To be argued by:
Susan L. Taylor
Time requested:
15 Minutes

51690

STATE OF NEW YORK
APPELLATE DIVISION : THIRD DEPARTMENT

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

Petitioners-Appellants,

v.

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.

BRIEF FOR RESPONDENTS ADIRONDACK PARK AGENCY AND NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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January 24, 2014

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MISCELLANEOUS

PRELIMINARY STATEMENT

In January 2012, after a multi-year application and conceptual review process, mediation efforts, a 19-day public adjudicatory hearing, and seven days of public deliberation, the bipartisan members of the Adirondack Park Agency (Agency) voted nearly unanimously to approve the development of the Adirondack Club and Resort (ACR) project on private land located in the Town of Tupper Lake, New York. Situated between the Village of Tupper Lake and the Big Tupper ski area, the project is a community of residential dwellings and resort-style amenities. The Big Tupper ski area has been closed as a commercial entity for a number of years, both contributing to and reflecting the region's economic depression. Respondent Preserve Associates, LLC and two related entities (collectively "Preserve"), the sponsors of the ACR project, intend to revitalize and reopen the ski area as the project's centerpiece.

The Agency approved the project, subject to a host of terms and conditions set forth in 14 draft permits. The Agency found that the ACR project, if undertaken in compliance with all the terms and conditions in the permits, is compatible with the Adirondack Park Land Use and Development Plan contained in Executive Law Article 27. And the Agency carefully considered the overall design of the ACR project and Preserve's commitment to protect 86% of the project site as open space and to avoid sensitive habitats, and reasonably found that the project would not have an undue adverse impact on the Park's resources.

The Agency's findings of land use compatibility and no undue adverse impacts are supported by substantial evidence in this multi-thousand page record. Moreover, in making its determination and the 100 findings of fact upon which it rests, the Agency fully complied

with the Adirondack Park Agency Act, its own regulations, and the State Administrative Procedure Act, and protected the rights of all the parties to the proceeding. The Agency's determination should therefore be confirmed and the petition dismissed in its entirety.

In addition to challenging the Agency's determination approving the ACR project, petitioners appeal from an order of Supreme Court, Albany County (Platkin, J.), that, as relevant here, denied their motion pursuant to C.P.L.R. § 408 for wide-ranging discovery with regard to the cause of action in their petition alleging improper *ex parte* communications. But, as Supreme Court properly concluded, petitioners contend that they already have sufficient evidence to attempt to establish their claim, and any need for additional evidence is far outweighed by the delay, burden and expense that additional discovery would entail. Accordingly, the order denying discovery should be affirmed.

QUESTIONS PRESENTED

1. Did the Agency rationally determine that the residential dwellings are compatible with resource management lands on the project site, where the record shows that the dwellings' locations will maximize open space and minimize impacts to natural resources, wildlife and nearby land uses?

2. Did the Agency properly take into account the potential economic benefits of the ACR project, where the Agency is both authorized and obligated to do so by the plain language of Executive Law § 809(10)(e)?

3. Did the Agency rationally determine that the ACR project, if undertaken in compliance with the terms and conditions in the permits, will not have an undue adverse

impact on the Park's wildlife, the wetlands near Cranberry Pond, or the public's use of the Tupper Lake boat launch?

4. Did the Agency rationally determine that the ACR project will not have an undue adverse impact on local government services or finances, where the record shows that Preserve has minimized financial risks and costs to local governments, that local governments will benefit financially from the project, and that they retain the final say over many aspects of the project?

5. Did the 100 detailed findings of fact contained in the Agency's final order comply with the statutory and regulatory requirement that Agency determinations include findings of fact?

6. Did petitioners demonstrate improper *ex parte* communications where they have identified no communications between Preserve and Agency voting members regarding issues of fact or conclusions of law?

7. Did the Agency properly extend to ten years the time frame for the ACR project to reach the "in existence" threshold under the APA Act, considering the large scale of the project and the substantial work and resources that must be expended to meet the many terms and conditions of the permits?

8. Did the court below properly exercise its discretion in denying petitioners' motion for wide-ranging discovery in this article 78 proceeding, where petitioners contend they do not need further discovery to establish their claim and where such extensive discovery would entail unnecessary delay and burden?

9. Are petitioners entitled to an award of attorneys' fees under the Equal Access to Justice Act, where the Agency's approval of the ACR project was rational and based on substantial evidence in the record?

RELEVANT STATUTORY AND REGULATORY BACKGROUND

The "basic purpose" of the Adirondack Park Agency Act (the Act or the APA Act), codified at Article 27 of the Executive Law, is to "insure optimum overall conservation, protection, preservation, development and use" of the Adirondack Park's abundant resources, including but not limited to natural resources. *See* Exec. L. § 801. To that end, the Legislature adopted the Adirondack Park Land Use and Development Plan (Plan) to guide land use planning and development on private land located in the Park. *See Wambat Realty Corp. v. State,* 41 N.Y.2d 490, 491-492 (1977); Exec. L. § 805. The Plan "recognizes the complementary needs of all the people of the state for 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." Exec. L. § 801. The APA Act, including the Plan, is administered and enforced by the 11-member Adirondack Park Agency, which is comprised of the Commissioner of the Department of Environmental Conservation, the Secretary of State, the Commissioner of the Department of Economic Development, and eight other members appointed by the governor with the advice and consent of the Senate. Exec. L. §§ 800, 801, 803.

The Plan and its accompanying map classify the privately-owned land in the Park into six land use areas. *See* Exec. L. §§ 805(1)(a), 805(2); *Wambat Realty*, 41 N.Y.2d at 491 ("comprehensive zoning and planning legislation"); *Matter of Lewis Family Farm v. APA*, 64

A.D.3d 1009, 1011-12 (3d Dep't 2009). The six land use areas are (1) hamlet, (2) moderate intensity, (3) low intensity, (4) rural use, (5) resource management, and (6) industrial. Exec. L. § 805(3)(c)-(h). Petitioners' challenges to the ACR project involve lands classified as moderate intensity and resource management. For these classifications, the Plan lists "primary" and "secondary" compatible uses. *Id.* Primary uses are those "generally considered compatible with the character, purposes, policies, and objectives of such land use area, so long as they are in keeping with the overall intensity guidelines for such area." Exec. L. § 805(3)(a). Secondary uses are those that are "generally compatible with such area depending upon their particular location and impact upon nearby uses and conformity with the overall intensity guidelines for such area." *Id.*

The Act identifies certain specific uses as class A regional projects and "requires those who plan to undertake such projects to apply beforehand to the APA for a permit." *Matter of Lewis Family Farm*, 64 A.D.3d at 1012; *see* Exec. L. §§ 809(1), 809(2)(a). A class A permit may be granted only if the Agency makes findings required by Executive Law § 809(10)(a)-(e), including that the project is compatible with the land use area where it is proposed to be located and will have no undue adverse impact.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Respondent Preserve proposes to develop a residential and resort community on private land located in the Town of Tupper Lake, Franklin County. Much of the land is owned by the Oval Wood Dish Corporation, and is criss-crossed by logging roads built to enable timber harvesting. The permitted community will be phased in over 15 years and will include great camps, residential neighborhoods, a 60-room inn, an outdoor theater and

bandstand, a marina, and other resort amenities (Appendix ["A"]4, A7-9, A2506-08). As the centerpiece of the project, Preserve plans to renovate and reopen the currently closed Big Tupper ski area (A2513).

Preserve intends to retain ownership of the ski area lands, facilities and related amenities, all commonly-owned open space lands, the inn, and the marina (A27). It intends to lease or sell the remaining lands to other developers who will build and sell the residential dwellings (A27). At most, 331 residential buildings will be built on the project site's 6,235± acres — 206 will be single-family dwellings, and 125 will be multiple-family structures located near the ski area (A3-6, A14-18). Most of the residences will be in "moderate intensity" land use areas; 80 of the single-family residences, including 35 great camps, will be built on lands classified under the Plan as "resource management" (A3, A4-6, A5135-36). A map of the project site, depicting the residential development in white, is part of the hearing record (A2628), and, for the convenience of the Court, is attached to this brief as an Addendum. The project will protect as open space approximately 5,400 acres of land, or 86% of the entire project site (A2506, A2628). This open space area is depicted on the attached map as the shaded areas.

The Village and Town of Tupper Lake are part of an economically depressed Adirondack community with a population of about 10,000 (Record ("R") 320). The unemployment rate in the area is 9.2% (R18327), and the Village's population declined by more than 500 in the past two decades, largely because several longtime employers, including the Big Tupper ski area, closed (A2512; *see also* A5721-22, A5726-31). Some 50 years ago, the Oval Wood Dish Corporation partnered with community residents by contributing money and land to create the ski area. Big Tupper opened in 1960 and operated

intermittently for the next 30-odd years, most recently due to the efforts of local volunteers (A2220-21, A2505). The Village and Town of Tupper Lake, as well as many municipal and regional governments, have publicly supported the ACR project (A18307, A2879-87, A4095, A4204, A4384-87, A5713-19, R20184-85, R20622). So, too, have dozens of small businesses, trade groups, and individuals (R18319-24, R18326-765).

A. The Administrative Process

Following an initial request for pre-application conceptual review and the submission of additional supporting materials, the Agency's Regulatory Programs Committee issued advisory recommendations and encouraged Preserve to apply for the necessary permits (A1582-1603, A1605-19, R531-614). For several reasons, including that the ACR project site includes wetlands, acreage within the designated Raquette River Recreational River area, and lands above 2,500 feet, Preserve was required to obtain permits from the Agency pursuant to APA Act §§ 809 and 810, as well as a wetlands permit pursuant to 9 N.Y.C.R.R. §§ 578.2 and 578.3, and a rivers permit pursuant to 9 N.Y.C.R.R. §§ 577.4(a) and 577.5(c)(1). *See* A2.

