STATE OF NEW YORK SUPREME COURT
APPELLATE DIVISION THIRD DEPARTMENT

In the Matter of the Application of

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

Appeal No. 516901

Petitioners-Appellants,

for a Judgment Pursuant to
CPLR Article 78

-against-

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

Respondents-Respondents.

APPELLANTS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR LEAVE TO APPEAL TO THE COURT OF APPEALS

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INTRODUCTION

Appellants Protect the Adirondacks! Inc., Sierra Club, and Phyllis Thompson ("Appellants") seek leave to appeal from the Opinion and Judgment and Order of the Appellate Division, Third Department, dated and entered July 3, 2014 ("Judgment").[1]

The Judgment is appealable to the Court of Appeals because the appeal will be taken in a proceeding originating in the Supreme Court[2] "from an order of the appellate division which finally determines the action and which is not appealable as of right". CPLR § 5602(a)(1)(i).

BACKGROUND

This CPLR Article 78 proceeding originated in Supreme Court, Albany County, and was transferred to the Appellate Division pursuant to CPLR § 7804(g) because the issues presented included "whether a determination made as a result of a hearing held, and at which evidence was taken" was, "on the entire record, supported by substantial evidence." CPLR § 7803(4).

The proceeding seeks to annul the approval by the Adirondack Park Agency ("APA") of the Adirondack Club & Resort ("ACR") project which has been proposed to be built in the Town of Tupper

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[1] A copy of the Judgment is annexed as Exhibit A to the Affidavit of John W. Caffry, Esq., of even date herewith ("Caffry Aff.").

[2] Judgment p. 1.

Lake, Franklin County (the "Project"). The Project is the largest project ever reviewed or approved by the APA pursuant to the Adirondack Park Agency Act, Executive Law Article 27 ("APA Act"), since the creation of the APA in 1971. Judgment, p. 2; A. 280, 2370.[3]

APA conducted a 19 day adjudicatory hearing on the Project application pursuant to its regulations at 9 NYCRR Part 580. A. 293. After briefing by the parties and the close of the hearing record, APA deliberated on the application and hearing record at three separate meetings, totaling 8 days, spread over three months. A. 293. On January 20, 2012 APA approved a Project Findings and Order, No. 2005-100 ("Order"), and 14 separate permits for the Project (A. 1-276), which granted approval of the Project, subject to certain conditions. A. 279-280, 293-294. The Order was issued on January 31, 2012. A. 293-294.

The proceeding was timely commenced in March, 2012. The Amended Petition includes 29 separate causes of action,[4] which demonstrated that, in approving the Project, APA violated the substantive requirements of the APA Act, the Freshwater Wetlands

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[3] This case was prosecuted in the Appellate Division using the appendix method under Rule 800.4(b). A single copy of the full Record was filed in the office of the Clerk of the Court. References herein to the pages of Appendix are abbreviated as "A. ___".

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

Act (Environmental Conservation Law ("ECL") Article 24), and its own regulations at 9 NYCRR Parts 574 and 578, and violated the procedural requirements of the APA Act and 9 NYCRR Parts 578, 580 and 587, and of the State Administrative Procedure Act ("SAPA"). The claims are detailed in Petitioners' Amended Petition (A. 279-432) and their Reply (A. 828-1073).

Petitioners made a motion to Supreme Court for leave to conduct discovery regarding the Twenty-Eighth Cause of Action, which alleges that the APA engaged in improper *ex parte* communications, including with the Executive Chamber. Supreme Court (Platkin, J.), by Decision and Order dated March 19, 2013, denied the Petitioners' motion. A. i-xii. By an order of Supreme Court (Platkin, J.) dated April 3, 2013, the case was transferred to the Appellate Division. A. xiii-xvii.

Petitioners then made a timely motion to the Appellate Division for leave to appeal from Supreme Court's Decision and Order and for the consolidation of that appeal with the underlying transferred Article 78 proceeding, which motion was granted. A. xviii.

After briefing was completed by the parties, oral argument was held on April 28, 2014 and the Judgment was issued by the Appellate Division on July 3, 2014. Caffry Aff. Exhibit A.

