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January 24, 2014



*Hand Delivered*

Hon. Robert D. Mayberger
Clerk of the Court
State of New York
Supreme Court, Appellate Division,
Third Judicial Department
P.O. Box 7288, Capitol Station
Albany, New York 12224-0288

Re: Protect the Adirondacks! et al. v. APA, et al.,
State of New York Appellate Division, Third Judicial Department,
Case No. 516901

Dear Mr. Mayberger:

Please find enclosed (1) the original and nine copies of Private Party Respondents' revised Brief in the above referenced matter, and (2) the Affidavit of Service confirming two copies of this Brief being served on counsel for Petitioners-Appellants.

Private Party Respondents acknowledge Respondents Adirondack Park Agency & NYS Department of Environmental Conservation's earlier request (1/16/14 transmittal letter) seeking "a preference placing this matter on the calendar for argument before summer." Private Party Respondents join in this request and respectfully seek argument as soon as reasonably possible. This Article 78 proceeding has been pending for 22 months. Prior to the commencement of this proceeding, Preserve Associates and the other Private Party Respondents had already undertaken over seven years of effort, and made a substantial investment, in the Adirondack Club and Resort project. They are the only parties "at risk" in this Article 78 proceeding. Every day of delay is prejudicial and extremely damaging to that investment and the future of the AC&R project. The delay also stalls the badly needed investment and economic development in the Tupper Lake community. Your efforts in this matter would be greatly appreciated.

Sincerely,

Thomas A. Ulasewicz, Esq.

TAU/v
Encl.

cc: Susan Taylor, Esq.
John Caffry, Esq. ✓
Claudia K. Braymer, Esq.
Robert Sweeney, Esq.

To be argued by: Thomas A. Ulasewicz, Esq.
Time Requested: 15 minutes

# New York Supreme Court

APPELLATE DIVISION – THIRD DEPARTMENT
Docket No. 516901

**In the Matter of an Application of**
**PROTECT THE ADIRONDACKS INC., SIERRA CLUB, PHYLLIS THOMPSON, ROBERT HARRISON, and LESLIE HARRISON,**

**Plaintiffs-Appellants,**

**-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**

## PRIVATE PARTY RESPONDENTS' BRIEF

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Albany County Index No. 1682-12

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## PRELIMINARY STATEMENT

This Article 78 proceeding, commenced nearly two years ago, challenges a Project Findings and Order (herein "Final Order") issued by the Adirondack Park Agency ("APA") on January 31, 2012 for the Adirondack Club & Resort ("AC&R" or the "Project") project in Tupper Lake, New York. In brief, Petitioners-Appellants (collectively, "Appellants") argue that, despite the unprecedented length and depth of the approval process, APA's Final Order is not supported by substantial evidence. APA's approval of the Project followed years of review, involved multiple expert witnesses and reports, and detailed public hearings. As a result of this thorough review process, Appellants' assertion that the Final Order is not supported by substantial evidence is plainly belied by the voluminous record.

The Final Order was approved in a 10-1 vote by the APA Board following an exhaustive 7 year, 5 month review. The 260 page Final Order includes 39 pages of findings and conclusions of law and 14 separate draft permits for the various components of the project. The draft permits will be issued upon the satisfaction of numerous conditions over the 15 year phasing of the Project's development.

The Project site is made up of 6,235 acres of land and its development is centered on the revitalization of the Big Tupper ski area. The 445 acre ski area, long the heart of the Tupper Lake community and a critical source of employment, economic vitality, and recreational opportunity for the entire region, has been closed for 14 years. Over the past 75 years, the vast majority of the remainder of the site, some 5,800 acres, has been logged extensively by the Oval Wood Dish Corporation. The Oval Wood Dish Corporation, also once a significant employer and economic resource in the area, closed its operations in Tupper Lake fifty years ago. Much of

the property is now in a liquidating trust, under option to the AC&R project sponsor, Preserve Associates, LLC ("Applicant" or the "Project Sponsor"). *

The Project plans also call for the redevelopment of the long-closed McDonald's Marina on Tupper Lake.

The residential component of the Project includes 651 homes to be developed in a variety of single family dwellings and multiple family dwellings. Project plans also include a clubhouse, spa, gym, recreation center, equestrian center, artists' cabins and a 60 room hotel. The Project density is substantially less than that allowed under the APA Act. (see pg. 4, infra.)

Review by the APA included exacting scrutiny of every conceivable issue and potential impact, including topography and slopes, geology and groundwater, surface water resources, wetlands, soils, terrestrial and aquatic ecology, climate and air resources, land use and community character, visual resources, cultural resources, transportation and traffic, public services, public and private sector economic impact, employment, wildlife habitat, visual impact, stormwater management and more.

Through a process of mediation and compromise throughout the lengthy approval process, the final design of the Project is extraordinarily sensitive to its unique environmental setting in the Adirondack Mountains. **Of the 6,235 gross acre site (including lands under water), 86% will remain undisturbed by development. The 522 acres of developed area includes 350 acres of previous development, leaving the Project's new development**

* The Private Party 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, will be collectively referred to herein as "Respondents" or "Resps."

**footprint limited to 172 acres**. With the consent of the Project Sponsor, deed restrictions prohibiting future development will be imposed on 3,885 acres of undeveloped land classified as "Resource Management." ("RM") In addition, in response to expressed environmental concerns, the Project Sponsor has agreed to eliminate the highest elevation residential development proposed for the Project, a wastewater treatment plant, a shooting school and sporting clays course, and the canoe launch on Simond Pond. Development on even the largest single family home lots (one being 1,211 acres) will be limited to a three acre envelope.

Careful site design has also avoided environmental impacts by utilizing existing transportation corridors on the Site. The majority of on-site roads will be confined to existing logging roads used for decades by the Oval Wood Dish Corporation, or are existing municipal roads that already traverse the Site. Through careful design, nearly all of the hundreds of acres of wetlands on the Site have been avoided. Only 1.47 acres of wetlands will be affected, mainly the result of unavoidable road crossings of stream corridors. Project plans call for the creation of 2.69 acres of wetlands as mitigation for this impact.

The host municipalities, the Town and Village of Tupper Lake, along with Franklin County, were actively involved in the process and unanimously supported project approval and development. Numerous other Adirondack municipalities, chambers of commerce and civic groups communicated their support of the Project to the APA during the course of the proceeding. (R020242-R020256) The APA record (including the pleadings in this matter) runs to 22,000 pages, and the set of plans depicting the Project totals 237 plan sheets. Forty parties were identified to participate in the application proceedings. Nineteen days of public hearings

were conducted over the course of a three month period in 2011. The APA dedicated its November and December 2011 and January 2012 monthly meetings to careful and thorough deliberations on the Project and the governing law.

The result of that unprecedented effort by all involved is the 260 page AC&R Final Order and draft permits. In their 29 causes of action, Appellants now attack this process and its results primarily based on assertions that the APA decision lacked "substantial evidence" and was "arbitrary and capricious". As demonstrated below, APA's approval of the Project is supported by substantial evidence and Appellants' challenge to this process must be rejected.

## STATEMENT OF FACTS

### APA Land Use Classifications

The following chart (A23) depicts the breakdown of acreage (excluding open water) and principal building[1] opportunities (overall intensity guidelines[2]) on the project site:

| " Land Use Area | Acreage | Potential | Proposed | Remaining |
|---|---|---|---|---|
| RM [*Resource Management*][3] | 4739.5 | 111 | 83 | 28 |
| MIU [*Moderate Intensity Use*][4] | 1228.2 | 942 | 606 | 336 |
| LIU [*Low Intensity Use*][5] | 180.3 | N/A | 0 | 56.4 |
| Hamlet [*see n.5*] | 10.7 | N/A | 0 | N/A |

**Thus, 38% of the mathematically available principal building rights for this project site are not being used by the project sponsor under the APA's approval of the AC&R project.**

1 Defined at § 802.50 of the APA Act. (Executive Law, Article 27 – hereinafter "APA Act")
2 Defined at § 802.46 of the APA Act.
3 See § 805(3)(g)(3) of the APA Act.
4 See § 805(3)(d)(3) of the APA Act.
5 See §§ 805(3)(e)(3) and 805(3)(c)(4) of the APA Act.

**On-Site Pre-Existing Development**

Contrary to what Appellants would have this Court believe, the AC&R project site has had, in varying degrees, nearly one hundred years of assorted land use and development on much of its terrain, all of which pre-existed enactment of the APA Act.[6] (A5694-5695).

**Density and Open Space Protection**

Appellants tell this Court that the approved project is development "sprawled over thousands of acres of the site" (A280), "large scale sprawl" and "fragmentation of habitat" (Appellants' Brief ["Apps' Br."], at 27). The pre-existing development on the AC&R project site involves approximately 350 acres (A5696). All of the 39 Great Camp lots[7] are to be deed restricted to one principal building and no further subdivision. (A33) Each great camp lot is restricted by the APA approval to an identified three (3) acre building envelop (*id.*). Overall, the project is expected to involve development or redevelopment of approximately 522 acres of the 6,235 gross acre site **including the 350 acres already disturbed by pre-existing development** (A5696). This results in approximately **86% of the site being undisturbed**. The APA's project approval requires deed restrictions on approximately 3,885 acres of the project site's RM lands assuring that said lands remain undeveloped and preserved as open space. This constitutes approximately 82% of the total 4,739.5± acres of land on the project site classified as RM land

6 The Adirondack Park Land Use and Development Plan and Map were presented to the Legislature and Governor on March 6, 1973. The Governor signed the Adirondack Park Agency Act on May 22, 1973. This is the date from which a pre-existing determination is made.

7 Two of the smaller eastern and two of the smaller western great camp lots are in the Moderate Intensity land use area. All other great camp lots are in the Resource Management land use area.

use areas (A3755).[8] This requirement received the written consent of the Applicant.

**The APA Regulatory Review Process**

The AC&R project went through an unprecedented regulatory review process both in thoroughness and duration. Starting with Conceptual Review and concluding with three months of deliberation on a final decision, the Project was before the Agency for approximately 7 years and 5 months. [For a detailed chronology of this entire review process, *see* A2807-2810 (APA hearing staff's March 3, 2011 "Summary of the Project Application" – Exh. 95) and A3745-3748 (APA Hearing staff's Closing Statement).]