Preserve submitted its initial permit application for the ACR project to the Agency in the spring of 2005 (A1632-1731 (excerpt), R673-3349). It supplemented its application three times over the course of the next year and a half, in response to Agency requests for additional information; its application was finally deemed complete on December 20, 2006 (A1911-2360 (excerpts), R3354-7583). The Agency then directed the application to public hearing pursuant to Executive Law § 809(3)(d) and 9 N.Y.C.R.R. § 580.2, identifying issues on which evidence would be taken (A2453-58, A2460-62).

In April 2007, the administrative law judge (ALJ) convened a public legislative hearing and then a pre-adjudicatory hearing conference at which dozens of individuals and organizations sought party status (R9394-491). After negotiations and mediation efforts overseen by the ALJ, Preserve submitted revised application materials in June 2010 (A2498-2726 (excerpt), R10098-12359). The ALJ then rendered a final ruling identifying the issues to be addressed at the adjudicatory hearing (A2774-77, R12480-93), and the parties and Agency staff submitted pre-filed written testimony (A5070-671).

In late March 2011, the ALJ convened an adjudicatory hearing that continued over the course of 19 days through June 2011 (A4627). More than 40 parties were involved, including all of the petitioners except Sierra Club. The hearing transcript is 4,486 pages long, and the 22,000±-page hearing record includes 258 exhibits, 236 drawings, 17 closing statements and 12 reply briefs (A4627). As permitted by Agency regulation and at the Agency's direction, the ALJ presided over the hearing, at which 23 witnesses testified, and certified the record to the Agency, but did not issue a report or recommendation on the application (R9333-35). *See* 9 N.Y.C.R.R. § 580.14(a)(5).

At the direction of the Agency's Executive Director, the staff's closing statement included a proposed order "for the sole purpose of providing the Agency Board with a full record"; it was "not intended in any way to suggest a preferred outcome or to prejudice any party to the adjudicatory proceeding" (A4999). Many parties commented on the staff's draft order, although petitioner Protect the Adirondacks! Inc. did not take advantage of that opportunity (A4170). After Preserve committed to permanently protect as open space, via deed restrictions, all of the 4,739.5 acres of resource management lands outside of the residential development envelopes, the staff revised its draft proposed order to reflect

Preserve's commitment (A2628, A4498-99, A4560-61, A4563). The Agency deliberated for more than 30 hours at its regularly scheduled public meetings in November and December 2011, and January 2012, which were telecast and open to the public (A4712).[1] Several Agency staffers with no involvement in the hearing assisted the members in their deliberations, in accordance with 9 N.Y.C.R.R. § 580.18(b) (deliberating and voting members "may have the aid and advice of agency staff other than staff [that] has been or is engaged in the investigative or litigating functions in connection with the review of the project or any factually related matters"). The members asked this "aid and advice" team to prepare draft decision documents for the Agency's consideration at its January 2012 meeting (A1399). After each member briefly explained his or her vote on the record, the Agency issued an order approving the project by a 10-1 vote (A1-39, A4633-40).

B. The January 2012 Final Order and Permits

In its January 31, 2012 order, the Agency made 100 detailed findings of fact, drew conclusions of law, and authorized development of the ACR project subject to a host of terms and conditions set out in 14 separate permits (A1-39). The Agency determined that the project, if undertaken in compliance with the order and all terms and conditions in the permits, would be compatible with moderate intensity and resource management land use areas and would not have an undue adverse impact on, among other things, the Park's water resources, wildlife or wildlife habitats, or amphibians.

Based on record evidence, the Agency also determined that the project would offer substantial economic, recreational, and other benefits (A2512-14, A2676-88, A5372-77).

[1] A4712 is a DVD of the Agency's deliberations, which occurred over several days. This brief cites to date, day and time for ease of reference.

The potential financial benefits included increased tax revenues, short term commercial activities during build-out, and permanently increased commercial opportunities as a result of the resort and residential components of the project (A30-31). The Agency found that about $140 million would be paid in construction wages, that the resort would employ about 230 full-time workers after completion, and that the ski resort, together with the community's new residents, could add more than $27 million to the local economy (A31). The Agency also found that Preserve's plans to rehabilitate and expand the Big Tupper ski area would be particularly beneficial to the local community. *See* A31.

The Agency will issue the 14 draft permits accompanying its order, which set terms and conditions specific to discrete aspects of the project, only after Preserve files a "full updated set of plans" that correspond to the final project (A36-37, A40-276).

C. This Article 78 Proceeding

Petitioners commenced this C.P.L.R. article 78 proceeding on or about March 20, 2012, seeking annulment of the Agency's approval of the ACR project (A277). Filed on June 18, 2012, the amended petition is 153 pages long and contains 29 causes of action alleging violations of the APA Act, the Freshwater Wetlands Act, APA regulations and the State Administrative Procedure Act (A279-432). After respondents filed answers and a return, the parties stipulated to transfer the proceeding to this Court for determination (A1157). In an order entered July 20, 2012, Supreme Court, Albany County (Platkin, J), transferred the proceeding (Rix-xii).

Petitioners subsequently filed a motion in this Court for disclosure pursuant to C.P.L.R. § 408. In an order entered November 29, 2012, this Court denied the motion without prejudice and remitted the proceeding to Supreme Court, Albany County (Rxiii).

Petitioners' subsequent motion for disclosure in Supreme Court was granted to a limited extent and otherwise denied in an order dated March 19, 2013 (Ai-xi). Then, in an order entered April 8, 2013, Supreme Court once again transferred the proceeding to this Court pursuant to C.P.L.R. § 7804(g) (Axiii-xv). In an order entered May 16, 2013, this Court granted petitioners' motion for leave to appeal from Supreme Court's order denying discovery, and consolidated the appeal with the proceeding (Axviii).

ARGUMENT

POINT I

THE AGENCY'S DETERMINATION THAT THE ACR PROJECT MEETS THE APPLICABLE STATUTORY CRITERIA FOR APPROVAL IS RATIONAL AND SUPPORTED BY AMPLE RECORD EVIDENCE

The criteria for approval of the ACR project, which is a proposed class A project in a municipality that has no Agency-approved local land use program, is found in Executive Law § 809(10). To approve the project, the Agency was required to find that it:

(a) is consistent with the Plan;

(b) is compatible with the character description and purposes, policies and objectives of the land use areas where it will be located;

(c) is consistent with the overall intensity guideline for the land use areas involved;

(d) would comply with any applicable shoreline restrictions; and

(e) would not have an undue adverse impact on park resources.

See Exec. L. § 809(10)(a)-(e).

Petitioners do not argue that the ACR project fails to comply with the overall intensity guidelines for the relevant land use areas (A5531-32). Nor is there any dispute that the

project complies with applicable shoreline restrictions. And while petitioners do not specifically argue in their brief to this Court[2] that the ACR project is inconsistent with the Plan (*see* Exec. L. § 809(10)(a)), they do argue that one aspect of the project is incompatible with resource management land use areas, and certain other aspects of the project will have an undue adverse impact on Park resources. But as discussed below, the Agency's determination that the ACR project is compatible with the land use areas and will not have an undue adverse impact on Park resources is rational and is based on substantial evidence contained in the hearing record in this matter. The determination should therefore be confirmed in its entirety.

A. The Agency's Finding That The Residential Development On The ACR Project Site Is Compatible With Resource Management Lands Is Rational And Supported By Substantial Evidence

Pursuant to § 809(10)(b) of the Plan, the Agency may not approve a project unless it is "compatible with the character description and purposes, policies and objectives" of the land use area on which the project will be located. A project is presumed to be compatible if it is listed in § 805 as a "primary" compatible use for that area. Exec. L. §§ 809(10)(b), 805(3)(a). A finding of compatibility for secondary uses depends on the project's "particular location" on the land use area and its "impact upon nearby uses." *Id.* Narrative descriptions that guide the Agency in reviewing compatibility are established in § 805(3)(g)(1) and (2).

In their brief, petitioners challenge as incompatible only the 80 single-family dwellings, including 35 great camps, in the resource management land use area. Single-family dwellings are included on the list of secondary compatible uses on resource

[2] Arguments not advanced in a brief are abandoned. *Matter of O'Brien v. Hevesi,* 12 A.D.3d 895 (3d Dep't 2004); *Matter of Lee TT v. Wing,* 248 A.D.2d 785 (3d Dep't 1998).

management lands. Exec. L. § 805(3)(g)(4). Therefore, the 80 residences are presumptively compatible depending upon their particular location and impact upon nearby uses. Exec. L. § 805(3)(a); R21684; *Matter of Richland Acres Dev. Corp. v. APA,* 161 A.D.2d 1011, 1013 (3d Dep't 1990). The Agency properly considered location and impacts to nearby uses, in the context of the guiding factors found in § 805(3)(g)(1) and (2) of the Plan, when making its compatibility determination for these residences.

The record demonstrates that Preserve carefully selected the locations proposed for residential development on the resource management areas of the project site. During the application process, Preserve's landscape architects and environmental scientists, usually accompanied by Agency staff engineers, biologists, and project review staff, made multiple visits to the land (A5077, A5094, A5125-26, A5252, A5301). These professionals mapped and analyzed soils, wetlands, visual and open space resources, slopes and topography, access and egress, storm water management, potable water supply, sewage, project phasing, grading and drainage, erosion control, landscaping, signage, utilities and outdoor lighting plans (A5077-78, A2589-627, A5529). Preserve also analyzed the existence of and potential for impacts to wildlife and wildlife habitats on the resource management lands (A1649-51, A1731, A1672, A1744-50, A1761-62, A1914, A2142-45, A2197, A2219-34, A2352, A2354-60, A6600-17).

