. The Eighth Cause of Action should be granted.

POINT III:

APA'S RULINGS ON KEY WETLANDS AND WILDLIFE ISSUES WERE NOT SUPPORTED BY SUBSTANTIAL EVIDENCE

As set forth above at Points I and II, Brief pp. 11-14 and Points I, II and III, and in the Petition (A. 301-304, 305-348),

Reply (A. 877-941) and Petitioners' post-hearing briefs (A. 3912-3924, 3932-3933, 4135-4144, 4164-4169, 4172-4173, 4176-4179, 4181-4182, 4412-4417, 4428-4429),[16] reviewing the record as a whole shows that APA's decision was not supported by substantial evidence. Although there was lengthy testimony on each of the wetlands and wildlife issues, a thick record does not automatically equal substantial evidence. Just as a lengthy civil trial may result in a verdict of no cause of action, when an applicant fails to meet its burden of proof, a 19 day adjudicatory hearing can result in a permit denial. Here, there were key gaps in the Applicant's proof (see Brief pp. 11-14; A. 844-846), some of which APA recognized by requiring further studies (Point I, supra), and others which are evident upon a careful reading of the record and comparing that to the applicable legal standards. The First, Third, Fifth and Seventh Causes of Action should be granted.[17]

[16] See also additional Appendix page cites in Brief Points I, II, III.

[17] The P.S. Brief (p. 13) points out that certain aspects of the Project were not adjudicated in the hearing, so that they are not subject to judicial review under the substantial evidence standard. However, each cause of action involving those issues is paired with a parallel cause of action for review under the arbitrary and capricious and error of law standards. A. 313-314, 317-319, 330-331, 347-348. See also A. 849-877 (replying to a similar argument in the P.S. Answer regarding the ripeness for adjudication of, and Petitioners' exhaustion of their administrative remedies on, the Project's impacts on Moderate Intensity Use areas). Therefore, this argument does not affect the Court's ability to decide any of the issues in this proceeding.

POINT IV:

THE PROJECT DOES NOT COMPLY WITH THE LEGAL REQUIREMENTS FOR RESIDENTIAL DEVELOPMENT IN A RESOURCE MANAGEMENT AREA

A. APA's Errors of Law Require Annulling its Decision

APA made three major errors of law in determining whether the proposed so-called "Great Camps" were compatible with the Resource Management land use area. First, APA admits (see Brief p. 38, fn 15) that it approved the Project on the basis that the directive of APA Act § 805(3)(g)(2) that "resource management areas will allow for residential development on substantial acreages or in small clusters on carefully selected and well designed sites" is "not a determinative factor" and "not prescriptive" (A. 1102). The State Brief (pp. 16-17) argues that this statutory language "does not provide specific thresholds for approval", but is merely a "guide" to APA, that sets "goals". This is contrary to the plain language of the statute and should be rejected. Brief Point IV.C; A. 943-946, 1097-1104, 4148-4150. In comparison to the mandatory language of § 805(3)(g)(2), for the less-protected Rural Use areas, APA Act § 805(3)(f)(2) uses precatory language: "Residential development and related development and uses should occur on large lots or in relatively small clusters on carefully selected and well designed sites". Even if the terms "substantial acreages", "small clusters", and "carefully selected and well designed sites" are not defined in § 805(3)(g)(2) (see State Brief p. 17), APA must still apply them as directed by the statute. The P.S. Brief (pp. 19-20) relies

upon the testimony of APA's staff witness for its defense of its interpretation that § 805(3)(g)(2) is not a mandate. However, this testimony, in which the witness cited no actual precedents, is due no deference from the Court. Brief pp. 37-38.[18] As a result of this error of law, the Tenth, Twelfth, and Fourteenth Causes of Action should be granted. Brief Point IV.C.