POINT I:

THIS IS A CASE OF STATEWIDE IMPORTANCE
THAT PRESENTS NOVEL AND SIGNIFICANT ISSUES

Leave to appeal to the Court of Appeals may be granted where the case presents "novel and significant" issues. Board of Education of Monroe-Woodbury Central School v. Wieder, 72 N.Y.2d 174, 183 (1988). The issues presented herein are both novel and significant.

Although the questions presented in this case directly affect only one region of the state, the six million acre Adirondack Park, they are of statewide importance. In adopting the Adirondack Park Agency Act, Executive Law Article 27 ("APA Act"), the Legislature found that:

> The Adirondack park is abundant in natural resources and open space unique to New York and the eastern United States. The wild forest, water, wildlife and aesthetic resources of the park, and its open space character, provide an outdoor recreational experience of national and international significance. ...
>
> Continuing public concern, coupled with the vast acreages of forest preserve holdings, clearly establishes a substantial state interest in the preservation and development of the park area. The state of New York has an obligation to insure that contemporary and projected future pressures on the park resources are provided for within a land use control framework which recognizes not only matters of local concern but also those of regional and state concern. ...
>
> A further purpose of this article is to focus the responsibility for developing long-range park policy in a forum reflecting statewide concern. This policy shall recognize the major state interest in the conservation, use and development of the park's

> resources and the preservation of its open space character, and at the same time, provide a continuing role for local government. APA Act § 801.

In upholding the Legislature's power to enact this law, the Court of Appeals held that, in light of

> the constitutional and legislative history stretching over 80 years[5] to preserve the Adirondack area from despoliation, exploitation, and destruction by a contemporary generation in disregard of generations to come (internal citations omitted),

the APA Act "serve[s] a supervening State concern transcending local interests", and that "preserving the priceless Adirondack Park through a comprehensive land use and development plan[6] is most decidedly a substantial State concern". Wambat Realty Corp. v. State, 41 N.Y.2d 490, 495 (1977).

The questions presented herein are also novel. See Board of Ed. v. Wieder, 72 N.Y.2d at 1183. For instance, the Court of Appeals has not had occasion to address the APA Act since 1998, when it upheld the dismissal of a proceeding against APA on statute of limitations grounds, and did not reach the merits of the case. Essex County v. Zagata, 91 N.Y.2d 447 (1998). It has never before had the opportunity to consider APA's application of the APA Act's "comprehensive land use and development plan" which

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

[6] See APA Act § 805.

the Court has found to be "most decidedly a substantial State concern". Wambat Realty v. State, 41 N.Y.2d at 495.

POINT II:

SECTION 805 OF THE APA ACT IS BINDING ON APA AND IS NOT MERELY GUIDANCE

The first question on which Appellants seek leave to appeal is:

> Whether the Appellate Division erred when it held that the Adirondack Park Land Use and Development Plan of APA Act § 805 is merely guidance to APA and is not binding on that agency, despite the plain language of the statute to the contrary?

Appellants' Tenth, Twelfth, Fourteenth, and Sixteenth Causes of Action showed that APA was arbitrary and capricious, and committed multiple errors of law, when it approved the 80 proposed residential lots for the Project on Resource Management lands, which are the most environmentally sensitive and most strictly protected private lands in the Park. Brief Point IV.A.[7] Crucially, APA erroneously based its decision to approve those lots on the theory that the criteria of the Adirondack Park Land Use and Development Plan set out in APA Act § 805 were mere guidance, or discretionary, so that APA was not required to adhere to the plain language of the law in deciding whether to

[7] Petitioners-Appellants' Brief to the Appellate Division, Third Department, dated September 6, 2013 ("Brief").

approve the Project. A. 349-376; 942-954; Brief Point IV; Reply Brief[8] Point IV.

APA made three major errors of law in determining whether the proposed so-called "Great Camps" were compatible with the Resource Management land use area. First, APA admitted that it approved the Project on the basis that the directive of APA Act § 805(3)(g)(2) that "resource management areas will allow for residential development on substantial acreages or in small clusters on carefully selected and well designed sites" is "not a determinative factor" and "not prescriptive" (A. 1102), despite the use of the prescriptive word "will" in the statute. See A. 943-944. APA argued that this statutory language "does not provide specific thresholds for approval", but is merely a "guide" to it, that sets "goals". See Reply Brief p. 13; Brief Point IV.C; A. 943-946, 1097-1104, 4148-4150.