Based on the information gathered during these site visits, and after studying and analyzing the project's potential impacts on natural resources and wildlife, Preserve centered development around the existing ski area and other already-developed areas close to New York State Route 30 (A2220, A2229, A2628, A5548-49). No development will occur within the designated quarter-mile-wide recreational river area along the approximately 2.5 miles of

Raquette River frontage that comprises the northeastern boundary of the project site (A20, A2228, A2628, A5540-42). In fact, with the exception of the proposed marina on Tupper Lake, no development is proposed on the shoreline or within 100 feet of any body of water within or bordering the project site, including Simond, Moody and Cranberry Ponds (A2628). Further, almost all of the proposed development is located more than 100 feet, and in many cases 200 feet, from the wetlands on the project site (A6050, R10439-41). Of the 243 acres of delineated wetlands on the project site, less than an acre and a half will be lost, and as mitigation for that loss, two and a half acres will be added (A21, A1647, R10505).

As a result of this analysis, Preserve revised its application to reduce the proposed areas of residential development on resource management lands. Preserve eliminated the entire 36-dwelling East Ridge neighborhood, as well as five dwellings in the West Slopeside neighborhood (A5280). Preserve also reconfigured the great camp lots, lessening their impacts on natural resources by reducing the areas where development could occur (A2516-17, A2531-38, A2589-627, A5547-48, A6560-63, A6621, R7424, R10440-41).

The general design of the project provides for appropriate storm water management, control of sediment and erosion, and minimal visual impacts (A32, A5123-24, A5145-52, A5251-59, A5263-65, A5283-84, A5309-10, A5317-18, A5535, A5544, R10496-503). It avoids sensitive resources (A5076-77, A5306-07, A5315-17, A5545, A6571-76), including steep slopes (A5535, A5548, A6593), wetlands (A33, A3562, A6050-51), the Raquette River corridor (A5540-42) and wildlife habitats (A2228-29, A2233-34, A2537-38, A5541-42, A5547).

Moreover, the 80 resource management residences included in Preserve's final application are carefully sited. Existing routes were used as roads and driveways, where

possible (A5550-51), and every proposed residence is located within a development envelope selected to conform with and limit impacts to the natural resources of the specific site (A2589-627, A5550-51). Wastewater treatment and water supply systems (where required), electric cables, and other utilities were proposed on a site-by-site basis, as appropriate for each dwelling's location (A10-11). In addition, stormwater management was proposed as necessary, based on the topography, soils, and other characteristics of each site (A2589-627, R10496-503).

Agency members discussed at length the potential impacts of allowing these 80 dwellings to be constructed in their proposed locations. *See, e.g.,* A4712 (Thurs., Dec. 15, 2011 [2:55:00-4:30:00]); *id.* (Weds., Jan. 18, 2012 [2:01:26-2:06:22]); *id.* (Thurs., Jan. 19, 2012 [00:56:30-1:25:00]). The members also reviewed the draft conditions associated with the proposed dwellings, and incorporated these conditions into the final order, along with additional requirements (A4712 (Thurs., Dec. 15, 2011 [2:55:00-4:30:00]); *id.* (Thurs., Jan. 19, 2012 [3:09:00-4:00:00])). The Agency's conclusion that the 80 proposed residences are compatible with the resource management land use area given their specific locations was rational and supported by substantial evidence.

Also rational and supported by substantial evidence is the Agency's conclusion that these proposed homes are compatible in light of their "impact upon nearby uses." Exec. L. § 805(3)(a). The project site's 6,235± acres are situated between the Village of Tupper Lake and the Big Tupper ski area. The site is also bounded to the south and east by privately-held, undeveloped lands and the publicly-owned Saranac Lake Wild Forest Area (79,000 acres) (A2233-34). To the east of these lands lies the publicly-owned High Peaks Wilderness Area (193,000 acres) (A2233-34). As required by the order, *all* of the 4,700+ acres of resource

management lands on the project site, outside of the carefully selected residential development envelopes, will be permanently protected as open space by deed restrictions (A33, A46-47, A84-85; A103, A4432, A4498-99). No development is allowed along the approximately 2.5 miles of Raquette River frontage, near the water bodies, in or adjacent to wetlands, or within or adjacent to the deer-wintering yard on the site (A33, A2628, A5540-42, R1011, R10438-41).

In addition to requiring an open space buffer between the resource management dwelling locations and the nearby public and private lands, the Agency required that the proposed residences be located and sized exactly as authorized, with only brown or dark green exterior finishes and downward facing outdoor lighting (A34-35). The order and permits also establish strict vegetative clearing limits around the dwellings (A80-81). The Agency found that these conditions will ensure that the residences will be "highly screened during both daytime and nighttime periods" from offsite locations (A35).

Petitioners nevertheless argue that the 80 single-family dwellings are incompatible because they do not comply with § 805(3)(g)(2), which describes the Legislature's goals for resource management lands (Br. at 31-41). But § 805(3)(g)(2) does not provide specific thresholds for approval. Rather, through narrative descriptions of the character and purposes, policies and objectives of resource management lands, §§ 805(3)(g)(1) and (2) guide the Agency in determining compatibility under the presumptions established in §§ 805(3)(a) and 809(10)(b). Although the Agency must consider these descriptive provisions in determining whether a proposed project is "compatible," it retains discretion in applying them. The Agency reads these sections together with the presumption of compatibility.

Petitioners focus (Br. at 35-41) on language in § 805(3)(g)(2) stating that "resource management areas will allow for residential development on *substantial acreages* or *in small clusters* on carefully selected and well-designed sites" (emphasis added). However, as made clear in the hearing exhibits petitioners themselves rely upon, *see, e.g.,* A2952-54, A2959-61 (Br. at 36), neither term is defined in the statute, and each is inherently subjective. Whether dwellings are on substantial acreage or in small clusters is not quantifiable and depends on the characteristics of the project and its location, as well as the constraints set by other statutory requirements. As discussed below, the Agency properly considered whether the 80 homes are on substantial acreages or in small clusters when making its determination of compatibility with the "purposes, policies and objectives" set forth in § 805(3)(g)(2).

First, record evidence shows that the 8 large great camps will be located on "substantial acreage" ranging from 111 acres to 1,211 acres (A2517, A2528, A2532-33, A5546). Moreover, the 27 smaller great camps are "clustered on both sides of the ski area to take advantage of that resort amenity" (A2528, A5548-60). And petitioners do not dispute in their brief that the 44 residences in the West Face Expansion neighborhood, which are grouped together on one to five acre lots, are in a "small cluster."

Second, as the members pointed out in a lengthy discussion during their deliberations on Thursday, January 19, 2012, the site is unique (A4712 [Thurs., Jan. 19, 2012 [00:56:30-1:25:00]). Preserve controls a very large parcel (6,235± acres) bounded on one side by a village and surrounding a ski area. It has been heavily logged over several decades. Preserve's design professionals avoided sensitive resources (A5076-77, A5306-07, A5315-17, A5545, A6571-76), including steep slopes (A5535, A5548, A6593), wetlands (A33, A3562, A6050-51), the designated quarter-mile wide Raquette River corridor (A5540-42)

and wildlife habitats (A2228-29, A2233-34, A2537-38, A5541-42, A5547). Approximately 86% of the project site will remain preserved as open space (A2628). Within these parameters, the Agency exercised its discretion reasonably in concluding that the project satisfies §§ 805(3)(g)(1) and (2).

B. The Agency's Finding That The Project Will Not Have An Undue Adverse Impact On The Resources Of The Adirondack Park Is Rational And Supported By Substantial Evidence

Pursuant to § 809(10)(e) of the Plan, the Agency may not approve a class A regional project unless it "would not have an undue adverse impact upon the natural, scenic, aesthetic, ecological, wildlife, historic, recreational or open space resources of the Park or upon the ability of the public to provide supporting facilities and services made necessary by the project." Exec. L. § 809(10)(e). In making this determination, the Legislature specifically directed the Agency to "tak[e] into account the commercial, industrial, residential, recreational or other benefits that might be derived from the project." *Id.* The Agency must also consider pertinent "development considerations," which are listed in § 805(4). *See* Exec. L. § 805(4).

In this case, the Agency properly considered a host of development considerations, including potential adverse impacts upon wildlife; the geology of the site and nearby land uses; the ability of local governments to provide necessary facilities, services and financing; and compliance with other governmental controls, as well as the project's potential benefits. The Agency's determination that the ACR project would not have an "undue" adverse impact on Park resources is rational and amply supported by substantial record evidence and should be confirmed.

That a different decision might also have been rational does not render the Agency's decision irrational, arbitrary or capricious. *Matter of Neighborhood Cleaners Assoc. v. DEC*, 299 A.D.2d 790, 792-93 (3d Dep't 2002); *Matter of Friedman v. APA*, 165 A.D.2d 33, 38 (3d Dep't 1991). Moreover, where, as here, the record contains sufficient evidence to support the granting or denial of a permit, "deference must be given to the discretion and commonsense judgments of the" decision-maker. *Retail Prop. Trust v. Board of Zoning Appeals*, 98 N.Y.2d 190, 196 (2002); *Matter of Schaller v. Town of New Paltz Zoning Bd. of Appeals*, 108 A.D.3d 821, 822-823 (3d Dep't 2013). It is "not the province of the courts to second-guess thoughtful agency decisionmaking." *Matter of Riverkeeper, Inc. v. Planning Bd. of Town of Southeast*, 9 N.Y.3d 219, 232 (2007).