Second, APA apparently made its decision on the basis that there is no difference between the statutory standards applicable to primary and secondary compatible uses, and has essentially admitted doing so (e.g. A. 496 (Answer ¶397)). See also P.S. Brief pp. 18-19; A. 371-372, 481-482, 496-497, 768, 779, 950-951; Brief Point IV.E. Now, the State Brief itself (pp. 12-13) concedes that these standards differ, but because the Attorney General's Office and the Court can not supply a rationale that was not relied upon by APA in its initial decision, the decision must be annulled. Barry v. O'Connell, 303 N.Y. 46, 50 (1951); Zelanis v. APA, 27 M.3d 1229(A) at *6-8; Brief Point IV.E. In addition, APA's initial interpretation would render mere surplusage the additional requirement of APA Act § 805(3)(a) that secondary uses may only be found to be compatible "depending upon their particular location and impact upon nearby uses ...". This, APA may not do. Scott v. Mass. Mutual Life Ins., 86 N.Y.2d

[18] APA's interpretations of its statues and regulations have been regularly overruled by the courts, particularly in the last several years. See Lewis Family Farm v. APA, 64 A.D.3d 1009, 1013 (3d Dept. 2009); Adirondack Mountain Club v. APA, 33 M.3d 383, 389-390 (Sup. Ct., Albany Co. 2011); Zelanis v. APA, 27 M.3d 1229(A) *6 (Sup. Ct. Essex Co. 2010); Simonson v. APA, 21 M.3d 775, 784-785 (Sup. Ct. Warren Co. 2008).

429, 435 (1995). Because APA misapplied the law, the Sixteenth Cause of Action should be granted. Brief Point IV.E.

Third, Respondents claim that (as required by APA Act § 805(3)(g)(2)) the residences on Resource Management lands are all "on carefully selected and well designed sites". See State Brief pp. 13-15. What they fail to mention is that APA found (A. 36-37) that many of these homes have not yet been proven to comply with the applicable requirements. Brief p. 36; A. 360-362, 487, 949-950, 3763-3768, 5321-5322, 5326, 6723-6724. APA is still waiting for revised site plans for these lots to be filed, after-the-fact.[19] A. 36-37. Therefore, it was arbitrary and capricious, and an error of law, for APA to approve these lots without being able to determine whether or not they will ultimately be proven, by the revised site plans, to comply with the law. See Pyramid Co. of Watertown v. Planning Bd. of Town of Watertown, 24 A.D.3d 1312, 1314 (4th Dept. 2005). The Fourteenth Cause of Action should be granted. Brief Point IV.C.

B. APA's Decision On the Residential Use of the Resource Management Lands Was Not Supported by Substantial Evidence

As set forth above at Point IV.A, Brief pp. 11-14 and Point IV, and in the Petition (A. 349-376), Reply (A. 942-954, 1097-1105) and Petitioners' post-hearing briefs (A. 4412-4423, 4135-4151),[20] reviewing the record as a whole shows that APA's

[19] See Brief Point I, and Point I, supra, regarding reliance on after-the-fact evidence being arbitrary and capricious and an error of law.

[20] See also additional Appendix page cites in Brief Point IV.

decision was not supported by substantial evidence. See also Point III, supra. The State Brief (p. 14) and the P.S. Brief (pp. 6-7) both highlight changes that the Applicant voluntarily made to the Project in a purported attempt to reduce its impacts. However, these relatively minor changes all occurred long before the hearing, so they do not change the import of any of the hearing testimony. Although an alleged 86% of the Project Site will not be disturbed by construction activity (State Brief p. 1), the sprawling nature of the Project will fragment wildlife habitat with roads and houses, and affect most of the key wildlife habitat, including "critical terrestrial habitat" for amphibians, on the Site. Brief pp. 27-31, Attachment A; A. 320-321, 354, 858-863-874, 901-902, 947, 2437-2441, 5222, 5229, 5587-5598, 5870, 5865-5869, 5974, 6051-6053, 6273, 6460, 6491-6493 6692-6696, 6699-6700. The Ninth, Eleventh, Thirteenth, and Fifteenth Causes of Action should be granted.

POINT V:

THE APA ACT REQUIRED THAT THE APPLICATION BE DENIED DUE TO THE PROJECT'S OFF-SITE IMPACTS ON THE STATE BOAT LAUNCH

The record shows that the Project's valet boat launching service will usurp the entire capacity of the State Forest Preserve Boat Launch on Tupper Lake. A. 380; Brief p. 42. Also, it will be an illegal commercial use of the State Forest Preserve. Notably, the Respondents offer no serious opposition on either the factual issue (Brief Point V.A), or the illegality

of this use of the Forest Preserve (Brief Point V.B). They instead focus primarily on various procedural arguments. All of the arguments made in the P.S. Brief (Point III), and most of those in the State Brief (Point I.B.5), are thoroughly debunked in the Petition (A. 377-397), Reply (A. 954-972, 1105-1106), and Brief (Point V), and need not be re-argued in this Reply Brief.[21] Notably, contrary to the P.S. Brief's (p. 23) claim that this issue will become ripe when DEC takes "formal action" on the Project's use of the boat launch, DEC has no advance permitting jurisdiction over this activity. A. 1082 (fn 6), 1105-1106.