Second, APA made its decision on the basis that there is no difference between the statutory standards applicable to primary and secondary compatible uses under APA Act § 805(3)(a) and § 809(10)(b). A. 496; Brief Point IV.E; Reply Brief pp. 14-15. It did so despite the fact that secondary compatible uses such as the 80 houses proposed for Resource Management lands are subject to the additional requirement of APA Act § 805(3)(a) that they

[8] Petitioners-Appellants' Reply Brief to the Appellate Division, Third Department, dated February 18, 2014 ("Reply Brief").

may only be approved "depending upon their particular location and impact upon nearby uses ...".

Third, APA found that the 80 residences on Resource Management lands are all "on carefully selected and well designed sites", as required by APA Act § 805(3)(g)(2), despite the fact that APA found (A. 36-37) that many of these homes have not yet been proven to comply with the applicable requirements. Brief p. 36; Reply Brief p. 15; A. 360-362, 487, 949-950, 3763-3768, 5321-5322, 5326, 6723-6724. APA is still waiting for revised site plans for these lots to be filed, after-the-fact. A. 36-37.

The Appellate Division agreed with APA and held that these mandates of the APA Act were merely "a consideration to guide the APA's exercise of its discretion." Judgment p. 10, fn 12. In doing so, it essentially gutted the heart of the APA Act and the Legislature's intent to

> implement the [Adirondack park] land use and development plan and to provide for the plan's maintenance, administration and enforcement in a continuing planning process that ... provides appropriate regulatory responsibilities for the agency". APA Act § 801.

This decision was contrary to the plain language of APA Act § 809(10)(a), (b) and (e) which mandate that a project may only be approved if the project is consistent with the land use and development plan, compatible with the applicable policies, purposes and objectives, and would not have an undue adverse impact on the resources of the park. Brief Point IV; Reply Brief

Point IV. Thus, the land use and development plan of § 805 is not merely a guide to APA. It creates mandatory requirements that must be strictly enforced.

The holding of the Appellate Division is also contrary to APA Act § 809(11), which provides:

> 11. Where there are practical difficulties or unnecessary hardships in the way of carrying out the strict letter of the provisions of the plan[9] or the shoreline restrictions, the agency shall have authority in connection with a project under its review to vary or modify, after public hearing thereon, the application of any of such provisions or restrictions relating to the use, construction or alteration of buildings or structures, or the use of land, so that the spirit of the provisions or restrictions shall be observed, public safety and welfare secured and substantial justice done.

In furtherance thereof, APA's regulations contain standards and procedures for the review and approval of such variances. 9 NYCRR Part 576.

Thus, contrary to the holding of the Judgment, the Legislature intended for the Adirondack Park Land Use and Development Plan (APA Act § 802(29), § 805) to be administered strictly, while providing for the granting of variances in individual cases of practical difficulty or unnecessary hardship. If the Legislature had intended for the plan to be merely guidance, without strictly defined requirements, it would not

[9] Adirondack Park Land Use and Development Plan, APA Act § 802(29), § 805.

have needed to provide for the granting of variances from "the strict letter of the provisions of the plan". APA Act § 809(11).

This question is both novel and significant. See Board of Ed. v. Wieder, 72 N.Y.2d at 1183. The Court of Appeals has never determined whether the Adirondack Park Land Use and Development Plan, as defined in APA Act § 802(29) and as set out in § 805 is merely a "guide" to APA, or whether it contains strict standards and criteria to which projects must conform. If the Judgment is upheld, the statutory protections afforded to the lands and environment of the Adirondack Park will be significantly weakened. See Judgment, p. 10, fn 12. Leave to appeal should be granted.

POINT III:

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

The second question on which Appellants seek leave to appeal is:

> Whether the Appellate Division erred when it held, despite the plain language and legislative intent of the APA Act to the contrary, that the APA Act allows APA to weigh and balance the alleged economic benefits of a project against its adverse environmental impacts when deciding whether or not those impacts are "undue"?

Appellants' Twenty-Sixth Cause of Action demonstrated that the APA Act did not permit APA to weigh and balance the alleged economic benefits of the Project against its adverse

environmental impacts. A. 410-411. Yet, in approving the Project, APA did just that. A. 520, 1022-1025. In doing so, it greatly exceeded the powers granted to it by the Legislature under the APA Act.[10] A. 297-301, 410-411, 837-843, 1022-1025; see also A. 4389-4399; Brief pp. 9-11, Point VII, Attachment C; Reply Brief Point VII.