**Mediation and Mitigation**

Appellants would have this Court believe that the mediation process that took place for the Project between April 2008 and June 2009 resulted in "ultimately unsuccessful settlement negotiations" (A293). To the contrary, what actually resulted from these negotiations were a number of significant mitigative measures, agreed to by the Project Sponsor, which reduced impacts of concern to a number of the parties and assisted in reducing the scope of hearing issues. These mitigative measures were (A3959):

- elimination of high elevation East Ridge development – 36 ski-in/ski-out single family homes;
- elimination of 19 of the 36 ski-in/ski-out detached high elevation home lots in the West Slopeside development;
- elimination of 8 residential units in 2 quadplex townhouse buildings located in the upper elevation of the West Face Expansion development;
- reduction in size and reconfiguration of the 31 small great camp lots to range in size from 19 acres to 39 acres;

8 Of the 2,635± Resource Management acres associated with the 8 Large Great Camp lots (Lots A to H), 2,608± acres will remain undeveloped lands (A3753). **This undeveloped land constitutes 98.9% of this contiguous land mass.** (see A 6, ¶ 17 for the precise size of each of these 8 parcels)

- reconfiguration of the 8 large camp lots to range in size from 111 acres to 770 acres; see footnote 8, supra.);
- all great camp lots limited to a 3 acre building envelope for contained site disturbance, regardless of lot size;
- elimination of the Orvis shooting school because of concerns with noise;
- elimination of the Lake Simond Road wastewater treatment plant – the lots intended to be serviced by that plant would be included in the existing municipal system;
- relocation of the outfall for the remaining on-site sewage treatment from direct discharge into Cranberry Pond to an adjoining tributary outlet stream below the Pond;
- elimination of the Lake Simond canoe launch; and,
- conveyance of the 36 acre "oxbow wetland complex" to the Adirondack Museum of Natural History for educational, recreational, non-development purposes.

**Compatibility**

All land uses and development proposed for the Project are listed on either the primary or secondary list of uses under the APA Act and, as such, are deemed compatible with the land use areas where such development is proposed to occur (*see* POINT II, *infra*, at 17-18; APA Act § 805[3][g][4]).

## ARGUMENT

## POINT I

### THE APA'S FINAL DECISION WAS SUPPORTED BY SUBSTANTIAL EVIDENCE AND WELL-REASONED IN FINDING NO UNDUE ADVERSE IMPACTS ON WILDLIFE, WILDLIFE HABITAT, AND THE CRANBERRY POND ENVIRONS.

Despite the lengthy review process, which included testimony by multiple expert witnesses and reams of expert reports, Appellants argue throughout the Amended Petition that APA's determination was not supported by substantial evidence. The record plainly belies this erroneous assertion.

In summary, as discussed in detail below, the APA properly concluded that there will be no **undue** adverse environmental impact on wildlife habitat and wetlands based on:

- unanimous reports from experts of no threatened or endangered species on the site;
- substantial evidence in the record of the common wildlife and amphibian species on the site, and wetlands locations and functions;
- 86% of the site left undeveloped;
- the most effective wildlife habitat protection, deed restrictions against future development, imposed on 3,885 acres of RM lands;
- careful site design that avoids all but 1.47 acres of the 243 acres of wetlands delineated on the site (A21);
- careful monitoring of Cranberry Pond water withdrawals, consistent with the two prior permits for Big Tupper Ski Area snow making withdrawals, and provisions for reacting to the variables resulting from unpredictable seasonal weather patterns;
- approval conditions allowing for focused, location-specific reports and environmental monitors for the imposition of refinements to mitigation measures for new construction development as the 14 individual permits for the project are implemented over the 15 year phased build out.

It is submitted that the evidence compiled throughout these proceedings not only details all aspects of the potential adverse impacts of the proposed Project, but includes numerous mitigation measures and other restrictions and limitations so as to overcome any "undue" adverse impacts and otherwise minimize those impacts (*Matter of Dudley Road Assn. v Adirondack Park Agency*, 214 AD2d 274, 281 [3d Dept 1995]).

Pursuant to Agency regulations, the official record of the adjudicatory hearing expressly includes, among other things, the application, the transcript of the hearing, and any evidence and exhibits admitted during the hearing. The Agency's decision on a proposed project must be made "upon consideration of the record as a whole" (*see* 9 NYCRR §§ 580.14[g], 580.15[a][3]; *see also* A4433-4434 [APA hearing staff's Reply Brief]). The adjudicatory hearing has as its core purpose the obtaining of sufficient information for the decision-maker to make an informed decision based on substantial evidence. This substantial evidence is a compilation of application materials, evidence submitted by the Applicant's twelve expert witnesses (A744), other

witnesses produced by intervening parties, and the APA hearing staff. The weight of evidence produced during the adjudicatory hearing necessarily shifts the burden of proof, hence, such needs for redirect testimony, supplemental testimony, and rebuttal testimony.

The Court of Appeals in *Matter of WEOK Broadcasting Corp. v Planning Bd. of Town of Lloyd*, 79 NY2d 373 (1992), stated what historically is the measure of substantial evidence: "substantial evidence being such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact" (citing *300 Gramatan Avenue Assoc. v State Div. of Human Rights*, 45 NY2d 176, 180 [1978]) and "is less than a preponderance of the evidence, overwhelming evidence or evidence beyond a reasonable doubt" (citing *Matter of Ridge Road Fire District v Schiano*, 16 NY3d 494, 499 [2011]).

"[W]here substantial evidence exists" to support a determination being reviewed by the courts, "that determination must be sustained, irrespective of whether a similar quantum of evidence is available to support other varying conclusions" (*Matter of Collins v Codd*, 38 NY2d 269, 270 1976]). In determining whether there is substantial evidence to support an administrative agency's determination, the reviewing court must review the whole record to determine whether the agency's action was rational; the question is not whether the record would convince the reviewing court of the facts found, but whether based on the record a reasonable person might have made findings and conclusions made by the administrative agency (*Moorehead v New York City Transit Authority*, 537 NYS2d 862 [2d Dept 1989]).

Furthermore, upon judicial review of a determination rendered by an administrative body after a hearing, the issue presented for the court's consideration is limited to whether that

determination is supported by substantial evidence upon the entire record, and a "reviewing court in passing upon this question of law may not substitute its own judgment of the evidence for that of the administrative agency, but should review the whole record to determine whether there exists a rational basis to support those findings upon which the agency's determination is predicated (*Purdy v Kreisberg*, 47 NY2d 354, 357 [1979]). Additional support for this argument can be found in *Lane Construction Corp v Cahill*, 270 AD2d 609 (3d Dept 2000) (internal citation omitted), where this Court held that "even if different conclusions could be reached as a result of conflicting evidence, a court may not substitute its judgment for that of the Deputy Commissioner [or agency] that provided that the administrative determination is properly supported by the record" (*see also Matter of Preble v Zagatta*, 263 AD2d 833, 835 [3d Dept 1999] ["Further, while judicial review must be meaningful, the fact that a different determination could have been made on the basis of conflicting evidence does not justify judicial interference so long as the agency's determination has a rational basis . . . . According great weight and judicial deference to the agency's determination which entailed technical and specialized expertise . . . ."] [internal citations omitted]).

**A. The Record With Regard To Assessment of Wildlife And Wildlife Habitat**

Appellants' argument that the record does not contain substantial evidence to support APA's determination of no undue adverse impact on wildlife is contrary to the record. The hearing record is replete with factual information and expert opinions provided by the Applicant and others with regard to both wildlife surveying and functional assessment (at the behest of APA staff during the application completion process, which ran between 2004 and 2007; *see* A718-720 [ Resps. Amd. Ans.]). The application included:

- three reports in its April 2005 submission (Exhibit 12) on the absence of any of rare and endangered species:
- as a follow up, a specific investigation of, and report on, the presence and habitat of Bicknell's Thrush;
- a biological survey (involving the alpine and sub-alpine life zones on the AC&R site) by Edwin H. Ketchledge, Ph.D;
- expert witness testimony regarding observation recordings obtained during over one hundred site visits during the application process;
- a report concerning field work and consultations with NYSDEC Region 5 Bureau of Wildlife on a reported deer wintering yard on the Project site;
- a wildlife functional assessment report in February, 2006 (A2142-2145);
- a wildlife "functional impact assessment" report in October 2006 (A2219-2234);
- a follow-up wildlife "functional impact assessment" report in December 2006 which focused on the western part of the property on the Type I and Type II open space lands (A2354-2360).

The Agency's Director of Regulatory Programs [8± years in that position, A5070-5074] testified that "[t]here certainly were vegetation maps and coverages, wetland field delineated and surveyed ... so I would say yes, they [*ecotone areas/habitat*] were represented" (A755-756). Furthermore, APA hearing staff's Reply Brief concluded:

> "In staff's opinion, if the Agency Board approves the proposed project, **the most effective way to protect wildlife on Resource Management lands is through the permanent protection of the Resource Management open space lands** shown on Drawing R-1 of Exhibit 83. These lands comprise almost all of the approximately 4,739.5 acres of Resource Management lands on the project site. Several of the Resource Management permits issued by the Agency since 2000 expressly or implicitly rely upon the retention of open space to also ensure protection of wildlife. . . .**In developing its recommendation of deed restrictions for these lands'[9] APA hearing staff followed Agency guidelines for protecting open space**. Draft Order conditions 29, 30 and 40 are intended to provide substantial protection of wildlife on Resource Management lands. **The Project Sponsor's concurrence with these conditions in the Revised Draft Order demonstrates its commitment to this objective**." (A4444-4445; see also

9 These deed restrictions are incorporated into APA's January 20, 2012 final Decision on this Project: *see* A-9 ["APA Project Findings & Order No. 2005-100" ¶ 34]; A84-85 [APA draft Permit 2005-100.3, "Large Eastern Great Camp Lots," ¶¶ 40-43; A102-103 [APA draft Permit 2005-100.4, "Small Eastern Great Camp Lots," ¶¶ 53-55; A223-225 [Permit 2005-100.12, "Small Western Great Camp Lots," ¶¶ 52-54].

Resps. Amd., Ans. at A759-761; emphasis added).[10]

## B. The Record With Regard To Assessment Of The Cranberry Pond Environs

Appellants argue that "there is no testimony, nor … field studies, expert reports or other competent evidence to support" APA's determination of no undue adverse impact relative to Cranberry Pond and that said determination is not supported by substantial evidence (A313). This simply is not true.

Initially, with regard to expert witnesses and testimony, there were five expert witnesses who addressed issues regarding water withdrawals from Cranberry Pond for snowmaking and/or wetlands in the vicinity of the Cranberry Pond complex (A3994). **Notably, Appellants did not produce any witness on these issues** (A733).