The State Brief (p. 34) does make one somewhat new argument, that the valet service would not use any parking spaces at the Boat Launch, so it would not use up the launch's capacity. However, the testimony showed that the limiting factor was launch time and the number of launching and landing slots per day, not parking. A. 379-385, 960-962, 966-968, 2901-2936, 4152-4163, 5739-5784. When APA approved the Project, including the valet boat launching service, its decision was not supported by substantial evidence, and was arbitrary and capricious and

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[21] The cites to Petitioners' prior responses to these arguments are:
- Lack of ripeness: A. 954-956, 968-969, 1105-1106.
- No court pre-approval to enforce Art. 14: A. 393-394, 957-958; Brief p. 44.
- Commercial status of valet boat launching service: A. 387-390, 969; 4160-4162, 4426-4427; Brief pp. 44-46.
- Argument about data: A. 379-385, 965-968.
- APA's jurisdiction over this off-site activity: A. 377-378, 386-387, 396, 958-964, 970-971.
- DEC's position on this issue: A. 293, 391-392, 965-966, 4160-4161.
- Speculation about mitigation of the impact through the DEC UMP process: A. 383, 4426.
- Argument that the Project's guests can use the launch without the valet service: A. 384-385, 388, 961-962; Brief pp. 46-47.

affected by error of law. The Seventeenth to Twentieth Causes of Action should be granted. Brief Point V.

POINT VI:

ALL OF THE RELEVANT EVIDENCE SHOWS THAT THE PROJECT WILL FAIL AND WILL IMPOSE FINANCIAL BURDENS ON LOCAL GOVERNMENTS

Substantial evidence is that which is reasonably adequate to support a conclusion. See Brief pp. 11-12, 22-23. The Project's revenues would supposedly come from two main sources, real estate sales and IDA bonding. The Project Sponsors failed to prove, with hearing testimony, the allegations of the application materials (see A. 301-304, 844-846; Brief pp. 12-14), so there was not adequate evidence that either of these sources was anything more than a fantasy.[22] Therefore, APA should have denied the application. Regarding real estate sales, the P.S. Brief (pp. 33) relies heavily on 2-1/2 days of testimony by a panel of witnesses. After cross-examination, this testimony proved only that the projected sales estimates had been made up out of thin air. Petitioners had no burden of proof, yet their expert testimony went even further and proved that the Project was doomed to failure. See Brief p. 49; A. 974-981, 983-996, 1105-1110, 4100-4114, 4400-4404. Regarding the IDA bonding, the P.S. Brief (pp. 30-32) relies on an out-of-date IDA resolution and opinion letter from its bond counsel, and ignores all of the

[22] The other promised benefits of the Project are also illusory. See Brief p. 49, fn 18; A. 4122-4130.

more recent evidence showing that these documents were no longer valid. Nor did the Project Sponsors prove, with testimony (see Brief pp. 12-14), the unproven allegations made in the application materials that their brief now relies on. See Brief Point VI.C; A. 404-408, 1011-1021, 1111-1116, 4114-4122.

APA improperly relied on evidence from outside the record. Brief Points II, VI.B. The State Brief (p. 37) claims that this was merely permissible "aid and advice", but the testimony and analysis given to the Members by the staff went far beyond that and created new revenue and expense estimates that were not in the record. A. 402-403, 981-983, 1106-1111. The "aid and advice staff" is not exempt from the regulations that are supposed to protect the rights of the parties to have a fair decision-making process following an adjudicatory hearing. See Green Island Assoc. v. APA, 178 A.D.2d 860, 863 (3d Dept. 1991).