1. The APA Act requires the Agency to take potential benefits into account in determining whether to approve a project.

As a threshold matter, petitioners' contention (Br. at 52-57) that the Agency approved the project after weighing and balancing its economic benefits against its adverse impacts on Park resources, and that the Agency had no statutory authority to do so, need not detain the Court long. Section 809(10)(e) of the Plan provides that the Agency may not approve a project like the one at issue here unless it finds that the project

> would not have an undue adverse impact upon the natural, scenic, aesthetic, ecological, wildlife, historic, recreational or open space resources of the park or upon the ability of the public to provide supporting facilities and services made necessary by the project, *taking into account the commercial, industrial, residential, recreational or other benefits that might be derived from the project.*

Exec. L. § 809(10)(e) (emphasis added). Pursuant to this clear language, the Agency is both authorized and obligated to consider the potential benefits of a proposed project.

Petitioners' suggestion that the Agency engaged in a "more good than harm" type of cost-benefit analysis prior to approving the ACR project is not supported by the hearing record. Petitioners rely on cherry-picked remarks made by some of the Agency members during their seven days of deliberations (Br. at 53 (*citing* A1116-20)). But careful review of the audiotape of the deliberations, which is included in the record (A4712), reveals that petitioners have not accurately "transcribed" or characterized the members' statements and have taken them out of context. *See, e.g.,* A1117-18. For example, petitioners point to Agency member Richard Booth's statement that the Agency's job is to "weigh the benefits against the impacts" (Br. at 53, A1117), but they ignore Mr. Booth's clarifying statement at a subsequent meeting that while "the amount of benefits is important" it is "not an equation" (A1118).[3] Petitioners also quote Agency Counsel John Banta, a member of the aid and advice staff, as saying that "in considering undue adverse impact, you are allowed to take your own view of what the record says about benefits" (A1117 ¶ 179), but that alleged quote is inaccurate and omits the remainder of Mr. Banta's remarks that the Agency's decision-making process "is not a cost-benefit analysis." *Compare* A1117 ¶ 179 *with* A4712 (Thurs., Dec. 2011 [1:09:25]).

The hearing record establishes that the Agency took into account the benefits that surrounding communities might derive from the ACR project if it were approved and ultimately proved to be viable. And that was entirely proper because the Legislature specifically directed the Agency to do so in § 809(10)(e) (Agency "shall take into account the commercial, industrial . . . or other benefits that might be derived from the project").

[3] Petitioners' complaint that Mr. Booth engaged in improper cost-benefit analysis is surprising since he was the sole Agency member who voted against the project (A4634).

Compare Boreali v. Axelrod, 71 N.Y.2d 1, 12 (1987) (anti-smoking regulations promulgated by Department of Health exceeded scope of authority delegated to it where agency was not "given any legislative guidelines at all for determining how the competing concerns of public health and economic cost are to be weighed").

Attempting to avoid the plain meaning of the language in § 809(10)(e), petitioners argue that it is ambiguous. According to petitioners, the Legislature's direction to "tak[e] into account" the benefits that might be derived from a project was intended to modify only "the ability of the public to provide supporting facilities and services" (Br. at 56). But any ambiguity that might exist in § 809(10)(e) is clarified by the plain language in § 805(4), which provides that:

> Any burden on the public in providing facilities and services made necessary by such land use and development or subdivision of land shall also be taken into account, as well as any commercial, industrial, residential, recreational or other benefits which might be derived therefrom.

Exec. L. § 805(4). This language makes clear that the public burden of a project is to be evaluated separately from any benefits that might flow from it and that the Agency may properly consider both when determining whether to approve a project.

This construction harmonizes the statute's several purposes. In claiming that the Agency lacks the authority to take economic benefits into account, petitioners argue that the Agency is required to protect the Park's natural resources above all else (Br. at 57). But petitioners ignore the Legislature's expressed purposes for promulgating the APA Act: "to insure optimum overall conservation, protection, preservation, *development and use*" of those resources, and to recognize the needs "of the park's permanent, seasonal and transient populations for growth and service areas, employment, and a *strong economic base*." Exec.

L. § 801 (emphasis added). Indeed, the Legislature included the Commissioner of the Department of Economic Development as a member of the Agency in recognition of the fact that North Country residents "have got to look at constant economic development if they are going to keep their head above water." *See* Senate Debate (May 14, 1973) at 1400 (Sen. Bill 6097). Thus, petitioners' contention that the Agency is not authorized to consider the potential economic benefits of the proposed ACR project falls flat.

2. Substantial evidence supports the Agency's finding that the ACR project will not have an undue adverse impact on the Park's wildlife or wildlife habitats.

In determining whether a proposed project would have an "undue adverse impact" on Park resources, the Agency must assess a variety of "development considerations," which are listed in § 805(4) of the Plan. *See* Exec. L. § 805(4). One pertinent development consideration is the ACR project's potential adverse impacts on wildlife, habitats of rare and endangered species, and key wildlife habitats. *See* Exec. L. §§ 805(4)(a)(5)(c). The record in this case shows that the Agency carefully reviewed those potential impacts and assessed whether the ACR project was designed to avoid or minimize them. In doing so, the Agency took into account Preserve's commitment to preserve about 5,400 of the site's 6,235 acres as open space, including all of the 4,739± acres of resource management lands outside of the residential development envelopes. The Agency rationally found that the ACR project's potential adverse impacts on wildlife and wildlife habitats were not "undue."

The record shows that several fish and wildlife species are present at various locations on the project site, including whitetail deer, black bear, porcupine, coyote, beaver, common loon, ruffed grouse, pileated woodpecker, turkey, red-tailed hawk, bass, trout, salmon, perch, smelt and whitefish, rose-breasted grosbeak, northern pike, walleye, pumpkinseed, white

sucker, and redbelly dace (A1696-97, A2228). Petitioner Thompson also testified to extensive observations of bird species on and near the project site (A3693-722, A5684-85). Adirondack Wild's expert identified 11 amphibian species adjacent to the site (A22, A2997-98). However, letters from the New York State Natural Heritage Program, the DEC, and the United States Fish and Wildlife Service confirmed that there was no indication of endangered or threatened wildlife species on the project site (A21-22, A1744-50, A1761-62). Moreover, other than a deer-wintering yard on the northeast portion of the site that will be part of the site's permanently protected open space (A22, A33, A2227-28, A2628, A5541-42), no key wildlife habitats or habitats of rare and endangered species were identified on the project site (A21-22, A1695-96, A1744-50, A1761-62, A2227-28, A2356, A5077, Transcript ("T") 2528-31[4]).

In addition to reviewing "historical records for threatened and endangered species," Preserve conducted several walk-through visual site investigations and completed "qualitative biological surveys including onsite visual assessments as defined in Agency guidance 'Guidelines for Biological Surveys'" (Guidelines) (A21; *see also* A4803). Further, in response to requests for information from Agency staff during the development of its application, Preserve also provided site assessment analysis with respect to wildlife and wildlife habitats (A2219-34, A2354-60).

Based on the information it gathered, Preserve designed the project in a manner that extensively protects open space to minimize potential impacts to wildlife and wildlife habitats. Approximately 86% of the 6,235± acres comprising the entire project site is

[4] "T" refers to the adjudicatory hearing transcript; this cite is in record on appeal vol. 13.

designated as open space (A2504, A2508, A2628, A5536, R10438). In the resource management land use area, all of the 4,739± acres, outside of the residential development envelopes, will be protected from development by deed restrictions (A33, A46-47, A84-85, A102, A223-25, A2628). This protected open space includes the wildlife habitat in and around the Raquette River area, wetlands, water bodies, and the deer-wintering yard on the project site (A33, A2228, A2628, R10438-41). Moreover, this habitat directly abuts 300,000 acres of undeveloped private and public lands (A2219-20, A2229, A2233-34, A5547, A5828-30). Based on the foregoing, it was rational for the Agency to conclude that the overall design of the project, coupled with the extensive protection of open space on the project site, would minimize potential adverse impacts upon wildlife and wildlife habitat (A33, A1719, A2229, A2537-38, A2628, A6622, A6675-77).

Petitioners' challenge (Br. at 22) to the adequacy of the biological surveys that Preserve conducted is meritless. The Agency's "Guidelines for Biological Surveys" state that "each application will be judged on its particular merits, taking into account other information known about the project site" (A4804). In most cases, only a "routine" qualitative survey, consisting of a walk-through of the project site, is required (A4805). The Agency requires a "full-scale," quantitative biological survey only where there are "compelling reasons," such as "the recognition of an impact to a biological resource and the need to mitigate impacts" or known potential impacts to threatened or endangered species (A4805). Here, no impacts to threatened or endangered species were identified. And, as demonstrated above, any recognized impacts on biological resources were mitigated by the project design and Preserve's commitment to conserve 86% of the project site as open space and avoid development near sensitive habitats. It was therefore rational and entirely proper

for the Agency to assess the project's potential adverse impacts on wildlife and wildlife habitats using the results of Preserve's "routine" survey.

That the Agency has required "full-scale" surveys in other cases (Br. at 22) is irrelevant, since each project is assessed on a case-by-case basis. And although petitioners contend that Agency staff had asked Preserve to complete a full scale quantitative survey (Br. at 21-22), the Agency members were themselves satisfied that Preserve's careful design of the ACR project, which avoided sensitive resources and protected most of the project site as open space, adequately protected wildlife and wildlife habitats.

Petitioners' contention (Br. at 21) that the Agency violated the State Administrative Procedure Act (SAPA) by referring to, relying on, or using the Guidelines because they are not part of the record and are not publicly available is meritless. In general, SAPA requires that evidence meet certain standards and be made part of the official record. *See* SAPA §§ 302 (findings of fact must be based on evidence and matters officially noted), 306 (rules of evidence applicable to administrative hearings); *see also* 9 N.Y.C.R.R. § 580.15 (same). By their own terms, the Guidelines "are guidelines, not rules" (A4804). And they are certainly not evidence. Thus, petitioners' reliance on *Simpson v. Wolansky*, 38 N.Y.2d 391 (1975), and *Beverly Farms, Inc. v. Dyson*, 53 A.D.2d 720 (3d Dep't 1976), which involved determinations that were based on evidence outside the hearing record, is misplaced. Even if the Guidelines were evidence, which they are not, their use in this matter did not strip any "party whose rights are being determined [of the chance] to be fully apprised of the proof to be considered, with the concomitant opportunity to cross-examine witnesses, inspect documents and offer evidence in rebuttal or explanation." *Simpson*, 38 N.Y.2d at 395. The Agency properly relied on the Guidelines. *See Matter of Friedman,* 165 A.D.2d at 36.