Secondly, it is important to understand the characteristics of Cranberry Pond. APA hearing staff expert witness Daniel Spada (A5563) summarized Cranberry Pond as:

> "Cranberry Pond is located near the center of the project site and appears as 'Tupper Lake Reservoir' on USGS maps ... Cranberry Pond was also formerly used as a source of snowmaking water for the Big Tupper Ski Area. The Town of Tupper Lake Golf Course currently draws water from Cranberry Pond during the growing season for irrigation.
>
> "Cranberry Pond is approximately 26 acres in size and is surrounded by wetlands. In addition, **it was partially created by manmade excavation** and current water levels are controlled, in part, by an existing beaver dam." [A5579; emphasis added]

Finally, all of Cranberry Pond and its associated wetlands are in the Moderate Intensity

[10] Furthermore, in the APA hearing staff's Reply Brief to the hearing record, it concluded: "Compared to other RM subdivision projects *(reviewed by the APA and citing to 9 projects between 2000 & 2007)*, including those cited by Adirondack Wild in its brief (*citing to an additional 6 projects between 1987 & 2001)*, **the Project Sponsor did more here to assess wildlife impacts**" (A4442 [emphasis added]; *see also* A721 [ Resps. Amd. Ans.])

land use area under the Adirondack Park Land Use & Development Plan Map; none of this water and wetland complex is on RM lands. [A718] Therefore, none of the Project's development components within the Moderate Intensity land use area were adjudicated for either compatibility or plan consistency and, therefore, they are not subject to a substantial evidence challenge. Consequently, other than the allegations in the SECOND, FOURTH, and SIXTH causes of action asserting an arbitrary and capricious decision affected by error of law, all other allegations in the FIRST and THIRD causes of action must be dismissed as failing to state a cause of action. The same is true for the FIFTH and SEVENTH causes of action except for those project components located on the Project site's RM lands (*see* A689, A691 [Resps' Objs. in Pt. of Law, Pts 1 (A689) and 2 (A691)]).

**C. Data Collection**

Appellants then proceed to tell this Court:

> "The fact that APA is requiring further studies of these impacts to Cranberry Pond (Order, pp. 33-34, Ski Area and Resort Permit, p.10) demonstrates that, on the current record, the Applicant did not meet its burden of proof, and that the APA lacked the requisite quantitative and scientific basis for its decision. As a result, there is not substantial evidence that the Project complies with the APA Act and the APA's Freshwater Wetlands Act regulations with regard to the prevention of adverse impacts to the ecology of Cranberry Pond." (A305-306).

Regarding "the requisite quantitative and scientific basis" for APA's decision on impacts to Cranberry Pond for snowmaking on the basis of substantial evidence, APA did require the Applicant to perform numerous studies and analyses on the impacts of using Cranberry Pond for snowmaking before completing the application, with an update of this work in 2010 for the adjudicatory hearing, including:

- Wetland delineation plans (including Cranberry Pond environs) WM-1 and WM-2 and wetland impact plan WI-1;
- October 2006 Cranberry Pond Bathymetric Map (A2340);
- Analysis of the hydrology/water budget (A2235-2248);
- TABLE 3 – long term average rates of water flow, Raquette River flow rates with inflow to Cranberry Pond (A2238);
- TABLE 4 – snowmaking pumping withdrawal rates (A2238);
- "Hearing Issues Remaining", Issue # 8 (A2560-2563);
- "Snowmaking Alternatives Cost Estimates" (A2587);
- Updated "Cranberry pond Bathymetric Map" (Exh. 82 - Attachment 20 at R010281); and,
- Completed application and "Updated (Reduced) Wetland Impact Areas M & N (Exh. 82 - Attachments 21-22 at R010282, et.seq.).

A condition calling for prospective, actual water withdrawals and the collection of data is not without precedent. APA has issued two earlier permits to prior owners of the Big Tupper Ski Area for a temporary period of water withdrawal (permit no. 94-246A: one year and permit no. 94-2468: two years) from Cranberry Pond for snowmaking (A2581-2582). Data and records were collected for the 1997-98 Cranberry Pond snowmaking water withdrawal (A717).

The pre-filed testimony of the Project Sponsor's expert witness on this subject (Kevin Franke) included references and information regarding a "worst-case scenario" analysis on "impact from drawdowns of Cranberry Pond for snowmaking" (A2246; A718). Mr. Franke enumerated eight measures that would minimize or avoid interference with wetland values and functions relative to Cranberry Pond (A549 [Attachment A to May 3, 2011 transcript at pp 4-5 found at Appendix B, Vol. VIII of the Return]).

In addition, consistent with this common-sense approach, APA hearing staff expert witness Daniel Spada concluded his pre-filed testimony regarding wetland impacts with testimony establishing that permit conditions (A2866-2867 [draft conditions 64, 65, 66, 67, 68, 72, 73]; A2868-2869) "should require proper construction, multi-year monitoring and bonding to

assure successful wetland mitigation" (A5583 – 5584). In imposing these monitoring requirements, the APA members clearly determined that while adverse impacts are associated with this project, like most other projects, potential impacts to Cranberry Pond did not rise to the level of **"undue"** adverse impacts. (*see* A36 ["Conclusions of Law"]; see also, January 20, 2011 Agency meeting - Webcast Records at A4712 - DEC designee Drabicki at 1:42:28, Bd member Lussi at 1:46:48, Dept of Commerce designee McCormack at 1:51:34, Bd. Member Mezzano at 1:55:11, Bd member Valentino at 2:04:46 & 2:05:37, and Bd member Wray at 2:06:40 through 2:07:35).

A review of the entire record demonstrated to the APA members that the Project's potential adverse impacts would be minimized through the implementation of conditions that might be further refined through the periodic collection of data for a project with a projected build-out timeframe of 15 years (*see Dudley Road Assn.v Adirondack Park Agency*, 214 AD2d 274, 278, 281 [3d Dept 1995]). With regard to snowmaking and Cranberry Pond as the approved water source, APA recognized that, depending on seasonal weather conditions and opportunities for snowmaking, monitoring of impacts was of importance. Furthermore, if future concerns of continued use of Cranberry Pond for snowmaking came into play, APA identified the alternative source as Tupper Lake (A24, at ¶ 96; A49, at ¶¶ 32-34 ["Ski Area & Resort" draft permit No. 2005-100.1). Mr. Spada also testified that:

> "monitoring conditions should provide adequate information to determine effects and suggest additional future mitigation . . . wetlands have been properly delineated and documented, satisfactory wetland mitigation sites are identified, and appropriate wetland mitigation plans have been developed. No additional information is required … [w]etland mitigation plans previously reviewed by Agency staff are deemed adequate and acceptable" (A5583 – 5584).

The approach used by the Agency members in crafting the two conditions that require an amphibian survey and monitoring of water withdrawals from Cranberry Pond during snowmaking simply reflects the "ability to apply the mandates of the regional land use plan on an individual project basis allowing the regional controls to be tailored to the requirements of individual sites and situations".[11] The essential issues of concern with both wildlife and its habitat and Cranberry Pond and its environs were identified, discussed and analyzed in the application process, mediation, public hearings, and post-hearing briefing. These processes were commented upon by some of the Appellants, many of the other active parties to the adjudicatory hearing, and other members of the public, and eventually deliberated by the APA members over a period of three months (*see e.g. Matter of Morse v. Town of Gardiner Planning Board.*, 164 A.D.2d 336, 340-342 [3d Dept 1990]).

Finally, the "entire record" includes the consent of the Project Sponsor to deed restrict 82% (3,885 out 4,739.5± acres) of its RM lands so as to remain undeveloped and preserved as open space (A4445); arguably, the quintessence of mitigation for eliminating undue adverse impacts for this individual site and situation.

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11 "The regional project review system established by the APA Act requires a case-by-case review and approval or disapproval of individual regional projects. This case-by-case review offers the Agency, and local governments, the opportunity and responsibility of taking the regional land use control goals of the Adirondack Park Land Use and Development Plan and applying them to individual projects in a manner that is consistent with the planning of those projects and with the specific resources of the project site and the area surrounding that site. This ability to apply the mandates of the regional land use plan on an individual project basis allows the regional controls to be tailored to the requirements of individual sites and situations." See, "Developing Institutions For Regional Land Use Planning and Control – The Adirondack Experience," Buffalo Law Review, Vol. 28 (1979) at page 678 by Richard S. Booth. Mr. Booth is a Professor, Department of City and Regional Planning, Cornell University. He also sits as a member of the APA Board for the past 5+ years.

## D. Conclusion

Based on all of the above arguments, it is respectfully submitted that this Court reject and dismiss Appellants' FIRST through EIGHTH causes of action.

## POINT II

## ALL PROPOSED LAND USES AND DEVELOPMENT ARE ON THE PRIMARY OR SECONDARY USES LIST AND FAVORED WITH A PRESUMPTION OF COMPATIBILITY AS A MATTER OF LAW

APA's Director of Regulatory Programs, Mark Sengenberger, in his pre-filed testimony, states:

> "All of the proposed uses [*for this Project*] in Resource Management lands are listed as primary or secondary compatible uses. As such, by statute, they are generally presumed to be compatible with Resource Management character, purposes, policies and objectives set forth in Executive Law § 805(3)(g)(1) and (2) ..." (A5074-5075; see also A692-694, A765-768 [Resps.' Amd. Ans., Objs. in Pt. of Law, Pt. 3]; A5698-5699)

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

> "If the project is on the **classification of compatible uses list** for the land use area involved, **there will be a presumption of compatibility** with the character description, purposes, policies and objections of such land use area." (emphasis added)

### A. Appellants Misrepresent The Statutory Language In The APA Act

Appellants take the position that "[t]he Order must be annulled because the project is not compatible with the site's resource management lands" (Apps' Br., at 31). The APA Act, however, clearly provides that both primary and secondary uses are "compatible" with the RM land use classification. Appellants' pleadings and Brief boldly, but inaccurately, represent that secondary uses (for example, single family dwellings) in the RM land use area are not compatible uses. This is false. Perhaps the most deceiving portion of Appellants' argument in

this regard is the following:

> "For Resource Management areas, the lists of uses considered to be **compatible uses and secondary uses** are very limited. 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[12]) they are listed as **primary compatible uses**" (Apps' Br., at 33 [emphasis added]).

When one reads APA Act §§ 805(3)(c)-(h), it becomes readily apparent that the terms "compatible uses and secondary uses" AND "primary compatible uses" exist nowhere in that section of the statute or, for that matter, anywhere else in the Act.