The Respondents argue that the Project would comply with APA Act § 809(10)(e) because, even if these revenues do not appear, there would not be undue adverse impacts from the Project on municipal finances. The hearing record shows otherwise. See Brief pp. 49-50; A. 400-401, 994-998, 1005-1010, 4130-4134, 4404-4411. The generalized statements of support for the Project by local government bodies that are relied upon by the State Brief (p. 35) and P.S. Brief (p. 28) do not alter what the actual evidence in the hearing record shows. There was not substantial evidence to support the decision and APA committed an error of law when it improperly relied on evidence outside the record.

The Twenty-First to Twenty-Fourth Causes of Action should be granted. Brief Point VI.

POINT VII:

THE LEGISLATURE ALREADY BALANCED ECONOMIC BENEFITS AGAINST ENVIRONMENTAL IMPACTS AND APA MAY NOT DO SO DURING PROJECT REVIEW

APA violated the APA Act when it weighed and balanced the Project's alleged economic benefits against its adverse environmental impacts. See Petition (A. 297-301, 410-411), Reply (A. 837-843, 1022-1025, 1116-1120); Brief (pp. 9-11, 52-58, Attachment C). Although the State Brief (pp. 20-21) quibbles over what type of weighing analysis APA did, the Respondents all admit that APA did in fact engage in weighing and balancing of economics against the environment. See A. 447-448, 451, 456, 469, 520, 527, 702-704, 813-814. In arguing that this was acceptable, the Respondents' briefs rely on certain out-of-context phrases from the APA Act and ignore the remainder of it.

Petitioners' post-hearing reply brief (A. 4389-4399) analyzed in detail each section of the APA Act its legislative history (Brief Attachment C). This demonstrated that the entire APA Act supports this cause of action. The Legislature intended for any such weighing and balancing to occur at the time of the Legislature's adoption of the "Adirondack park land use and development plan" (APA Act § 802(29)), and not for it to be done

as part of the review of an individual project.[23] It the Legislature had intended to give APA this power, it would have done so. See Talisman Energy v. NYS DEC, 113 A.D.3d 902, *3-5 (3d Dept. 2014). Instead, it found that "[t]he plan represents a sensibly balanced apportionment of land" for resource preservation and economic purposes. APA Act § 801.[24]

The legislative history cited in the State Brief (pp. 21-22) actually shows that the balancing of interests occurred when the Adirondack Park plan map (APA Act § 805(2)) was divided into the six private land use areas. Attachment A, p. 1397.[25] APA's lack of authority under the APA Act to engage in such balancing may be contrasted to its express mandate to do so when it exercises its separate permit issuance powers under the FWA.[26] See Point I.B, supra; ECL § 24-0801(2); 9 NYCRR §§ 578.9, 578.10(a). When APA

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[23] The various sections of the APA Act that are quoted by the Respondents actually support Petitioners' position that the only time that economic benefits or impacts may be taken into account is when APA looks at a project's burdens on government services, and not for purposes of offsetting its adverse impacts on the environment. See APA Act §§ 805(4), 809(10)(e); A. 4389-4399.

[24] See Ass'n for the Protection of the Adirondacks v. Town Board of Tupper Lake, 64 A.D.3d 825, 829-830 (3d Dept. 2009)(concurring op.)(APA Act does not allow such balancing by APA itself); see also Kapusinski v. Fitts, 246 A.D.2d 811, 813 (3d Dept. 1998); Brown v. Glennon, 203 A.D.2d 846, 849 (3d Dept. 1994)(APA has "awesome responsibility" to preserve the "priceless Adirondack Park).

[25] A copy of Senator Smith's entire speech, provided to Petitioners' counsel by the Attorney General's Office, is annexed hereto as Attachment A.

[26] APA Act § 809(10)(e) and ECL § 24-0801(2) contain almost identical language, but in the APA Act the requirement to take into account a project's economic benefits applies only to "the ability of the public to provide supporting facilities and services made necessary by the project", which language is missing from the ECL. Thus, the APA Act was clearly intended by the Legislature to be more protective of the environment than the ECL, and it does not allow APA to do the same type of balancing that the ECL requires. See Ass'n for the Protection of the Adirondacks, 64 A.D.3d at 827.

did this type of weighing and balancing on the ACR Project it acted in excess of its jurisdiction and committed an error of law. Boreali v. Axelrod, 71 N.Y.2d 1, 12 (1987). The Twenty-Sixth Cause of Action should be granted. Brief Point VII.