Finally, petitioners' criticisms of the credentials of Preserve's witnesses, their credibility, and Preserve's decision not to submit rebuttal testimony get them nowhere (Br. at 29). In *Matter of Richland Acres Dev. Corp.,* 161 A.D.2d at 1012, this Court confronted similar claims. There, the petitioner claimed that "since respondent offered no expert testimony of adverse impacts, the findings were based on conjecture and speculation." The Court rejected that claim: "We disagree. Viewed as a whole, the record, including the testimony of petitioner's experts, provides an adequate basis for [the Agency's] findings." 161 A.D.2d at 1012.

This Court should reach the same conclusion here. Although petitioners disagree with the Agency's conclusion that the qualitative biological studies that Preserve conducted provided the Agency with sufficient information to assess whether the ACR project had "undue" potential adverse impacts on wildlife and/or wildlife habitats, there is no requirement that an environmental review address every conceivable environmental impact. In *Matter of Save the Pine Bush v. Common Council of Albany,* 13 N.Y.3d 297 (2009), the Court of Appeals applied a "rule of reason" to bring to a close the extended review of the environmental impacts of a hotel proposed for an area near Albany's protected Pine Bush area. This "'rule of reason' is applicable not only to an agency's judgments about the environmental concerns it investigates, but to its decisions about which matters require investigation." 13 N.Y.3d at 308. Here, the Agency's review of the ACR project's potential adverse impacts upon wildlife and wildlife habitats was reasonable. Its finding that those impacts would not be "undue" was rational, where Preserve's project design avoids sensitive resources and maximizes protected open space, and is supported by substantial evidence in

the record. *Cf. Matter of Save the Pine Bush,* 13 N.Y.3d at 300, 307; *Matter of Jackson v. UDC,* 67 N.Y.2d 400, 421 (1986), *cert. denied,* 537 U.S. 1191 (2003).

3. Substantial evidence supports the Agency's finding that snowmaking will not have an undue adverse impact on Cranberry Pond.

In connection with Preserve's proposal to use Cranberry Pond for snowmaking purposes, the Agency was required to consider potential adverse impacts on waters, wetlands, and fish. Exec. L. § 805(4)(a)(1), (5)(e), (6)(a). As discussed below, given the evidence presented at the hearing regarding the current and historic uses of Cranberry Pond, the Agency acted reasonably in conditionally approving Preserve's use of the pond for snowmaking for an initial trial period, subject to further study to fine-tune mitigation of any adverse impacts.

Preserve plans to refurbish the now-closed Big Tupper ski area. However, the viability of the ski area depends upon the ability to make snow (A23). In the late 1990s, the previous owners of the Big Tupper ski area had permits to withdraw water from the 26-acre Cranberry Pond for snowmaking (A2511, A2582, A5580-81). Cranberry Pond was created in part by human activity, is partially maintained by a beaver dam, and is fed by natural and rerouted drainage off a nearby mountain (A2415-16, A5579). The pond's volume and shape fluctuate over time based on beaver activity (A2416, A3029-30, A5274). The Town of Tupper Lake draws water from Cranberry Pond and uses it to irrigate the nearby municipal golf course (A5579, A6048).

Evidence in the record establishes that withdrawing water from nearby Tupper Lake for snowmaking would cost Preserve in excess of $3 million, whereas continuing the historic use of Cranberry Pond as the source of water for snowmaking would cost less than $600,000

(A2587). Preserve proposed using Cranberry Pond as the water source for snowmaking because in its view, there is no economically feasible alternative to using Cranberry Pond, at least in the initial phases of the project (A23, A2561, A2587, A5267-68, A5275, A5579-81, R6559, R23544). Data from the 1997-98 ski season showed that withdrawals of water from Cranberry Pond exceeded natural input on only 14 days (A2240, R23539). Expert testimony at the hearing established that after factoring in Preserve's proposed expansion of the ski area, withdrawals from the pond would potentially exceed natural input on about 16 days (A2243, R23540-42[5]), only two days more than during the '97-'98 season. Record evidence also established that the pond's water volume would be reduced less than 3 inches and would be restored in a few days (A2247, A6029-30, R23540, R23542).

There was conflicting evidence concerning the potential environmental impacts of this temporary diminution in water volume. *Compare* A2248, A6029-30, R23537, R23542 *with* A5230, A5583, A6038, A6048. Preserve's witnesses testified that there would be no environmental impacts because the drawdowns would be infrequent, minimal and of short duration (A6029-30, R23537, R23542). Agency staff thought some impacts were likely (A5583, A6038, A6408). And a witness for Adirondack Wild opined that the drawdowns would likely have a significant impact on amphibians (A5230). Notably, however, there was no evidence that the water withdrawals during the 1997-98 ski season had adverse environmental impacts.

After considering all the evidence, the Agency acknowledged that water levels in Cranberry Pond would diminish if withdrawals exceeded natural daily inflows (A33). But

[5] Pre-filed testimony of Kevin Franke appended to Transcript (record on appeal vol. 10).

the Agency concluded that it could not determine what, if any, impact a "temporary net loss of flow (and pond volume)" would have on the fish, wildlife and other biota within the pond (A33); *see also* A5583, A6038, A6048. Accordingly, as a condition of the permit pertaining to the ski area and resort, the Agency has required Preserve to prepare a detailed wetland and quantitative biological survey and impact analysis plan with respect to Cranberry Pond and submit it to the Agency for approval before withdrawing any water from the pond for snowmaking purposes (A49). If the Agency approves that plan, Preserve will be allowed to withdraw water for a two-year trial period, during which Preserve will be required to monitor impacts to the pond and its wetlands and submit a yearly detailed monitoring report to the Agency (A34, A49). The Agency has limited the term of the initial permit to five years, reserving the right to limit or terminate the water withdrawals after the two-year trial period if the withdrawals substantially impair wetland functions including wildlife (A34, A49, A6038-39).

The water in Cranberry Pond had previously been used for snowmaking, and record evidence established that any loss of water volume due to snowmaking would be both minimal and temporary. Moreover, the record evidence concerning potential adverse impacts was, at best, conflicting. The Agency was not required to accept the testimony that supported petitioners' position. *See Matter of Friedman*, 165 A.D.2d at 38. The Agency's decision to require Preserve to conduct additional studies both prior to, and during, its use of the pond for snowmaking so that any required mitigation efforts could be fine-tuned is rational in light of the conflicting evidence. On these facts, it was rational for the Agency to permit continued temporary use of Cranberry Pond for snowmaking, and to conclude that such use would not result in an undue adverse impact.

Petitioners' contention (Br. at 25-26) that the Agency's approval of the use of Cranberry Pond for snowmaking violates the New York State Freshwater Wetlands Act, codified in article 24 of the Environmental Conservation Law, is also without merit. The Agency has the authority under the Wetlands Act to review and approve projects involving freshwater wetlands in the Adirondack Park. *See* ECL §§ 24-0801(2), 24-0511; 9 N.Y.C.R.R. Part 578. Wetlands are assigned a value rating from 1 (highest value) to 4 (lowest) according to their "overall worth." 9 N.Y.C.R.R. § 578.5. A large wetland complex with a value rating of "2" adjoins Cranberry Pond (A1899). The Agency may issue a permit for a proposed activity in a wetland area that is rated 2 if it finds that the proposed activity would result in "minimal degradation or destruction of the wetlands or its associated values," and is *either* "the only alternative which reasonably can accomplish" the project sponsor's goals *or* "alternatively . . . is the only alternative which provides an essential public benefit." 9 N.Y.C.R.R. § 578.10(a)(2).

Here, Preserve's proposed use of Cranberry Lake for snowmaking met these regulatory requirements. The record established that the cost of using Tupper Lake for snowmaking is currently prohibitive, and Cranberry Lake is the only economically feasible option in the project's initial phase (A2561, A2587, A5267-68, A5275). Thus, it was rational for the Agency to conclude that using Cranberry Lake temporarily was "the only alternative which reasonably can accomplish" Preserve's goal of renovating and reopening the Big Tupper ski area (*see id.* § 578.10(a)(2)). Having reached that conclusion, it was not necessary for the Agency to consider whether the use of Cranberry Pond was "the only alternative which provides an essential public benefit." Petitioners' contention (Br. at 25-26) that the Agency could not issue a permit unless it also made the latter finding is based on a

misreading of the regulation, stating, in plain language, that a proposed activity must be *either* the only alternative that "reasonably can accomplish" the project sponsor's goals *"or alternatively"* the only activity providing an essential public benefit. 9 N.Y.C.R.R. § 578.10(a)(2)(ii), (iii) (emphasis added).

The permit pertaining to the ski area and resort requires Preserve to prepare a detailed wetland and quantitative biological survey and impact analysis plan with respect to Cranberry Pond and submit it to the Agency for approval. Contrary to petitioners' contention (Br. at 16-18, 27), the Agency's decision to require submission of this "after-the-fact" study does not render the Agency's determination arbitrary and capricious. Record evidence supports the finding that the withdrawal of water will have minimal impact on the wetlands and their functions. *See* 9 N.Y.C.R.R. § 578.10(a)(2)(ii); A6029-30, R23537, R23545. The Agency unquestionably has the statutory authority to impose conditional permits and to issue permits for trial periods. *See* Exec. L. § 809(13). The Agency's decision to require the completion of additional studies while Preserve continues to use Cranberry Pond during the trial period rationally reflects the Agency's efforts to mitigate potential impacts on wetlands and wildlife.