What the prefatory language for the primary and secondary uses lists says for all land use areas other than Hamlet is:

> "(4) Classification of **compatible uses**:
>
> **Primary uses** in [*Moderate intensity use areas ...*
> *Low intensity use areas .... Rural use areas ...*
> *Resource management areas ... Industrial use areas*]: ...
> **Secondary uses** in [*Moderate intensity use areas ...*
> *Low intensity use areas ... Rural use areas ...*
> *Resource management areas ... Industrial use areas*]:..."(emphasis added)

Appellants' arguments with regard to the non-compatibility of the Project proposal with the purposes, policies, and objectives of RM lands—said arguments being laced throughout their causes of action numbered NINE through SIXTEEN—are fallacious. In fact, no use is expressly prohibited in any land use area, and the listed uses, both primary and secondary, are presumed compatible with the Park's Land Use and Development Plan.[13]

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12 This is not an accurate statement. There is no primary or secondary uses list for Hamlet areas. [*see* APA Act at §805.3.c.(3)]

13 "... lists of compatible uses are set forth as a guide for development in all but hamlet areas. No use is expressly prohibited in any land use area; the Plan is concerned more with intensity than type of development." **1N.Y.**

## B. An Ill-Conceived Position By Appellants That Is Contrary To The Hearing Record

Appellants argue that "in Resource Management areas, **residential development must be** 'on substantial acreage or in small clusters on carefully selected and well designed sites' **as mandated** by APA Act § 805(3)(g)(2)". (*see e.g.* A356, at ¶ 315; A356, at ¶ 319; A359, at ¶ 329; A359, at ¶ 333; A361, at ¶ 345; A362, at ¶ 349; *see also* Apps' Br., at 34)

This argument is flawed. Section 805(3)(g) of the APA Act states, in pertinent part:

> "[f]inally, resource management areas **will allow for** residential development on substantial acreages or in small clusters or carefully selected and well designed sites" (emphasis added).

This is hardly "mandatory" as Appellants would have this Court believe. Neither the APA Act, its companion regulations, nor the APA guidance document "Development in the Adirondack Park" define the terms "substantial acreage," "small clusters" or "carefully selected and well designed sites" (A1826-1836; A2951). Accordingly, the interpretation and implementation of these terms is left to the sound judgment of the Agency.

The pre-filed testimony of APA expert witness Mark Sengenberger established that:

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**Adirondack Park Agency Comprehensive Report, 1-71 (1976)** [A two volume Comprehensive Report on the status of the APA planning process and the administration and enforcement of the Adirondack Park Land Use and Development Plan. The report evaluates the Agency's program and analyzes the substantial progress made to that date by the Agency.]; see also, Savage and Sierchio, **"The Adirondack Park Agency Act: A Regional Land Use Plan Confronts the Taking Issue,"** Albany Law Review, Vol. 40 at 458 – 459 (1976).[..."**Flexibility with respect to permissible uses also underlies the distinction between the primary and secondary use classifications.** A primary use for a particular land use area is 'generally' permitted as compatible with the area provided it conforms to the applicable overall intensity guideline. Subject to the same restraint, secondary uses are permitted, provided the Agency is satisfied that the proposed site, and the impact of the new use on other existing uses in the vicinity, will not render it an incompatible use. **Finally, the flexibility inherent in the approach to compatible uses is demonstrated by the fact that any local government, in adopting a local land use program, is free not only to add other uses to the statutory list of primary and secondary uses, but also to put a secondary use on the list of primary uses and vice versa.** (citing to APA Act §807.2.d)" (emphasis added); Mr. Savage was an Agency member from 1979 to 1997]

> "[1] residential development in Resource Management does not necessarily have to be on lots of certain prescribed sizes or in clusters in order to be compatible ... the question of compatibility depends upon a careful assessment of the project using the 37 development considerations on a project by project basis. [2] In all projects, regardless of the land use area classification, careful placement of proposed development is critical in order to have well-designed sites and avoid or minimize impacts to sensitive natural resources. **When there are impacts, as there are here and with every project**, the question then becomes how material those impacts are and whether they can be adequately addressed by changes to the project and/or conditions imposed on the proposed project. [3] This **approach to the Resource Management compatibility determination, which recognizes `small clusters on carefully selected and well designed sites' and `substantial acreage' as important considerations for reducing impacts rather than as inflexible mandates that may or may not make sense in a given factual context or for a given applicant..."** (A5079-5080 [emphasis added]; *see also* A694-697 [ Resps' Amd. Ans., Obj. in Pt. of Law, Pt. 4]).

APA hearing Staff's "Closing Statement" to the APA Board stated:

> "The terms `substantial acreage' and `in small clusters' are not defined terms, nor in staff's experience have they been applied in any precise or systematic way... subject to conditions in the Draft Order, all of the proposed residential development in RM is on `carefully selected and well designed sites' based on the design and review process undertaken by the Project Sponsor under APA staff's review" (A3819).

**C. Maintaining Timber Management**

Appellants also argue that "the [ACR] 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" (Apps' Br., at 39). This statement is egregiously false. Section 805(3)(g)(2) of the APA Act states in pertinent part:

> "The basic purposes and objectives of resource management areas are to protect the delicate physical and biological resources, encourage proper and economic management of **forest**, agricultural and **recreational resources** and preserve the **open spaces** that are essential and basic to the unique character of the park..." (emphasis added)

Condition No. 23 to Permit no 2005-100.3 ("Large Eastern Great Camp Lots") states:

"**Forest Management Plan**

> 23. By January 1, 2015, the Project Sponsor shall ensure that a Forest Management Plan has been developed by a professional forester according to the standards set by the Forest Stewardship Council or the Sustainable Forestry Initiative for implementation on the project site. The Forest Management Plan shall be subject to Agency review and approval pursuant to a letter of permit compliance, and shall provide a silvicultural strategy for the entire block of lots that may include, but not be limited to, the following objectives: general sustainable timber harvest, production of veneer hardwoods, sugar bush, improvements for particular wildlife habitat(s), or long-term forest preservation with a goal of 'old growth'" (A81).

Approximately 2,608± acres of the 2,635± acres which make up the 8 Large Eastern Great Camp Lots will remain as open space and constitute available lands for the above referenced "Forest Management Plan" (A3753, A84-85, A102, A223-224; see also "Density and Open Space Protection" supra. at 5)

Finally, APA approved the re-development of the pre-existing Big Tupper ski area, restoration of existing ski trails, construction of four ski bridges, and the installation of miles of hiking, cross country skiing, and snow-shoeing trails throughout the facility for an enhanced 4-season recreational use (A7; A40-62 [draft APA permit no. 2005-100.1]).

Thus, in examining the basic purposes, policies and objectives of RM areas pursuant to § 805(3)(g)(2) of the APA Act, the Project is laden with a combination of forestry uses, recreational resources, and open space protection. Appellants' arguments in this regard lack any merit whatsoever.

**D. Conclusion**

Based on all of the above, it is respectfully submitted that this Court reject and dismiss Appellants' NINTH through SIXTEENTH causes of action.

## POINT III

## THE AC&R'S PROPOSED VALET BOAT LAUNCHING SERVICE IS NOT ILLEGAL

### A. Ripeness

The proposed valet boat launch service for use of the State owned Tupper Lake Boat Launch is not currently in existence and will not be for several years. Therefore, no violations of the Environmental Conservation Law, its companion pertinent regulations, or any other laws of the State of New York, including Article XIV of the State Constitution, have occurred or ripened for judicial review. In fact, DEC has not taken any formal action on the AC&R's proposed use of this State boat launch since no project related activity has occurred (*see* A697-699[Resps' Amd. Ans., Objs. in Pt of Law, Pts 5-7).

"[R]ipeness and justiciability are matters pertaining to subject matter jurisdiction which can be raised at any time" (*333 Cherry LLC v Northern Resorts, Inc.*, 66 AD3d 1176, n 3, [2009]; *see also Matter of New York State Inspection, Sec. & Law Enforcement Empls., Dist. Council 82, AFSCME, AFL–CIO v Cuomo*, 64 NY2d 233, 241 n 3 [1984]). "The concept of ripeness 'holds that a controversy cannot be ripe if the claimed harm may be prevented or significantly ameliorated by further administrative action or by steps available to the complaining party'" (*Federation of Mental Health Ctrs. v. DeBuono*, 275 AD2d 557, 561–562 [3d Dept 2000], quoting *Church of St. Paul & St. Andrew v. Barwick*, 67 NY2d 510, 520 [1986], cert denied 479 US 985). "A claim contingent on events which may not occur should be dismissed as non-justiciable" (*Federation of Mental Health Ctrs.*, 275 AD2d at 561–562; *see also Matter of New York State Inspection*, 64 NY2d at 240).

In considering whether agency action is ripe for judicial review, courts ordinarily employ a two-step analysis. "The first step, which is the `appropriateness inquiry', involves an analysis of the completeness of the agency's action to decide if it inflicts actual and concrete injury, or whether the agency's action, despite being final, awaits consideration of extraneous factors as yet unknown" (*Matter of Rushin v Commissioner of the N.Y. State Dept. of Correctional Servs.*, 235 AD2d 891, 891 [3d Dept 1997] [internal quotations omitted]). "The second step of the analysis involves a consideration of the effect on the parties if judicial review is declined. If the anticipated harm is insignificant, remote or contingent, or if it may be prevented or ameliorated by further agency action or steps available to the complainant, the controversy will not be deemed ripe for review" (*id.*).

In the instant case, APA has not "approved" the valet boat launch operation and the New York State Department of Environmental Conservation has not taken any formal action on the Applicant's proposed use of the State Boat launch since no project related activity has occurred. As such, the fact that the boat launch does not exist establishes that "extraneous factors as yet unknown" will still be considered in the future by the DEC. With regard to the second prong, if judicial review of the proposed boat launch is declined, the potential harm to Appellants is insignificant and remote, due to the fact that the DEC will take formal action on the Applicant's use of the proposed State Boat launch once project related activity has occurred.

**B. Appellants' Action Is Impermissible**

Section 5 of Article XIV of the NYS Constitution provides that a violation of any provisions of this article may only be restrained "at the suit of the people or **with the consent of**

**the Supreme Court Appellate Division**" [emphasis added]. The Constitution gives a secondary right to any citizen of the State to maintain an action to restrain a violation, if the Attorney General defaults, provided that the Appellate Division consents to the maintenance of such action. The constitutional provision plainly contemplates the granting of consent in advance of the commencement of an action; it does not authorize retroactive approval (*People v System Properties*, 281 AD 433 [3d Dept 1953]). Here, it is clear that Appellants did not receive prior approval of the Third Department to bring this claim. Accordingly, Appellants' purported constitutional claim must be dismissed.

**C. Not A Commercial Operation**

While it is clear that Appellants' "boat launch" claims fail legally, those claims are also factually deficient. The Project Sponsor's April 18, 2005 application submission to the APA states:

> "The Adirondack Club and Resort does not propose any type of commercial activity to be done directly on State lands. All transactions, ... will be completed on private lands ... ...no boats will be moored, docked, beached, left or abandoned at the State boat launch site; ... The only activity involving the Adirondack Club and Resort, ... that will take place on State lands, will be the launching of boats." (R000949; see also Resps. Amd. Ans. at 795-796)

With regard to this subject matter, the Agency's Final Order states:

> "101. The State boat launch is administered by the Division of Operations within the NYSDEC out of the Region 5 office, and NYSDEC has not stated any concern with the use of the boat launch as proposed by the Project Sponsor. As members of the public, project owners and their guests are entitled to use the State boat launch and other public facilities." (A24-25; *see also* A785-786)

Finally, even though the "forever wild" clause of the Constitution was intended to protect and preserve natural forest lands, such protection does not prohibit use and enjoyment of the

areas by the people of the State (ECL § 9-0101[6]; Laws 1885, c. 283, § 8; Const. art. 14, § 5; *Helms v Reid*, 90 Misc2d 583 [Sup Ct Hamilton County 1977]).