POINT VIII:

APA'S ORDER DID NOT MEET THE MINIMUM REQUIREMENTS OF THE LAW

Although APA's Order (A. 1-39) did contain various findings of fact and a conclusory conclusion of law, this did not rise to the level required by the law, that such findings and conclusions must be supported by specific references to the record and provide a clear written discussion linking the facts to the statutory criteria, so as to allow the courts to conduct a meaningful review. Petition (A. 421-415); Reply (A. 1026-1029, 1120-1121); Brief pp. 58, 60, fn 24, fn 25. The Respondents' briefs failed to address the need for the level of detail that the courts have required, and instead focused on the less detailed wording of the APA regulations. They argue that because APA made findings of fact, and because 9 NYCRR § 580.18(c)[27] provides that "the making of findings of fact shall constitute a ruling upon each finding proposed by the parties", APA met its duty.[28] Respondents' argument would mean that making a few findings on a single random issue would satisfy this duty, even

[27] Miscited at State Brief p. 39 as 9 NYCRR § 580.14(b)(9)(iii).

[28] Contrary to the P.S. Brief's (p. 38) claim that Petitioners' Brief did not cite this language, it is fully quoted at Brief p. 59.

if there were hundreds of issues. However, as detailed in the Reply (A. 1028-1037, 1120-1122), an issue-by-issue analysis of APA's decision shows that, in those findings that it did make, APA actually failed to address most of the relevant issues. Even if APA had satisfied 9 NYCRR § 580.18(c),[29] its barebones findings and summary conclusion did not meet the detailed requirements established by SAPA and the courts. Reply, A. 1026-1029; Brief Point VIII.

The P.S. Brief (p. 37) argues that APA was not obligated to make findings because the Petitioners did not present proposed findings. Petitioners did do so, and the State admitted this. See Brief p. 59, fn. 22. Even if Petitioners did not do so, that did not obviate APA's duty to comply with SAPA and the case law. The State Brief (p. 39) argues that the requirement for APA to make findings and conclusions is merely directory and is not mandatory. However, the use of "shall" in 9 NYCRR § 580.18(b) makes this a mandatory duty. This is consistent with the requirements of SAPA and the case law. See City of New York v. Novello, 65 A.D.3d 112, 116-118 (1st Dept. 2009); Reply (A. 1026-1029); Brief Point VIII. APA's inadequate written decision "burdens" the Petitioners and "also impedes the Court in its review" of the determination. Barry v. O'Connell, 303 N.Y. 46, 51 (1951). APA's decision was rendered in violation of lawful

[29] See Quiver Rock, LLC v. APA, 93 A.D.3d 1135, 1137 (3d Dept. 2012). The Attorney General's Office and both law firms that now represent the Project Sponsors appeared in this case.

procedure and the Twenty-Seventh Cause of Action should be granted. Brief Point VIII.

POINT IX:

THE APA'S "AID AND ADVICE STAFF" DID IN FACT GIVE IMPROPER SUMMARIES OF THE RECORD TO THE APA MEMBERS

This Court's holding in Green Island Assoc. v. APA, 178 A.D.2d 860, 863 (3d Dept. 1991) applied to all members of the APA staff, and should have made it perfectly clear to the APA that its "aid and advice staff" could not provide a summary of the hearing record to the APA Members during their deliberations. See Brief Point IX. Respondents' briefs do not address the clear holding of Green Island Assoc., other than to incorrectly argue that a separate holding in that decision, regarding aid and advice from the staff on a procedural issue, is somehow relevant to this cause of action, which involves the APA's decision on the merits of the application.

Instead, Respondents argue that no such "summary" was provided. However, the roughly 400 pages of PowerPoint slides and other documents (A. 4646-4713, 5001-5009; Record Vol. 67) provided to the Members by the staff over several days can not rationally be called anything but a "summary". APA's decision was made in violation of lawful procedure and the Twenty-Ninth Cause of Action should be granted. See Green Island Assoc., 178 A.D.2d at 863; see also A. 420-423, 1051-1057; Brief Point VIII.