4. Substantial evidence supports the Agency's finding that residential development will not have an undue adverse impact on amphibians.

Similarly, and contrary to petitioners' contention (Br. at 15-19), the Agency's decision to require Preserve to submit additional amphibian surveys as a condition of the permits related to the project's residential development does not render the Agency's determination arbitrary and capricious. The record includes evidence that 11 amphibian species exist near roads traversing the project site; none is endangered or threatened (A22,

A2997-98, A5455, A6026). The Agency found that the absence of curbs on project roadways, as well as the general design of the project, which avoided wetlands, maintained a buffer from wetlands, and preserved open space, would minimize adverse impacts on amphibians (A33). However, the Agency acknowledged that some residential development was proposed on resource management lands in areas of "upland amphibian habitat," which could potentially affect amphibian migration patterns (A22). Accordingly, the Agency required Preserve to conduct a "comprehensive amphibian survey" and "identify critical habitat areas and amphibian migration corridors" on certain of the resource management lands that "require additional protection" (A22, A33). This additional survey requirement was imposed as a permit condition in connection with several of the residential neighborhoods. *See* A96-97 (Small Eastern Great Camp permit); A217-18 (Small Western Great Camp permit); A236-37 (West Face Expansion permit). Before any road construction or conveyance of lots, the comprehensive amphibian survey will be complete, and additional measures will be implemented to protect any amphibian species that might face adverse impacts as a result of the residential development (A22). Based on the survey results, Preserve will be required to implement "best management practices and mitigation techniques prior to construction to further protect amphibian habitat" (A97, A218, A236, A252).

The Agency's decision to impose this additional survey requirement does not render its approval of the ACR project arbitrary or capricious. Rather, it reflects the Agency's effort to fine-tune mitigation of adverse impacts as the project is phased in (A36) (the project "complies with the applicable approval criteria" if "undertaken in compliance with the following and with all terms and conditions in the permits issued pursuant to this Order").

5. Substantial evidence supports the Agency's finding that the proposed boat launch service will not have undue adverse impacts.

The Agency's determination that Preserve's proposed use of the Tupper Lake boat launch would not have an undue adverse impact upon the recreational resources of the Park or the public's ability to use the boat launch, and otherwise complied with the Act, is both rational and supported by substantial evidence. Petitioners' challenge (Br. at 41-47) to the Agency's approval of this part of the ACR project should therefore be rejected.

The Tupper Lake boat launch is located on public land on State Route 30 and is operated by DEC (A24). Preserve proposes to use the boat launch to launch boats owned by project homeowners. ACR staff will transport the homeowners' boats to the launch, and a separate shuttle service will transport the homeowners to the marina, where they will meet their boats. *See* A9. Preserve will neither charge homeowners for the shuttle service nor use any of the launch's parking spaces for trailers or cars.

Petitioners' contention that this limited use of the boat launch was unlawful under the APA Act misses the mark for several reasons. The use of public land in the Adirondack Park is controlled by the provisions of the State Land Master Plan (Executive Law § 816), not the Adirondack Park Land Use and Development Plan contained in Executive Law Article 27, which controls only the use and development of private land. *See* Exec. L. § 805(1). DEC is responsible for the administration of the boat launch, which is on state-owned land (A5129). Like the private land Plan, the State Land Master Plan "recognizes the unique land ownership pattern within the Adirondack Park – the intermingling of public and private lands in a checkerboard pattern" (A5096-97).

Petitioners' contention (Br. at 42, 45) that the ACR homeowners' use of the boat launch will "usurp" the entire capacity of the boat launch, leaving no opportunity for the general public to use it and transforming the ACR homeowners into illegal "de facto" operators of public land in violation of the State constitution, is misguided. Preserve does not intend to use any of the parking spaces at the boat launch, leaving them all free for public use (A5098). As the ACR project builds out over time, the launching of the boats of ACR homeowners may "cause congestion and user conflicts" (A5131), but that is an issue subject to DEC's "administration and regulation of the boat launch," and "it is not known if and when" that might occur (A531-32). Moreover, DEC, which operates the boat launch, expressed no concerns about Preserve's proposed use of the boat launch (A24-25, A5095, A5761), which is currently underutilized (A5132, A5761). And if there ever is a lack of capacity at the launch, DEC's unit management plan process is the appropriate way of addressing it (A5761-62). In the meantime, petitioners' claim is speculative and unripe. *See, e.g., Matter of Adirondack Council, Inc. v. APA*, 92 A.D.3d 188, 191 (3d Dep't 2012). And finally, as the Agency properly found, "[a]s members of the public, project owners and their guests are entitled to use the State boat launch and other public facilities" (A24-25).

6. Substantial evidence supports the Agency's finding that the ACR project will not have undue adverse fiscal impacts on local governments.

The Agency's determination that development of the ACR project will not have undue adverse impacts on local governmental services or finances is rational and supported by substantial evidence. The record establishes that Preserve has taken adequate steps to minimize financial risks or costs to local governments and that local governments will, in fact, benefit financially even if the project is not fully completed on schedule. Moreover, the

affected municipalities, which have publicly expressed support for the project, retain the final say over many aspects of the project. This Court should therefore reject this challenge (Br. at 47-52) to the Agency's determination.

The capital costs of all public infrastructure necessary for the ACR project will not fall on the local governments. Rather, Preserve intends to pay for those costs through a combination of private indebtedness, proceeds from sales, developer equity and revenue from Franklin County Industrial Development Agency (FCIDA) revenue bonds (A29, A2543, A2671-72, A2689, A2702). While petitioners speculate that Preserve's plan to obtain FCIDA bonds will fail (Br. at 51-52), the record indicates that the FCIDA has already taken official action toward the issuance of bonds on behalf of Preserve (A28). And in the event of a default by Preserve on the FCIDA bonds, there is no risk to the local government (A6379), or taxpayers (A5733).

Preserve will minimize financial risk "by starting development where demand is expected to be highest and infrastructure cost lowest" (A2542). Accordingly, residential development will begin with the great camp lots on the eastern portion of the project site, where most roads already exist and where water and wastewater facilities will be built by developers (A2669, A2550, A6270-72). If Preserve lacks funding for the remaining residential infrastructure, which must be installed before lots can be conveyed (A679-80), the project will not proceed and local governments will not be impacted. Nor will the cost of maintaining the public infrastructure necessary for the ACR project fall on the local governments (A12). Road maintenance costs will be borne by the project's homeowners' association (A2689, A6274-75). Operation and maintenance costs for water and electric will be paid by user fees (A2688). Moreover, because Preserve intends to build in phases,

revenues from increased assessed property values will help pay for other increased infrastructure maintenance costs (A2544, A2551, A5382-83).

Local governments will bear only those costs associated with the provision of general municipal services from the Town of Tupper Lake and with the addition of new students in the Tupper Lake School District (A2688, A5364). However, those costs are eclipsed by Preserve's projections of the revenue that will accrue to the benefit of those entities. Indeed, the Town's tax revenues will increase by more than $550,000 simply as a result of Preserve's purchase of the project site and the sale of the large great camp lots, which require no public roads, sewer or water (A6269-70). Furthermore, even in the first year, the Town and school district should receive significant project-related revenues (A2688). And even if the project is not fully completed on schedule, local governments would nonetheless benefit significantly (A5382-83).

Preserve confirmed that local service providers, including emergency services, utilities, public transportation, public schools and health services, are able "to provide supporting facilities and services made necessary by the project" (A28). Importantly, both the Village and Town of Tupper Lake have continuing jurisdiction and control over the project and public infrastructure (A28, A2552). Tupper Lake's Planning Board made clear that it will have "the last say" on how much fiscal risk or impact it is willing to assume (A4205-08) (existing government controls provide "positive safeguards" supporting a finding of no undue adverse impact "upon the ability of the public to provide supporting facilities and services made necessary by the project"). Finally, the project will be subject to subsequent review by the Agency of infrastructure and the conditions of any FCIDA financing (A26-27).

There is no merit to petitioners' contention (Br. at 49-50) that undue adverse fiscal impacts are unavoidable because Preserve's real estate sales projections are overly optimistic. Based on record evidence (A4712 (Wed., Jan. 18, 2012 [00:53:50]), Agency aid and advice staff calculated that Preserve could sell parcels for prices as much as 70% less than anticipated without increasing any burden on local government (A5004). Nor is there any merit to petitioners' contention (Br. at 50-51, A402) that it was improper for aid and advice staff to present this information to the Agency members after the hearing record closed. The Agency's regulations permit exactly the kind of assistance that the aid and advice staff rendered to the deliberating members. *See* 9 N.Y.C.R.R. § 580.18(b) (allowing members to "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"). The aid and advice staff neither investigated nor litigated the ACR project, and the calculation at issue was not evidence. It was nothing more than a mathematical computation based on evidence that was already in the record, which could have been made by any Agency member. *Simpson v. Wolansky,* 38 N.Y.2d 391 (1975), upon which petitioners again rely (Br. at 21, 50), involved evidence outside the administrative record, and is therefore inapposite. In sum, based on the record evidence, it was rational for the Agency to conclude that development of the ACR project would not have undue adverse fiscal impacts on any of the local governments involved in the project.

POINT II

THE AGENCY COMPLIED WITH ALL APPLICABLE RULES AND PROCEDURES

A. The Agency's Determination Contains Detailed Findings of Fact

Contrary to petitioners' contention (Br. at 58-60), the Agency's determination contains detailed findings of fact to support its decision to approve the ACR project. The APA Act precludes the Agency from issuing a permit "unless it first determines" that the project meets the relevant statutory criteria. *See* Exec. L. § 809(10). Under the Agency's regulations, a determination made pursuant to § 809(10) must "include findings of fact and conclusions of law or reasons." 9 N.Y.C.R.R. § 580.18(c). *See also* SAPA § 307(1) (requiring "findings of fact and conclusions of law or reasons for the decision, determination or order."). The Agency's determination here meets all those requirements.