D. **Boat Launch Capacity/Watershed Stewardship Program**

In various paragraphs throughout causes of actions seventeenth through twentieth, Appellants allege that the "Project and the Valet Boat Launching Service do not conform to the APA Act because the service will usurp the entire capacity of the State Boat Launch, thereby preventing the public from using it" (*see* A377; A379-387). This argument is specious because the APA Act does not apply to lands owned by the state. Section 805(1)(a) of the APA Act states that:

> "[*the Adirondack Park Land Use and Development Plan*] "shall hereafter serve to guide land use planning and development throughout the entire area of the Adirondack Park, **except for those lands owned by the state**" (emphasis added).

The Amended Petition never once cites (or mentions) the text of APA Act § 805(1)(a) (*see* A697-698 [Resps.' Amd. Ans., Obj. in Pt. of Law, Pt. 5, arguing lack of subject matter jurisdiction and failure to state a cause of action]). The Tupper Lake State Boat Launch is owned by New York State and is governed by the "State of New York Adirondack Park State Land Master Plan" ("SLMP") (*see* APA Act § 816; see also, A785-786 [Resps. Amd. Ans.] & A24-25, ¶¶ 100-103 [Final Order]).

The Project Sponsor's Reply Brief (A4269-4271) contains a detailed analysis of both the 2009 and 2010 data collected by the Watershed Stewardship Program. (*see* A4306-4321) Appellants claim that these two Program Reports disclose current daily public use in the range of 40 to 50 boats on many summer weekends (A380) at or near the capacity of 48 per day

(A381). Appellants are in error because (1) they do not distinguish between motorized and non-motorized boats (the launch services both); and (2) these numbers of 40 and 50 are for weekends – two days, Saturday and Sunday from May to September; the usage is actually 20 to 25 per weekend day (A4270). The following is a more accurate analysis (A4270-4271):

2009: • 413 or 417 boats were counted over 22 weekend days [The boat counts take place between 7a.m. & 4 p.m. The volunteers try to be on time. On occasion, a weekend day has gone unattended.]
• 306 of those boats were motorized
• Therefore, 306 motorized boats for 22 weekend days = 13.9 boats per weekend day over a 9 hour period

2010: • 504 boats were counted over 25 weekend days
• 397 boats were motorized
• Therefore, 397 motorized boats for 25 weekend days = 15.8 boats per weekend day over a 9 hour period.

The Project Sponsor took this analysis one step further and, using the "Tupper Lake Recreational Study 2010 – Table 4," broke the daily weekend usage into hourly usage (A4271). This table shows that the average number of boats **per hour** over the course of 14 weekends (25 days) is **0.935 BOATS PER HOUR**. The most boats that summer were on the 4th of July weekend and averaged 3.38 motorized boats using the launch per hour. The least boats that summer were on the weekend of June 4th week with an average of 0.6 motorized boats using the launch per hour" (*see* A 788-789 [ Resps' Amd. Ans.]).[14]

**E. Conclusion**

Based on all of the above, this Court should dismiss Appellants' SEVENTEENTH

14 The "estimated usage of 474 boats on a weekend day" as presented by Appellants in paragraph 445 of their Amended Petition (A381), should read "47". [see Resps. Amd. Ans. at A789]

through TWENTIETH causes of action.[see also Resps. Amd. Ans., Objs. in Pt. of Law, Pt. 5 (A697-698) and Pt. 6 (A698-699 with regard to causes of action Nineteen and Twentieth]

## POINT IV

## THE AC&R PROJECT WILL NOT HAVE AN UNDUE ADVERSE FISCAL IMPACT ON LOCAL GOVERNMENT

Appellants' Twenty-First and Twenty-Second causes of action assert that:

> "The Applicant failed to meet its burden of proof to show that the Project could succeed, and that its real estate sales and other tax generating activities could be successful so as to avoid undue adverse impacts to the public and local governments" (A403, ¶ 548) **AND**
> "Without the tax revenues that the Applicant has projected, the Project will have an undue adverse impact on the public and local governments, such that the approval of the Order and Permits was contrary to APA Act §805(4) and §809(10)(e), and DCs (c ) (2)(b), (d)(1)(a), (d)(1)(b), and (e)(1)(a)" (A404, ¶551).

Appellants' framing of the "burden of proof" issue is so blatantly artificial and contrary to the law that it deserves little attention. The real issue under APA Act § 809(10)(e) is whether the record provides substantial evidence that the Project "would not have an undue adverse impact upon...the ability of the public to provide supporting facilities and services." (APA Act § 805.4.d ["Development Considerations"]). In addition, this section of the APA Act also directs the APA to "tak[e] into account the commercial, industrial, residential, recreational or other benefits that might be derived from the project". The record provides overwhelming support for APA's determination that the Project will not have an undue adverse impact on the municipal service providers.

### A. Municipal Support And The Ability Of The Public To Provide Services

The record includes, and the APA Findings reflect, the ability of the involved local governments

to meet the service needs of the Project, and the unanimous support of the Project by those municipalities and Franklin County [see A4203 to 4222 ["The Town of Tupper Lake, and Joint Town and Village of Tupper Lake Planning Board – Reply Post Hearing"]); see also A3379-3452, A14-18, A26-27 & Final Order at ¶¶ 124 (A29), 128 and 129 (A30).]

The Town of Tupper Lake and the Joint Town and Village of Tupper Lake Planning Board in their Post Hearing Reply brief, told the Agency Board members:

> "The record and administrative notice of Tupper Lake's governmental control factors provide a factual basis and yield the legal conclusion that the Project will not have an undue adverse fiscal impact on the local governments when the proposed benefits that might be derived from the Project are taken into account. (A4204).
>
> ... the Planning Board retains jurisdiction of the final proposed Project at the local level where the project will have the most impact. Long after all other agencies, ... review the project, Tupper Lake will decide at the local level whether and how to allow the Project to move forward and with what conditions. It is incomprehensible that the Planning Board will approve the Project, or components of the Project, without protecting the municipalities ... and that municipal, school or special district taxes or special district user charges are not taken into consideration (A4205).
>
> We are requesting the Agency approve the Project pursuant to the Act and its promulgated regulations with the confidence that the criteria set forth in Act sections 805 and 810 have been properly reviewed and satisfied. The record and administrative notice of governmental controls provides the Agency the authority to do just that" (A4222; see also A3379-3452 [overview of Joint Town/Village of Tupper Lake Planning Board involvement with APA hearing Issues 5 & 6]).

In addition, several local governmental entities have undertaken "official actions" in furtherance of the Project. In 2006, the Town adopted a new Planned Development District

("PDD") zoning classification and designated the Project site as a PDD.[15] In 2010, the Town of Tupper Lake Planning Board granted conditional Final PDD Plan approval for the first 18 residential lot phase of development in the Project (A28)[16] In 2007, the Franklin County Industrial Development Agency ("FCIDA") took "official action" in support of the Project. (*see infra* Point IV.B at 30-32). In 2006, the Tupper Lake Town Board created Sewer District #27 and Water District #27 for the connection of 56 lots in the Project to the existing municipal utility systems.

With respect to the benefits analyses performed throughout the Project Sponsor's multiple submissions to APA staff, the Final Order recognizes the very significant potential for "commercial...residential, recreational, or other benefits" (APA Act §§ 805[4], 809[10][e]) that would be derived from a successful Project. (A30-31; Final Order at ¶¶ 132-138). The record includes ample support for these Findings, including projections for construction expenditures and jobs, post-construction Project related employment by year and phase, projected homeowner and visitor expenditures, and the infusion of increased property taxes, school taxes, and sales taxes into municipal coffers (*see* A2676-2704; A5345-5356; A5363-5396; A5435-5451; A5452-5454).[17]

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15 Appellant Protect's predecessor-in-interest, Association for the Protection of the Adirondacks, unsuccessfully challenged the Town's re-zoning of the Project site in litigation that extended over a two year period (*see Association for the Protection of the Adirondacks v Town of Tupper Lake*, 64 AD3d 25 [3d Dept 2009]).

16 Consistent with the Project phasing plan designed to avoid impacts on municipal service providers, the first-phase PDD will require virtually no municipal services. Access will be provided via the conversion of existing logging roads to serve as private roads, and on-site sewer and water facilities.

17 These last three page references are to the pre-filed testimony of Adore Flynn Kurtz, Executive Director of Clinton County Industrial Development Agency and expert witness for the Project Sponsor. Two pages of this testimony are missing from the Appendix. These pages can be found at Attachment B following the June 6, 2011 hearing Transcript at pp. 2 & 4 (referenced at Appendix B of the Return at A550).

In addition to the potential for revitalization of the local economy, the record also documents the Project plans for dramatic improvements to, and the re-opening of, the Big Tupper Ski Area. (*see* A1639-1642, A1668-1669). As directed by APA Act § 809(10)(e), the Final Order (A7-8) takes into account the potential for the very significant positive benefit the revitalized ski area would provide.

**B. The Pending FCIDA Transaction**

Appellants' Article 78 Petition devotes two causes of action (the Twenty-Third and Twenty-Fourth) to the untenable assertion that the Project's proposed Franklin County Industrial Development Agency ("FCIDA") transaction represents "a significant risk of undue fiscal impacts on municipalities and the public." (*see* A282, at ¶ 10[e]). These claims refer to a May, 2006 Preserve Associates' application filed with FCIDA proposing financing of the developer's construction of the Project's "public" infrastructure requirements (sewer, water, roads, and electric) through tax exempt IDA bonds (*see* A4302 [Appendix 3 to Applicant's post-hearing Reply Brief]). As explained below, this Application is still pending before FCIDA.

The pertinent facts regarding the FCIDA transaction are these:

- For the purpose of ensuring "no undue adverse impact" on municipal service providers, the ACR Project application to the APA proposes that the Project will fund and construct all of its infrastructure requirements (i.e. sewer, water, roads, electric) that would, under most project development scenarios, require at least some level of governmental funding or participation (A29, at ¶125).

- No municipal bonds will be issued for the Project, and the involved taxing jurisdictions will have no liability or exposure in the event that FCIDA ultimately determines to issue bonds for the Project's public infrastructure (A29, at ¶ 125; Pre-filed testimony of Adore Kurtz, Executive Director, Clinton County IDA referenced at footnote 17, *supra* at 29, and her live testimony at A6379-6380; see also APA Final Order A29-30, at ¶ 127).