POINT X:

APA CAN NOT REDEFINE "IN EXISTENCE" STATUS
AND IGNORE THE STATUTORY DEFINITION OF THAT TERM

The State Brief (pp. 44-45) misrepresents how much construction must be done on the Project before a single lot can be conveyed and the Project would achieve "in existence" status under the APA Act and APA's Order (A. 1). While some infrastructure might be built before some lots are sold, these requirements can instead be met by posting a "performance guarantee". A. 57, 101, 116-117, 132-133, 148-149, 164, 179, 193, 206, 240, 272-273. Likewise, many lots, including Large Eastern Great Camp Lots, the Museum Lot, and the Lawson Access Lot, can be conveyed without any such construction having occurred. A. 75-89, 428-429, 1059-1062, 1130-1132. At most, they may require additional studies and/or the filing of deed covenants. A. 75, 82-84, 102, 116-117, 131-132. See also P.S. Brief p. 42, fn 23 (listing only paperwork requirements, and none for infrastructure construction, as prerequisites for lots to be conveyed). These paper actions would not be sufficient to achieve "in existence" status under APA Act § 802(25) and § 809(7)(c), and 9 NYCRR § 572.20, which require a much greater level of effort. Brief Point X; A. 423-431, 1058-1065, 1129-1132. See also Town of Orangetown v. Magee, 88 N.Y.2d 41, 47 (1996); Schoonmaker Homes v. Village of Mayfield, 178 A.D.2d 722, 724-726 (3d Dept. 1991) (substantial construction and substantial expenditures both required to obtain vested rights). Thus, the

Order (A. 1) is inconsistent with the mandates of the APA Act and APA's regulations. A. 427-430, 1059-1063, 1130-1132.

Contrary to the State Brief (p. 46), 9 NYCRR § 572.20(d) does apply to this issue. The determination of "in existence" status can not be made in a project's initial approval. This only becomes an issue after a period of two years (or more if the period is properly extended), when APA must decide whether or not "in existence" status has been achieved. If it has been achieved, the permit remains valid; if it has not, the permit is deemed to have expired. APA Act § 809(7)(c); 9 NYCRR § 572.20(a). By definition, this is not a determination that can be made at the time of project approval as APA purported to do (A. 1). APA has no authority or discretion, anywhere in the APA Act or its regulations, to redefine the term "in existence" or to alter these criteria, on a project-by-project basis. See Adirondack Mountain Club v. APA, 33 M.3d 383, 391 (Sup. Ct. Albany Co. 2011)(APA must comply with APA Act).

As for the second issue in the Thirtieth Cause of Action (A. 426-427, 1062, 1130-1132), APA Act § 809(7)(c) does give APA the power to alter the time period to achieve "in existence" status, but in this case it did not properly do so when it extended the period from two years to ten years. A. 1. While the APA Members may have discussed various things that could possibly have been used to make that determination (State Brief pp. 45-46), they did not actually make, or discuss making, such a determination (A. 235, 1129-1132), nor did they make the findings required by APA

Act § 809(7)(c) in order to do so. Neither the APA counsel or the Attorney General's Office can create grounds for a decision after-the-fact if APA did not do so. Barry v. O'Connell, 303 N.Y. 46, 50 (1951). See also Point VIII, supra (regarding the requirement for APA to make findings).

As for the third issue in the Thirtieth Cause of Action (A. 430) contrary to the State Brief (p. 46), the mandatory permit language set forth in 9 NYCRR § 572.20(d)(3) applies to "every project permit issued or renewed" and not just to renewals. APA approved the ACR Project with conditions that were made in violation of lawful procedure and affected by error of law. The Thirtieth Cause of Action should be granted. Brief Point X.

POINT XI:

RESPONDENTS HAVE NOT DENIED THAT ILLEGAL EX PARTE CONTACTS OCCURRED BETWEEN THE EXECUTIVE CHAMBER AND APA

Respondents' Briefs attempt to narrow the application of the *ex parte* contact rules to avoid the obvious violations thereof that occurred during the APA's deliberations following the adjudicatory proceeding. The *ex parte* rules prohibit communications to APA "by the Governor, or anyone else" when the matter was subject to an "adversary adjudicatory proceeding". McSpedon v. Roberts, 117 M.2d 679, 684 (Sup. Ct. N.Y. Co. 1983). The *ex parte* contacts between the Governor and/or his staff and the APA violated SAPA and the APA regulations. Brief, p. 67. The existence of these contacts is demonstrated by the 18 sets of

communications documents between the Executive Chamber and APA that have been withheld by the State (A. 1176-1178, 1321-1326, 1529-1530, 1550-1552). The likely content thereof was demonstrated when the Mayor of Tupper Lake personally "thanked the Governor for his support with the APA commissioners' vote on the ACR permit". A. 1532-1533, 1556.