The Agency's 39-page order contains 100 detailed findings of fact in numbered paragraphs addressing natural resources, intensity guidelines, utilities, phasing, the individual neighborhoods, organizational and structural details, local governments, impacts of the project, project benefits, infrastructure and dozens of other issues (A20-36). Based on the Agency's extensive factual findings, it concluded, as a matter of law, that the project would comply with all relevant statutes and regulations (which the Agency individually identified in the order) if undertaken in accord with the terms and conditions of the permits issued pursuant to the order (A36).

Petitioners erroneously contend (Br. at 59) that the Agency was required to specifically address each of the findings of fact that petitioners proposed in their post-hearing briefs. Pursuant to Agency regulation, the "making of findings of fact shall constitute a

ruling upon each finding proposed by the parties." 9 N.Y.C.R.R. § 580.14(b)(9)(iii). Thus, the 100 findings of fact contained in the Agency's determination constitute rulings upon petitioners' proposed findings. The Agency's interpretation of its own regulations is entitled to deference. *Matter of Gracie Point Comm. Council v. New York State Dep't. of Envtl. Conserv.*, 92 A.D.3d 123, 128 (3d Dep't 2011). In any event, "it is well settled that an agency's failure to follow procedural provisions that are merely directory rather than mandatory in nature will not warrant annulling a subsequent determination unless the challengers show that substantial prejudice resulted from the agency's noncompliance." *Matter of Dudley Road Assoc. v. APA,* 214 A.D.2d 274, 279 (3d Dep't 1995). Petitioners have not alleged, much less proven, that the Agency's actions cau sed them substantial prejudice.

B. The Agency Did Not Have Improper *Ex Parte* Communications

"An *ex parte* communication is any communication regarding issues of fact or conclusions of law with any party or its representative or hearing officer by one party to an adjudicatory proceeding out of the presence of the other parties to the same proceeding without simultaneous communication with the other parties." 9 N.Y.C.R.R. § 587.4; *see also* SAPA § 307(2). Nothing in the record supports petitioners' claim (Br. at 63-67) that there were *ex parte* communications between Preserve and the Agency hearing staff, the aid and advice team, or the Agency's voting members.

Before the hearing, the Agency assigned several of its administrative staff members, including Associate Attorney Paul Van Cott, to serve as the "hearing staff" in connection with the ACR project (A597-98, A1399, A4997). Among other tasks, the hearing staff ensured that the record ultimately presented to the Agency's voting members was full and

complete. *See* 9 N.Y.C.R.R. §§ 580.6, 580.18(a), A1406-07. As part of its closing statement after the hearing, staff created a draft order containing potential findings of fact and conditions based on the hearing record for the parties to comment on and, ultimately, for the Agency's consideration (A1399, A4999).

Apart from the "hearing staff," other Agency personnel, including then-Counsel John S. Banta, served as the Agency's "aid and advice" team in connection with the project. *See* 9 N.Y.C.R.R. § 580.18(b); A1398-99, A5000. Aid and advice staff helped the Agency's voting members during the decision-making phase of the ACR project review, based on the record of the hearing. 9 N.Y.C.R.R. §§ 580.18(b), 587.4(c)(2)(ii). In accord with written instructions from the Agency's Executive Director, the aid and advice team had no "substantive discussions about the project or the staff recommendation with the Hearing Staff Team" (A5000). As Agency Counsel, Mr. Banta also acted as a "gatekeeper" between the hearing staff and the voting members (A1398-99).

At the Agency's December 2011 meeting, after the record had been closed and the Agency had already begun its deliberations, the voting members asked the aid and advice staff to restructure the October 24, 2011 draft order that the hearing staff had prepared (A1399). The draft order had contemplated the issuance of just one permit, and the voting members wanted it reorganized into a draft order and multiple permits (A1399, 1409). Because the members were already familiar with the October draft order, they asked aid and advice staff to cross-reference the conditions in the reorganized order with those that were in the October draft order (A1399). After the reorganization and redrafting was complete, Mr. Banta asked Mr. Van Cott to review the reorganized order and permits to ensure that the conditions were accurate and consistent with the October draft order, except where the

members had requested changes (A1400, A1409). Mr. Van Cott, in turn, reviewed the reorganized order and permits with Preserve and noted that some conditions had been inadvertently changed from the October draft order (A1400, A1402, A1410-11). He communicated the errors to Mr. Banta, the aid and advice staff made the necessary corrections to the affected conditions, and the Agency's Executive Director sent a corrected draft to the voting members (A1400, A1410, A4775-80).

Petitioners improperly characterize this as an "open channel of communication between the Applicant and the Agency Members" in violation of the *ex parte* rules (Br. at 65). The communications to which petitioners point were not "regarding issues of fact or conclusions of law." *See* 9 N.Y.C.R.R. § 587.4(a). Rather, they related to nonsubstantive corrections that were necessary to ensure the accuracy of conditions in the final proposed order and permits. *Compare* A4498-99 *with* A4779-80. *Cf. Matter of Britt v. DiNapoli*, 91 A.D.3d 1102, 1102 (3d Dep't 2012) (communication between hearing officer and agency lawyer regarding scheduling of testimony and other procedure was "for purely administrative purposes"); *Matter of Cantone v. DiNapoli*, 83 A.D.3d 1259, 1260 (3d Dep't 2011) (same). These communications were therefore not in violation of the *ex parte* rules. Moreover, and in any event, neither SAPA § 307(2) nor the Agency regulations prohibited communication between Preserve and Mr. Van Cott. *See Matter of Concerned Citizens v. Crossgates*, 89 A.D.2d 759, 761 (3d Dep't 1982), *aff'd*, 58 N.Y.2d 919 (1983) (communications between representatives of developer who sought permit for construction of shopping mall and DEC deputy commissioner and staff not prohibited under SAPA where those DEC personnel were not fact-finders or decision-makers).

Nor is there any other evidence of improper *ex parte* communications. Petitioners point to remarks made by the Mayor of Tupper Lake in a January 2012 radio interview, two emails allegedly sent by Preserve to Mr. Banta, and documents petitioners obtained pursuant to FOIL, and accuse the aid and advice team of creating a backdoor channel of communication between the Agency members and Preserve (A418-19, A5054-62, Br. at 64-67). But sworn statements by the Agency staff and Chair refute petitioners' accusations of wrongdoing. Agency Chairwoman Lani Ulrich "categorically den[ied]" "communication of any kind" with any member of the hearing staff or any party (A1415-16). Agency Counsel Banta denied engaging "in any substantive discussions concerning the language in the aid and advice staff's draft order and permits with applicant's counsel" (A1401). He also denied having opened or read the two emails that "inexplicably" were sent directly to him by Preserve (A1401). Agency hearing staff attorney Van Cott's communications with Mr. Banta were limited to correcting language in several conditions of the permits transmitted by the Executive Director to the Agency members (A1410, A4498-99, A4779-80). Thus, petitioners' allegations that the Agency members engaged in *ex parte* communications lack record support.

Similarly without merit is petitioners' contention (Br. at 60-61) that the aid and advice team improperly provided "summaries of the hearing record" to the members during their deliberations without affording petitioners an opportunity to comment on their "accuracy." Br. at 61. While parties to a hearing must be "provided an opportunity to make written comment with respect to the completeness" of any "summary" of the hearing record (9 N.Y.C.R.R. § 580.18(a)), nothing in the regulations allows comments when "agency staff

other than staff which has been" engaged with the hearing provide the members with "aid and advice" about the record (9 N.Y.C.R.R. § 580.18(b)).

The alleged "summaries" to which petitioners point were prepared by the aid and advice team, after the hearing record closed, to assist the Agency members in their deliberations. First, the aid and advice team prepa red a Power Point presentation that reviewed the issues for which the members had directed the ACR application to hearing in 2007. This Power Point was presented to the members during the public meetings, and included only quotes and other information taken directly from the hearing record (A4584-623, A4627, A4646-711). Second, the aid and advice team prepared a memo titled *Financial Impact and Economic Benefits*, which reviewed the financial information established in the hearing record (A4723-28). But neither the Power Point nor the memo were, or purported to be, a summary of the hearing record within the purview of § 580.18(a) (A606). They were simply tools to aid the Agency members in evaluating the record of the ACR project. It was entirely proper for the aid and advice team to render this type of assistance. *See Matter of Green Island Assoc. v. APA,* 178 A.D.2d 860, 863 (3d Dep't 1991) (primary purpose of staff memorandum was "to evaluate the information contained in the public hearing record in order to advise respondent whether to reopen the hearing" and constituted "aid and advice," not a summary of the record). In any event, even if the Power Point and memo had "summarize[d] the record" within the meaning of § 580.18(a), petitioners never even asked the Agency for an opportunity to comment.

C. The Agency Properly Extended the Two-Year Time Frame for the ACR Project to Reach the "In Existence" Threshold

Under the APA Act, a project for which a permit has been issued must be "in existence within two years" of the recording of the permit in the county clerk's office. Exec. L. § 809(7)(c). The Agency can, and routinely does, extend the two-year period after considering "the potential of the land related to the project to remain suitable for the use allowed by the permit" and "economic considerations attending the project." *Id.*; A677. Contrary to petitioners' contentions (Br. at 62), under the circumstances present here, the Agency properly extended the statutory two-year "in existence" period.

Land use or development is "in existence" when it "has been substantially commenced or completed." Exec. L. §§ 802(25)(a), 802(28). A subdivision is "in existence" when it or a portion of it "has been substantially commenced" and when "substantial expenditures have been made for structures or improvement directly related thereto." *Id.* § 802(25)(b); *see also id.* § 802(63). A permit becomes ineffective if the project is not "in existence" by the established deadline. *Id.* § 809(7)(c).