- On August 22, 2006, FCIDA's nationally recognized bond counsel law firm, Fullbright & Jaworski, LLP, issued an opinion to FCIDA concluding that (i) the Project meets the requirements of Article 18-A of NYS General Municipal Law for issuance of FCIDA bonds, and (ii) as proposed in the Project's application, those bonds would qualify for tax exempt status under the Internal Revenue Code and regulations (A3208-3215).[18]

- On April 11, 2007, following a public hearing, FCIDA took "official action" on the Project application, determining that the Project is qualified under General Municipal Law Article 18-A, and agreeing to issue FCIDA bonds upon completion of all application and legal requirements (A4303).

The next steps in the FCIDA application process, i.e. negotiating the structure and terms of the payment-in-lieu-of-tax ("PILOT") agreement and the final bond resolution, were put on hold pending the outcome of the APA and Town permitting applications (*see* A4304-4305). The specifics of the Project's infrastructure requirements, such as the design and location of the roads, water lines, and sewer lines, were entirely dependent on the Project itself being approved by the regulators and, if approved, the scope and design of the Project allowed under those approvals. The parties to this transaction, FCIDA and Preserve Associates, have advanced the application process as far as it can go in the context of the other regulatory activities and, more recently, this litigation. (*see* A699-702 [Resps. Obj. in Pt. of Law, Pt, 8]).

As with Appellants' arguments concerning the fiscal impacts of the Project, the entire premise of Appellants' FCIDA claims fails any test of logic. Assuming for the sake of argument that Appellants are correct and the proposed FCIDA transaction is "not approvable," it certainly does not follow that "a significant risk of undue fiscal impact on municipalities and the public"

18 In its pleadings and Brief, Appellants go on at some length about certain 2011-12 attorney-client communications released to them by FCIDA's Executive Director in response to a Freedom of Information Law demand. It is notable that (i) neither that FCIDA Executive Director nor the attorney on those e-mails were involved in the 2006-7 legal opinion and official action of FCIDA, and (ii) there has been very little recent interaction with these current FCIDA staff members pending issuance of the APA approvals and resolution of this litigation.

will occur as a result (A282). To the contrary, if the FCIDA transaction is not finally approved by FCIDA and the Project fails because of that, **NO** public services will be required and **NO** municipal expenses or impacts of any kind will occur. Similarly, if FCIDA declines to complete the transaction and the Project is able to proceed with infrastructure financed through other means (i.e. conventional financing, owner equity, etc.; *see* Final Order, A29, at ¶ 125), no fiscal impact or municipal liability will have resulted from the failure of the FCIDA transaction. In short, Appellants have not connected, and cannot connect, their premise of "an unapprovable application" with their conclusion of "undue fiscal impacts."

**C. The Projected Real Estate Sales**

Appellants, citing only to their post-hearing Briefs, tell this Court:

> "The evidence overwhelmingly proved that the project will not achieve real estate prices and volumes at the Applicant's projected levels, or achieve the resultant tax revenues at the levels projected in the application. In fact, there was no competent proof introduced at the hearing to support the real estate sales and tax revenue numbers claimed in the application materials." (A398-399, at ¶ 526).

This is an affront to what actually constitutes the Record on this issue. An analysis of the projected fiscal impacts was submitted by the Project Sponsor to Agency staff in April 2005 (A1764-1825). Further "Public Service/Fiscal Impacts/Economic Impacts" analyses were submitted in February, 2006 (A2060-2085; A2087-2100). Thereafter, the Applicant provided a supplemental report to the original fiscal and economic analysis dated October 26, 2006. (A2249-2338; *see also* A801, at ¶ 286 [Resps' Amd. Ans.]).

Finally, this earlier fiscal analysis was updated in a 2010 submission by the Project Sponsor (A2629-2704 [75 pages]) prior to commencement of the adjudicatory hearing. Under

this analysis, the projected net fiscal position was summarized for each municipal jurisdiction for each year of the phasing plan. Table IV-1 of this update (A2688; *see also* R012321) displays a projection demonstrating that revenues and expenses result in a net positive fiscal position for the Town, the school district, the county, and the directly affected departments of the Village (Water Department and Electric Department). The net positive revenue would occur each and every year of the fifteen year phasing plan (*see* ¶ 286-A801).

In terms of "no competent proof introduced at the hearing," the Project Sponsor presented a panel of **three experts** on the fiscal/economic issues. **This panel testified for two and one-half days.** (A6185-6356 [171 pages]; *see also* A5345, A5357, and A5393 - Hearing Transcripts, June 1-3, 2011 [618 pages] and pre-filed testimony of all three experts [52 pages])

Appellants then tell this Court:

> "527. The evidence proved that the resort real estate market will not support sales of the levels projected for the Project. Instead, due to the ski area's small size, the resort's remote location, and the lack of a well-established ski area, the real estate sales are only likely to be about one-eighth of the claimed levels." (once again citing only to their post-hearing Briefs)

Again, the conclusory, inaccurate message in this statement cannot be condoned by any Court.

A scenario depicting fiscal impacts which may be associated with partial project completion was incorporated into the APA hearing record. This scenario was predicated on the sale of 19 detached homes and10 great camp lots with gross sales of $35.1m. The value of these sales were determined to be equivalent to: (i) a 7.5% increase in the Town's assessed value, (ii) a projected net revenue to the Town $216,930 per year (which is approximately 14% of the total real property tax levy of the Town in 2008), and (iii) a projected net revenue to the school district

of $612,454 per year (equivalent to 10% of the total real property tax levy of the school district in 2009). These figures were used to reach the conclusion that given the cautious approach to project infrastructure development, no significant exposure to the municipal service providers is anticipated should any phase or section of the project not proceed as projected (A4067-4069; *see also* A802).

Furthermore, in reviewing the fiscal impacts the Joint Town and Village of Tupper Lake Planning Board directed questions to the AC&R consultants regarding the projected tax revenue and PILOT calculations. The Planning Board analyzed the revenues on both a 50% reduction in the sales projections and a 75% reduction in the sales revenues, keeping as a constant the cost of the infrastructure and bond amounts. The Town and Village Joint Planning Board concluded that any potential impacts are outweighed by the benefits the Project offers. These calculations and conclusions were incorporated into the APA hearing record. (A4215-4216; *see also* A3379-3452)

Finally, all of the above data and analyses lends itself to numerous projections regarding sales, revenues, taxes and municipal services over the 15-year expected build-out. This is exactly the kind of exercise the Project Sponsor wanted to enable the decision-makers to perform especially in providing the 2010 Update for the public hearing. It was precisely this type of mathematical exercise that was performed by aid-and-advise APA staff member Kelleher for the Agency Members based on this evidence in the record (*see* Appellants' arguments concerning APA Decision based on evidence outside the record at Apps' Br. p. 50 and Amended Pet. ¶ 540, et. seq. in support of their Twenty-first and Twenty-second causes of action).

**D. Conclusion**

Based on all of the above, the TWENTY-FIRST, TWENTY-SECOND, TWENTY-THIRD and TWENTY-FOURTH causes of action must be dismissed. In addition, the TWENTY-THIRD and TWENTY-FOURTH causes of action should be dismissed for lack of subject matter jurisdiction and failure to state a cause of action (*see* A699-702 [Resps. Objs. in Pt. of Law, Pt. 8]).

## POINT V

## BALANCING ENVIRONMENTAL IMPACTS WITH ECONOMIC AND OTHER BENEFITS

In calling for the annulment of the APA's Final Order and draft in its Twenty-sixth cause of action,[19] Appellants argue that:

> "**APA may not weigh and balance** that project's economic benefits against its adverse impacts on the resources of the Adirondack Park ... **as a matter of law, this is not allowed**" (Apps' Br., at 52) emphasis added).

Throughout this argument, Appellants never once cite to the full, operative text of §§ 801, 805(4) or 809(10) of the APA Act in order to avoid an accurate analysis of what these statutes actually say with regard to this "balancing" issue. Never once, do Appellants tell this Court that §801 of the APA Act entitled "Statement of legislative findings and purposes" actually says:

> "The Adirondack park land use and development plan set forth in this article recognizes the **complementary needs** of all the people of the state for the preservation of the park's resources and open space character and of the park's permanent, seasonal and transient populations **for growth and service areas, employment, and a strong economic base,** as well. In support of the **essential interdependence of these needs**, the plan **represents a sensibly balanced**

19 The Amended Petition has no Twenty-Fifth cause of action. (A814)

**apportionment of land to each**." (emphasis added)

Instead, Appellants preach to this Court that "**Nothing** in the APA Act's `Statement of Legislative Findings & Purposes´ **so much as mentions** the promotion of economic benefits, let alone the balancing thereof against protection of the Park's resources" (Apps' Br., at 54). This is unconscionable.

Professor Richard Booth in his law review article on "*The Adirondack Experience*" (*supra*, n.11 at 16) states the following with regard to balancing environmental and economic impacts:

> **The most important purpose of the Act** is to establish a system of comprehensive land use controls that will protect, **while encouraging the wise use of**, the unique scenic, aesthetic, wildlife, recreational, open space, ecological and natural resources of the Adirondack Park. **This basic purpose might aptly be labeled `balance´ because it is based on the twin goals of preservation and utilization. It would not be too difficult to imagine one of those goals completely overshadowing the other if the balance between these goals were not maintained.** (emphasis added)

Appellants would have this Court determine that protection of natural resources must "completely overshadow" the wise use of those resources. Simply stated, the Twenty-sixth cause of action is a request for this judiciary branch of government to rewrite the APA Act on the basis of Appellants' illusionary allegations. This Court must dismiss this TWENTY-SIXTH cause of action on the arguments presented above. [see also, Resps.' Obj in Pt. of Law, Pt. 9 - failure to state a cause of action (A702-704)].

## POINT VI

## APPELLANTS' ARGUMENT THAT FINAL APPROVAL "FAILED TO MAKE THE FINDINGS REQUIRED BY LAW" AND WERE "CONCLUSORY" IS PREPOSTEROUS.

Appellants take the position that the "APA's regulations allow the parties to a hearing to make 'proposed findings of fact ... and proposed conclusions of law relative to the required statutory and regulatory determinations'" (A412). Appellants then assert that Protect's Closing Statement and Closing Reply Brief made numerous proposed findings on each hearing issue as well as did Phyllis Thompson (A413). Appellants next argue "APA's final decision 'shall include findings of fact and conclusions of law or reasons for the decision, determination or order'" (A412). Appellants conclude, as part of their Twenty-seventh cause of action (A412-415): "APA did not make specific findings and conclusions on the issues, and the statutory determinations that it was mandated to make" (A414).

In reviewing Protect's Closing Statement (A4096-4170) and Closing Reply Brief (A4388-4429), there are no proposed findings of fact or proposed conclusions of law. Protect actually told the Agency in its Closing Statement:

> "Because the application must be denied as a matter of law, and because no permit conditions could make the project legally approvable, Protect has no comments on the Agency Staff's draft permit conditions (Ex. 96) at this time." (No comments were provided, as well, in Protect's Reply Brief.)