Neither set of Respondents has denied that such improper contacts occurred (A. 1362-1480), or even addressed them in their briefs. See State Brief Points II.B, III; P.S. Brief Point IX. Therefore, since this is "a CPLR article 78 proceeding (as opposed to a plenary action)", failure to respond to these allegations (A. 1176-1177, 1321-1326, 1529-1533, 1550-1552, 1556) "is the equivalent of an admission thereof". Piela v. Van Voris, 229 A.D.2d 94, 96 (3d Dept. 1997).

In addition, the record clearly shows that illegal indirect communications occurred between APA and the Project Sponsors during APA's deliberations,[30] and that they appeared to affect the outcome of an important issue, which is part of the Thirtieth Cause of Action. A. 415-420, 1038-1050, 1121-1124, 1171-1180, 1279-1319, 1328-1339, 1348-1361, 1481-1581, 5010-5062. APA's decision was made in violation of lawful procedure. The Twenty-Eighth Cause of Action should be granted. Brief Point XI.A.

[30] The Respondents' carefully worded denials show that there is at least the appearance of impropriety, which is sufficient to warrant annulment of APA's decision. See Brief p. 66.

As for Petitioners' appeal (Brief Point XI.B), their request for discovery has been narrowly tailored to address only the *ex parte* contact issue, out of the 29 causes of action. This issue is unique because, by definition, the evidence of these contacts is outside of the administrative record, and is solely within the knowledge of the people from whom discovery is sought. The evidence cited above leaves no doubt that some *ex parte* contacts occurred. If it is the Court's opinion that these facts are insufficient proof of the Twenty-Eighth Cause of Action, then discovery is needed to obtain evidence that is both "material and necessary". The Respondents have not shown that the "records sought by [P]etitioners are cloaked in privilege or confidentiality",[31] and they have produced no actual evidence of any burden on them if discovery is allowed. Nespoli v. Doherty, 17 M.3d 1117(A) *3 (Sup. Ct. N.Y. Co. 2007); see Town of Mamakating v. New York State Bd. of Real Prop. Services, 246 A.D.2d 844, 845 (3d Dept. 1998). Petitioners' appeal should be granted so that all relevant evidence on this issue can be provided to the Court.[32] See A. 1161-1581; Brief Point XI.B.

[31] The communications between the Governor's Counsel's office and the APA (A. 1176-1178, 1321-1326, 1529-1530, 1550-1552) are not privileged because the Governor's Counsel does not have an attorney-client relationship with APA. A. 1494-1496.

[32] If it will assist the Court in deciding this cause of action or the appeal, the Court should undertake an *in camera* review of the 18 sets of communications between the Executive Chamber and the APA which are among the records which Petitioners seek to obtain in disclosure. See A. 1176-1178, 1321-1326, 1529-1530, 1550-1552.

POINT XII:

PETITIONER SIERRA CLUB HAS STANDING TO SUE

The Project Sponsors claim that petitioner Sierra Club lacks standing to sue herein. P.S. Brief Point VII.A. Sierra Club did in fact participate in the legislative hearing process on the Project (A. 1138-1139, 1155-1156), it advocated for the convening of an adjudicatory hearing by APA (R. 8168), and its members and co-petitioners Robert Harrison and Phyllis Thompson were parties to that hearing (A. 287-289). This defense should be rejected. See Youngewirth v. Town of Ramapo, 98 A.D.3d 678, 680 (2d Dept. 2012). This defense is also thoroughly rebutted in the Reply (A. 832-835) and in the Affidavits of Roger Downs (A. 1133-1156) and Phyllis B. Thompson (A. 1141-1148). Ultimately, this defense will have no effect on the outcome of the case because no respondent has challenged the standing of the other Petitioners.

CONCLUSION

Each cause of action in the Amended Petition has merit and should be granted. Petitioners' appeal should also be granted, so that they can conduct discovery on the single issue of the illegal *ex parte* contacts between APA and the Project Sponsors and between APA and the Executive Chamber. APA's actions were not substantially justified and Petitioners should be awarded their attorneys' fees.

Dated: February 18, 2014

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