In its order approving the ACR project, the Agency stated that the project would be deemed to be "in existence" when the first lot was conveyed, and must be "in existence" within 10 years from the date of issuance of the Agency's order (A1). Because of the conditions precedent, the project will be substantially commenced before this occurs. Specifically, before conveyance of any authorized "neighborhood" lot, the order and permits require construction of the community wastewater treatment system or extensive upgrades to the existing municipal system, as well as completion of all water supply, stormwater management, road, and electric utility infrastructure, and all grading and landscaping on the

surrounding project site (A101, A116-17, A132, A148-49, A164, A179, A193, A206, A240, A272-73). Before conveying any other authorized lot, the order and permits require: (1) the approval of plans and, in some instances, installation of all road and electric utility infrastructure and all associated grading and landscaping on the surrounding project site (A83-84, A101), (2) the filing of deed restrictions to permanently prohibit residential development on the open space resource management lands (A46-47, A84-85, A102, A223-24), and (3) either installation of the community wastewater treatment system or extension of the municipal system for all lots to be connected (A57-58, A100-01, A222-23) or approval by the Agency and, as required, DEC, Department of Health, and the Town and Village of Tupper Lake for engineered plans for wastewater treatment for all lots that will contain an on-site system (A10, A37, A83-84, A100-01). A variety of other plans are also required. *See* A37, A50-58, A82-83, A96-99, A217-18, A220-21.

As set forth in the affidavit of Agency Associate Counsel Sarah Reynolds, a member of the aid and advice team, the Agency gave due consideration to the substantial amount of work that would be required to complete the many terms and conditions of the permits, as well as the extensive resources that the project sponsor would expend (A678-79). *See also* A4712 (Weds., Jan. 18, 2012 [3:02:00-3:30:00], Thurs., Jan. 19, 2012 [2:15:00-2:20:00]). The Agency also considered the fact that the applicant could not materially disturb the project site prior to the conveyance of the first lot, except where authorized by permit conditions, to ensure that the lands will remain suitable for the uses allowed (*id.*). Potential economic consequences, both positive and negative, from the project's implementation or possible failure were also considered (*id.*). The record thus establishes that the Agency considered all the relevant factors before deciding to provide the applicant with a longer

period of time by when the ACR project must be "in existence." The 10-year period is appropriate given the scale of the project and the number of conditions precedent contained in the order and permits. This longer period will "facilitate the enforceability of permit requirements, improve administrative efficiency, and protect the rights of permit holders and lot purchasers." *See* A677.

Finally, petitioners' reliance on the standards and procedures set forth in 9 N.Y.C.R.R. § 572.20 is misplaced because that regulation does not apply to an initial permit application like the one at issue here. Section 572.20 only applies when the Agency is renewing a permit that has already expired (A683); *see also* 9 N.Y.C.R.R. § 572.20(a). Nor do the cases petitioners cite (Br. at 62-63 & n.27) support their argument. In none of those cases was an Agency permit annulled on the ground that the Agency improperly exercised its discretion in extending the two-year time frame for a project to reach the "in existence" threshold, nor is the Agency aware of any such cases.

POINT III

SUPREME COURT CORRECTLY EXERCISED ITS DISCRETION IN DENYING PETITIONERS' MOTION FOR DISCOVERY

The court below did not abuse its discretion in denying petitioners' request for wide-ranging discovery to obtain evidence to attempt to further establish their claim that the Agency and Preserve engaged in improper *ex parte* communications. Petitioners contend that they already have sufficient evidence to establish their claim. And any need for more evidence is far outweighed by the attendant delay, burden and expense of more discovery.

Discovery in an article 78 proceeding is only available upon leave of court. C.P.L.R. §§ 408, 7804(a); *Matter of General Elec. Co. v. Macejka*, 117 A.D.2d 896, 897 (3d Dep't

1986). Moreover, "because discovery tends to prolong a case, and is therefore inconsistent with the summary nature of a special proceeding, discovery is granted only where it is demonstrated that there is a need for such relief." *Matter of Town of Pleasant Valley*, 253 A.D.2d 8, 15 (2d Dep't 1999); *see also Matter of Council of City of New York v. Bloomberg*, 6 N.Y.3d 380, 389 (2006). A party seeking discovery must establish that the requested information is "material and necessary" to the claim. *Matter of Town of Wallkill v. New York State Bd. of Real Property Servs.*, 274 A.D.2d 856, 859 (3d Dep't 2000). "In order to arrive at a considered determination regarding requested disclosure, the court 'must balance the needs of the party seeking discovery against such opposing interests as expedition and confidentiality.'" *Id.* (citation omitted). Where a trial court has denied a motion for discovery, "only a clear abuse of discretion" will warrant a reversal. *Cochran v. Cayuga Med. Ctr. at Ithaca*, 90 A.D.3d 1227 (3d Dep't 2011).

Here, petitioners seek wide-ranging discovery. They seek leave to depose all the voting members of the Agency, the Agency's legal counsel and staff, the ACR project sponsors and their legal counsel, the Governor's staff, State legislators and staff, and local government officials and staff (Avi-vii). Petitioners also seek document production to augment the 22,670-page administrative record plus the more than 1,000 pages of documents that the Agency has produced pursuant to FOIL (Avi-vii). But as the court below observed in denying petitioners' motion, petitioners have repeatedly contended that they already have "irrefutable" and "substantial" evidence in their possession to fully establish their claim that the Agency and Preserve engaged in improper *ex parte* communications (Avi). Thus, as the court below properly held, since all that petitioners really seek is the opportunity to obtain

"even 'more evidence' of improper contacts" (Avi), the additional information petitioners seek is neither material nor necessary. *See Matter of Town of Wallkill*, 274 A.D.2d at 859.

Rather than seeking appropriately tailored discovery, petitioners propose "to undertake a wide ranging, unfocused and intrusive inquiry" (Avii-viii). Supreme Court correctly exercised its discretion in concluding that petitioners' interest in obtaining additional evidence does not outweigh the "substantial delay, expense and other burdens" that additional discovery would entail (Avi-viii). Petitioners' request for extensive discovery is inconsistent with the summary nature of a special proceeding. *See Matter of Town of Pleasant Valley*, 253 A.D.2d at 15. Petitioners have already filed a 674-paragraph petition containing 29 causes of action (and a 246-paragraph reply with supporting affidavits), a "supplemental return," and a discovery motion. On this record, petitioners' "assertion that they were entitled to further inquire whether the [Agency] was justified in its position amounted to no more than an expression of hope insufficient to warrant deferral of judgment pending discovery." *Matter of Price v. New York City Board of Educ.*, 51 A.D.3d 277, 293 (1st Dep't 2008).

POINT IV

PETITIONERS ARE NOT ENTITLED TO ATTORNEYS' FEES

Petitioners' request for attorneys' fees under the New York State Equal Access to Justice Act (EAJA) should be denied on the ground that the Agency's approval of the ACR project was "substantially justified" within the meaning of the EAJA or, alternatively, because it is premature. The EAJA provides that a "court shall award to a prevailing party, other than the state, fees and other expenses incurred by such party in any civil action

brought against the state, unless the court finds that the position of the state was substantially justified or that special circumstances make an award unjust." C.P.L.R. § 8601(a). The statute "was enacted to 'improv[e] access to justice for individuals and businesses who may not have the resources to sustain a long legal battle against an agency that is acting without justification.'" *Matter of New York State Clinical Lab. Assn. v. Kaladjian*, 85 N.Y.2d 346, 351 (1995) (*quoting* Governor's Mem. approving L. 1989, ch. 770, 1989 N.Y. Legis. Ann., at 336). "The Legislature, however, did not intend to provide every plaintiff -- or even every 'prevailing' plaintiff -- with attorneys' fees. Instead, fees 'shall' be awarded only where the plaintiff 'prevail[s]' and where the agency's position was not 'substantially justified' and no 'special circumstances make an award unjust.'" *Wittlinger v. Wing*, 99 N.Y.2d 425, 432 (2003); *see* C.P.L.R. § 8601(a). The failure to establish any one of the required elements precludes an award of counsel fees. *Matter of Walker v. Novello*, 36 A.D.3d 1100, 1102 (3d Dep't 2007). The Agency's approval of the ACR project was "substantially justified" within the meaning of the EAJA because, as discussed in this brief, it complied with all legal requirements, was rational and was based on substantial evidence in the hearing record. Moreover, and as also discussed herein, the Agency followed the correct procedure in rendering its determination. Petitioners' request for attorneys' fees should therefore be denied.

Alternatively, petitioners' request should be denied as premature. The EAJA directs a party seeking fees to submit an application "within thirty days of final judgment of the action." C.P.L.R. § 8601(b). A final judgment is one "that is final and not appealable." *Id.* § 8602(d). Because there is no final judgment in this matter, there is no "prevailing party." *Id.* § 8601(a); *see Matter of Essex Co. v. Zagata*, 91 N.Y.2d 447, 456 (1998). Petitioners are

therefore not entitled to attorneys' fees at this point in the litigation. *See Matter of Walker*, 36 A.D.3d at 1102. Should petitioners ultimately prevail in this litigation in whole or in part, the State respondents will demonstrate that their positions were substantially justified and that special circumstances make an award unjust.

CONCLUSION

For the foregoing reasons, the petition should be dismissed in its entirety and the order below denying discovery should be affirmed.

Dated: Albany, New York
January 24, 2014

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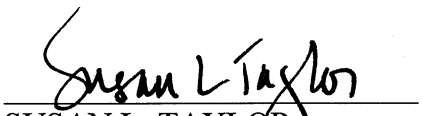
By: 
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