Appellant Phyllis Thompson also did not provide any proposed findings of fact or conclusions of law in her post-hearing briefs. (A3935-3942). Appellant Robert Harrison and Leslie Harrison filed no post-hearing briefs and Appellant Sierra Club was not a party to the proceedings and therefore had no entitlement to participate in post-hearing submissions.

With regard to 9 NYCRR 580.18(c), Appellants only cite to a portion of that regulation, choosing to leave out the following language:

> "The making of findings of fact [*by the Agency members*] **shall constitute a ruling upon each finding proposed by the parties.**" (emphasis added)

This is precisely what the Agency members did in adopting its Final Order (*see* A815).

Finally, Appellants assert that "APA did not make the findings and determinations required of it by APA Act §809 (10)(a) to (e)" (A413). They then point to the "Conclusions of Law" statement in the Final Order (A36) and characterize it as "one generic conclusion that the Project complied with the law" (A414).

First, this "Conclusion of Law" statement opens by saying: "The Agency, having considered the findings set forth above, …". What is "set forth above" are essentially 36 pages of findings of fact and other statements which were derived from: (1) a conceptual review process for this project which took place over approximately six months, (2) an application submission process which lasted one year and eight months, (3) a legislative hearing and two pre-hearing conferences conducted over six months, (4) mediation sessions conducted over the course of approximately 19 months, (5) then, eight and one-half months of pre-hearing activities including scoping of hearing issues, document discovery, preparation of expert pre-filed testimony, pre-hearing conferencing and two more legislative hearing sessions, (6) the actual adjudicatory hearing covering a three month period of time with 19 hearing days, (7) post-hearing briefing occurring over the next four months , and finally (8) the Agency deliberating the project application and hearing record over the course of three months and seven public meetings. This so-called "one generic conclusion" that Appellants would have this Court believe must

result in a ruling of violation of lawful procedure, was a multi-faceted process which took nearly seven years and five months to come to a final decision. This is what the 39 page final "Project Findings and Order" and the 14 individual Permits totaling 221 pages (A815) represent as constituting the five separate determinations necessary to approve a project under APA Act §809(10)(a)-(e).

Based on all of the above, it is respectfully submitted that this Court determine that Appellants' TWENTY-SEVENTH cause of action must be dismissed.

## POINT VII

## APPELLANTS' PROCEDURAL RIGHTS WERE NOT VIOLATED

Appellants in their Twenty-ninth cause of action call for the annulment of the AC&R Final Order and Permits because "the parties were not provided with an opportunity to make written comments on the **summaries of the record** which were prepared for the APA members by the 'senior staff'[20] during their deliberations, as required by the APA's regulations" (A420 [emphasis added]). Appellants fail to advise this Court that 9 NYCRR 580.18(b) of the APA Act states that Agency members "**may have the aid and advice of agency staff** other than staff which has been or is engaged in the investigative or litigating functions in connection with the review of the project or any factually related matters." (emphasis added). In addition, 9 NYCRR 587.4(c)(2)(ii) also states that "**any agency member or employee**:...(ii) **may have the aid and advice of agency staff...**" (emphasis added).

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20 Throughout the entire review of this project including Agency member deliberations towards a final decision, Respondents do not recall anyone using the term "senior staff." In fact, Respondents are of the opinion that there is no such category of personnel titled "Senior Staff" within the APA. The references to APA staff during these times were simply "staff," "hearing staff," "executive staff," and "aid and advice staff."

The "aid and advice staff" did not provide a summary of the hearing Record. At the November 17 & 18, 2011 deliberations, there were discussions of certain hearing issues with the Agency members posing questions to the "aid and advice staff" to be answered in writing for the December, 2011 deliberations (*see* A4713-4728; A818-819).[21] After the December meeting, the "aid and advice staff" reconstructed the original hearing staff's Findings & Conditions to a draft "APA Project Findings and Order" and 14 permits specific to geographical areas of the project site (A4729-A4774) with transmittal memos dated January 11 and January 13, 2012 (A4775-4780).

In addition, Appellants allege in their Twenty-ninth cause of action that "Senior Staff" presented "an analysis of the Projects costs and revenues that purported to show that even if revenue sales were 70% lower than the applicant had projected, there would be no risk to municipalities" (A422). Appellants go on to allege that "this analysis was not in the hearing record" (A422). This is not true as explained in detail at POINT IV.C., *supra.* at 32-34.

**A. Appellant Sierra Club Lacks Standing To Sue**

Appellant Sierra Club never actively participated in the regulatory review process regarding the AC&R Project. Persons who were not parties to an administrative hearing did not have standing to bring an Article 78 proceeding challenging that administrative determination_ (*O'Brien v Barnes Bldg Co., Inc.*, 380 NYS2d 405 [1974]). Moreover, in *Mount Hope Development Corp. v. James*, 233 App. Div. 284 (1st Dept 1931) *affd.* 258 NY 510 (1932), and *In the Matter of Jonas,* 155 NYS2d 506 (Sup Ct Westchester County 1956), *affd.* 3 A.D.2d 558

21 The webcasts of the Agency meetings deliberating the final decision for the AC&R proposal can be found on disk A4712.

(2d Dept 1957), the courts noted that the petitioners were strangers to the administrative proceedings, were not parties to it, had not intervened, had not attempted to do so, did not appear, and did not afford themselves of the opportunity to litigate the issues they want to litigate now. These are the exact circumstances that exist with regard to Petitioner-Appellant Sierra Club in the proceedings before this Court.

**B. Conclusion**

Based on all of the above, it is respectfully submitted that this Court dismiss Appellant's TWENTY-NINTH cause of action and further rule that Petitioner Sierra Club lacks standing to sue. (*see* A705 [Resps' Amd. Ans., Objs. Pt. of Law, Pt. 10])

## POINT VIII

## LENGTH OF TIME FOR A PROJECT TO BE REQUIRED TO BE "IN EXISTENCE"

The Thirtieth cause of action essentially calls for the annulment of the APA's approval because "granting the Applicant 10 years to get the Project `in existence' violated APA Act § 809(c)" (A427).[22] Appellants go on to allege: "[t]he Order states that APA `will consider this project in existence when the first lot **authorized herein** has been conveyed'" (A427). This position being taken by Appellants ignores both the definition of "in existence" and the details and requirements that must be met prior to the conveyance of the first lot.

First, "conveying" a lot means a change in ownership. Second, "authorized herein" is not limited to "conveying a single lot" as Appellants would have this Court believe, but rather it also involves satisfying a number of pre-conditions before an individual Phase 1 Permit can be

22 There is no §809 (c) in the APA Act. Respondents conclude that Appellants are referring to §809.7.c. and will direct their responses to that section.

issued. (These pre-conditions can be found at A36-38 (Final Order) and A82-85 (Draft Permit 2005-100.3 - Large Eastern Great Camp Lots as but one permit example, at ¶¶ 30, 36, 41 and 42)] [23]. It is respectfully submitted to this Court that "in existence", as set forth in the Final Order and the 14 individual permits, involves a great deal more than merely conveying one lot in the first 10 years.

Appellants next argue that:

> "the potential of the land related to the project to remain suitable for the use allowed by the permit and to the economic considerations attending the project (§809[c]) were not even discussed by the APA Members when they approved the extension from 2 years to 10 years" (citing to the January 18-20, 2012 Agency minutes).

This argument is also incorrect. In fact, the 10 year period for the project to be "in existence" first appeared in APA hearing staff's "Revised Draft Order" – condition no. 11 of their October 24, 2011 Reply Brief (A4469; A823 [Resps' Amd. Ans.]), which states in pertinent part:

> "At staff's suggestion and with the Project Sponsor's concurrence, this condition has been revised to allow 10 years for the project to be `in existence' ... Executive Law 809(7)(c) allows the Agency Board to specify an appropriate length of time for a project to be `in existence' ...
>
> APA hearing staff believe that the 10-year period provides the Project Sponsor with additional flexibility given `the economic considerations attending the project'. Also, there is no reason why the land related to the project would become unsuitable for the mixture of uses proposed by the Project Sponsor within the 10-year period."

Thus, (1) the Agency members were aware of this 10 year period for the project to be in existence for approximately 3 months and NOT 3 days as Appellants would have this Court

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23 Examples of these pre-conditions which must be satisfied prior to the sale of a lot under a particular draft permit include: filing of deed restrictions to preserve open space (A46-47, A84-85, 202, 223-224); submission of final plans for all of the Great Camp Lots (A37); final subdivision plat plan approval from the Town and Village Joint Planning Board (A99, A115, A129, A145, A161, A204, A220, A238 & A269), among others.

believe;[24] and (2) Appellants' argument that the Agency cannot determine "ahead of time, whether the Project is `in existence'" (A429) was directly refuted by APA hearing staff to the Agency members by citing to § 809(7)(c) of the APA Act and including their reasoning behind the two factors for which the statute allows the time for "in existence" to be extended.

Finally, Appellants argue that "9 NYCRR § 572.20(d)(3) requires that all APA permits which are issued, or renewed, shall recite the provisions of 9 NYCRR § 572.20(d)(1) and (2)" (A426). This is a misreading of those regulations. The requirement for reciting the provisions of 9 NYCRR § 572.20(d)(1) and (2) in "every project permit issued" is referring to the issuance of "a new permit" where the original permit expired [*see* 9 NYCRR § 572.20(b)], or "renewal requests which may involve such a material change ... [*so as to*] be treated as an application for a new permit" [*see* 9 NYCRR § 572.20(c)(2); *see also* A821 (Resps' Amd. Ans.)].

Based on all of the above, it is respectfully submitted that this Court dismiss Appellants' THIRTIETH cause of action.

## POINT IX

## THERE WERE NO IMPROPER EX PARTE COMMUNICATIONS

The record, even as distorted by Appellants, is clear that there were no prohibited *ex parte* communications.

Appellants' Twenty-Eighth cause of action is based on N.Y.'s State Administrative

24 As a matter of fact, APA hearing staff in its various draft Permit Conditions throughout the adjudicatory hearing process never recommended less than 5 years for the AC&R project to be "in existence." This dated as far back as March 3, 2011, nearly 11 months before the Agency's final decision. Not once between March 3, 2011 and the Agency's final decision on January 20, 2012 did any of the Appellants object to a proposed "in existence" term being greater than 2 years. This timeframe and opportunity to object included all of the adjudicatory hearing sessions and the 4 months of post-hearing briefing.

Procedure Act ("SAPA") and APA regulations that prohibit certain communications that meet the definition of both "ex parte" and fall within the "prohibition" defined in the regulation. An examination of these provisions demonstrates that Appellants' Twenty-Eighth cause of action must fail. SAPA § 307(2) provides:

> "Unless required for the disposition of ex parte matters authorized by law, **members or employees of an agency assigned to render a decision or to make findings of fact and conclusions of law** in an adjudicatory proceeding shall not communicate, directly or indirectly, in connection with any **issue of fact**, with any person or party, nor, in connection with any **issue of law,** with any party or his representative, except upon notice and opportunity for all parties to participate." (emphasis added)

Under the plain language of the statute, SAPA only applies to communications relative to specific subject matter (*i.e.*, issues of law or fact) and specific persons (*i.e.*, members or employees assigned to render decisions or make findings of fact and conclusions of law) (*see Britt v DiNapoli*, 91 AD3d 1102 [3d Dept 2012] [stating that communications for "purely administrative purposes," are not improper]; *Cantone v DiNapoli*, 83 AD3d 1259, 1260 [3d Dept 2011] [same]; *Concerned Citizens Against Crossgates v Flacke*, 89 AD2d 759, 761 [3d Dept 1982] [holding that communications between a party and agency staff did not violate SAPA because the staff involved were not assigned to make findings of fact or conclusions of law]). Within the APA, the only members or employees who render decisions or make findings of fact and conclusions of law where adjudicatory hearings are involved are the eleven voting members who constitute the "agency" (*see* Executive Law §§ 802(3), 803) Accordingly, as it pertains to the APA, SAPA only prohibits communications with the eleven voting members.

In addition to SAPA, Appellants allege that APA's regulations (see 9NYCRR §587.4)

support their Twenty-Eighth cause of action. The APA regulations mirror SAPA's language. The regulations, however, also provide an exception to the rule, such that:

> "any agency member or employee (i) may communicate with other members of the agency; and (ii) may have the aid and advice of agency staff which have not been engaged in the investigation or prosecuting functions in connection with the matter or proceeding or factually related matter or proceeding" [9 NYCRR § 587.4 (c)(2)(i) &(ii)].

As with SAPA, the APA regulation only prohibits certain communications with certain people, namely, those responsible for rendering decisions or making findings of fact or conclusions of law. Both SAPA and the APA regulations plainly prohibit communications between parties to the hearing and APA's voting members. Contrary to Appellants' characterizations, however, neither SAPA nor the APA regulations prohibit communications between the parties and APA staff (*see Concerned Citizens Against Crossgates*, 89 AD2d at 761). Additionally, neither SAPA nor the APA regulations prohibit communications between APA staff personnel (*see* 9 NYCRR 587.4[c][2]; SAPA § 307[2] *see also* A1375-1376). Rather, as they pertain to internal communications, SAPA and the APA regulations prohibit communications between certain staff and the voting members (*see* SAPA § 307[2] [prohibiting agency members from communicating with *any person*, which could include certain staff]; 9 NYCRR 587.4[c][2] [same]). Specifically carved out from this internal prohibition are staff assigned to give "aid and advice" (*see* SAPA § 307[2][b]; 9 NYCRR 587.4[c][2][ii]). "Aid and advice" staff are those who are not "engaged in investigative or prosecuting functions in connection with the case under consideration or [a] factually related case" (SAPA § 307[2][b]; 9 NYCRR 587.4[c][2][ii]). In order to comply with this distinction between certain staff, the APA designates staff as either "hearing staff" or "aid and advice staff" (A597, A605 [Affidavit of John

S. Banta, dated 5/18/2012]).

Thus, as these provisions pertain to the APA, in order to prove an *ex parte* communication, Appellants must establish that (1) a communication occurred; (2) that it pertained to an issue of fact or issue of law; and (3) that it was between a party to the proceeding and a voting member, or between a hearing staff employee and a voting member (*see* 9 NYCRR 587.4(c)(2); SAPA § 307[2]). Appellants' have failed to make this showing and, as such, their Twenty-Eighth cause of action must be rejected.

Indeed, Appellants' Twenty-Eighth cause of action is based on innuendo and supposition instead of facts. A close examination of Appellants' pleadings reveals that they do not offer any evidence of communications between a party or a member of the hearing staff and the voting members of the APA (*see* Apps' Br. at 64-67; A415-420 [Amended Petition]). Rather, Appellants take the normal and permissible administrative process—which involves the parties communicating with hearing staff, the hearing staff communicating with aid and advice staff, and aid and advice staff working with the voting members—and contort it into a nefarious story of *ex parte* communications through secret back-channels that Appellants' suggest implicates virtually the entire APA, the Applicant and its attorneys, and even the Governor's office. Notwithstanding these inflammatory accusations, Appellants' Twenty-Eighth cause of action is nothing but an unsupported conspiracy theory.

Critically, Appellants have not alleged that a party or a member of the hearing staff communicated with an APA voting member. Instead, Appellants allege, with no supporting evidence, that the Applicant's permissible communications with staff were necessarily

transmitted to the APA's voting members (*see* Apps' Br. at 64-65). For example, in their Amended Petition, Appellants allege that "[a]ny communication by the Applicant with the 'Senior Staff' or other APA Staff persons who were providing 'aid and advice' to the APA members, **was, in effect, communication by the Applicant with the APA Members**" (A419 [emphasis added]). Thus, Appellants' Twenty-Eighth cause of action is contingent on their assumption that APA staff members were improperly transmitting communications from the Applicant to the APA's voting members. Appellants' suggestions of impropriety stand in stark contrast to the record, which is devoid of any evidence to support their dubious assumption of wrongdoing on the part of APA staff and the voting members.

Not only are Appellants' allegations unsupported in this regard, but if given credence, it would upend the entire administrative process by creating a presumption that permissible communications between an applicant and agency staff are necessarily transmitted to the voting members. As it stands, the APA administrative process is designed so that agency staff create a buffer between applicants and the voting members. Applicants are permitted to communicate with staff, and certain staff (*i.e.*, the aid and advice staff) may communicate with the voting members. Appellants' presumption that an applicant's communications with staff are necessarily transmitted to voting members would hamstring this administrative process by precluding applicants from having any discussions with staff. Moreover, if accepted, Appellants' position would effectively shift the burden to the applicant to demonstrate the nonexistence of *ex parte* communications. This result was not contemplated by SAPA or the APA regulations, which plainly permit an applicant to communicate with agency staff.

In furtherance of their conspiracy theory, Appellants dramatize an email that Applicant's counsel's office mistakenly sent to APA staff attorney John Banta during the process of reorganizing the hearing staff's draft permit into multiple separate permits (*see* A5054 [the "Ulasewicz Memo"]; A1446-48 [Affidavit of Thomas A. Ulasewicz, sworn to on January 16, 2012]). Appellants' urge that the Ulasewicz Memo is evidence of an improper *ex parte* communication, yet fail to explain how a communication from a party to an APA staff member is prohibited under either SAPA or the APA regulations. Appellants' fail in this regard because neither SAPA nor the APA regulations prohibit communications between a party and APA staff. Indeed, as an agency attorney, John Banta does not render decisions or making findings of fact or conclusions of law and, therefore, communications with him are not prohibited. Moreover, even if such communications were prohibited, Banta attests to the fact that he never read the memo (A1401 [Affidavit of John S. Banta, sworn to on 10/4/2012]) and, in any event, the Ulasewicz Memo does not discuss "issues of fact" or "conclusions of law." APA Chairwoman Ulrich, who is also mentioned in the Ulasewicz Memo, unequivocally attests that she never read the memo (A1415-16 [Affidavit of Leilani Ulrich, sworn to on 10/5/2012]).

For the foregoing reasons, this Court should reject Appellants' TWENTY-EIGHTH cause of action.

**A. Appellants' Motion For Leave To Conduct Disclosure**

This Court should affirm Supreme Court, Albany County's (Platkin, J.) decision and order denying Appellants' motion for leave to conduct disclosure because the court did not abuse its discretion (Ai-Axi). It is well-settled that "the trial court is imbued with considerable

discretion to control disclosure, and *only a clear abuse of that discretion will justify this Court's intervention*" (*Mitchell v Stuart*, 293 AD2d 905, 906 [3d Dept 2002] [emphasis added]). Supreme Court's decision denying Appellants' motion for leave to conduct disclosure was not a "clear abuse of discretion" and, therefore, should be affirmed.

Disclosure is not available as of right in a CPLR Article 78 proceeding; it may only be granted upon leave of court (CPLR 408; *Town of Wallkill v New York State Bd. of Real Prop. Servs.*, 274 AD2d 856, 859 [3d Dept. 2000]; *Gen. Elec. Co. v Macejka*, 117 AD2d 896, 897 [3d Dept. 1986]). Leave of court is required "[b]ecause disclosure tends to prolong a case, and is therefore inconsistent with the summary nature of a special proceeding" (*Matter of Town of Pleasant Val. v New York State Bd. of Real Prop. Servs.*, 253 AD2d 8, 15 [2d Dept. 1999]). Accordingly, "discovery is granted only where it is demonstrated that there is need for such relief" (*id.* [emphasis added]). "In order to arrive at a considered determination" on a motion for leave to conduct disclosure, the court "must balance the needs of the party seeking discovery against such opposing interests as expedition and confidentiality" (*Town of Wallkill*, 274 AD2d at 859 [internal quotation marks omitted]).

Throughout this litigation, Appellants have maintained that they have "irrefutable evidence" of *ex parte* communications (A1164-1187 [Affidavit of John Caffry, sworn to on 12/7/12], at ¶ 28; *see also id.* at ¶¶ 24, 25, 30, 32, 35). On this basis, Supreme Court denied their request for disclosure, holding that:

> "The Court is not persuaded that petitioners' interest in pursuing additional evidence of alleged improper ex parte communications outweighs the burdens attendant to the wide ranging disclosure they seek. As petitioners already claim to possess irrefutable proof of their 28th cause of action, there is limited necessity associated with their sweeping effort

to obtain 'even more' evidence" (Avii).

Now, Appellants have changed their tune, asking this Court to grant disclosure "if the Court is not satisfied that they Appellants have proven the Twenty-Eighth Cause of Action" (Apps' Br. at 67). Appellants request for disclosure should be denied because Supreme Court has already passed on the issue and Appellants have failed to demonstrate that Supreme Court abused its discretion in denying their request. Considering Supreme Court's "considerable discretion to control disclosure," and that only a "clear abuse" of that discretion warrants reversal, this Court should affirm Supreme Court's decision denying Appellants leave to conduct disclosure (*Mitchell*, 293 AD2d at 906).

## CONCLUSION

All 29 causes of action brought by Appellants are meritless and must be dismissed. In addition, Judge Platkin's Decision and Order to deny further discovery recognized the abuses of the discovery process inherent in that Petition and its obvious "fishing expedition" characteristics. Judge Platkin's Decision and Order must not be upset.

Dated: January 24, 2014

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