APA Act § 809(10)(e) requires a determination by APA 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.

However, APA may only take "into account the commercial, industrial, residential, recreational or other benefits that might be derived from the project" (id.) to determine whether or not they may support "the ability of the public to provide supporting facilities and services made necessary by the project". Id. Both the plain language of APA Act § 809(10)(e), and the APA Act considered as a whole,[11] show that the

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[10] Appellants' post-hearing reply brief (A. 4389-4399) analyzed in detail each section of the APA Act and its legislative history (Brief Attachment C). This analysis demonstrated that the entire APA Act supports this cause of action.

[11] See Talisman Energy USA v. NYS Department of Environmental Conservation, 113 A.D.3d 902, 904-905 (3d Dept. 2014)(stating that the intention of the Legislature is best ascertained from the plain language of the statute, but the

Legislature did not empower APA to weigh and balance those alleged economic benefits against a project's "undue adverse impact upon the natural, scenic, aesthetic, ecological, wildlife, historic, recreational or open space resources of the park". Id. See A. 4389-4399; Brief Point VII, Attachment C; Reply Brief Point VII.

The Appellate Division appears to have dismissed this cause of action at page 5 of the Judgment. The Judgment (p. 15) also stated:

> Petitioners' remaining contentions, to the extent we have not specifically addressed them, have been considered and found to be without merit.

Therefore, the Appellate Division upheld APA's claim of authority to weigh and balance economic considerations against adverse environmental impacts on a case-by-case basis, despite the lack of statutory authorization for APA to do so.

This question is both novel and significant. The Court of Appeals has recently reaffirmed the principle which it had previously set out in Boreali v. Axelrod, 71 N.Y.2d 1 (1987) that, without specific statutory authorization, "an agency may not engage in the balancing of competing concerns" such as environmental impacts and economic benefits, "thus acting on its own idea of sound public policy". New York Statewide Coalition

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legislative history may also be considered; a court must also harmonize all parts of a statute, in accord with the legislative intent).

of Hispanic Chambers of Commerce v. New York City Dept. of Health and Mental Hygiene, ___ N.Y.3d ___, 2014 WL 2883881, 2014 N.Y. Slip Op. 04804, *2, (2014). These two cases addressed this issue in a rulemaking context. Id. See SAPA Art. 2.

The present case presents the issue in the context of adjudication and permitting. See SAPA Art. 3. Therefore, not all of the four factors established in Boreali in a rulemaking context for such an analysis, of whether or not an agency action crosses over into prohibited policy-making, will apply herein. This case does require an analysis of the first Boreali factor, which will necessarily inform the Court of Appeals' statutory interpretation analysis as to whether or not the APA Act authorizes APA to engage in such a weighing and balancing process.

As the Third Department itself held in a prior proceeding involving the Project:

> The APA is charged with the duty to ensure that certain projects within its jurisdiction "would not have an undue adverse impact upon the natural, scenic, aesthetic, ecological, wildlife, historic, recreational or open space resources of the park" ... . This environmental mandate predated SEQRA[12] and, as reflected in the APA's regulations, it is more protective of the environment [than SEQRA]. Association, 64 A.D.3d at 826-827 (internal citations omitted).

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

Moreover, as Presiding Justice Peters wrote in her concurrence in that case, while SEQRA requires agencies to strike a balance between social and economic goals and the protection of the environment (id. at 829),

> [t]he APA, on the other hand, is not charged with such a balancing of goals and concerns but, rather, is required to ensure that certain projects within its jurisdiction "would not have an undue adverse impact upon the natural, scenic, aesthetic, ecological, wildlife, historic, recreational or open space resources of the park" (Executive Law § 809[9], [10][e]). Id. at 829-830.
>
> Clearly, by placing environmental concerns above all others, "the APA's mandate is more protective of the environment than that embodied within SEQRA." Id. at 830.

The Legislature intended for any such weighing and balancing to occur at the time of its adoption of the "Adirondack park land use and development plan" (APA Act § 802(29) and § 805), and not for it to be done on a case-by-case basis as part of the review of individual project applications. A. 4388-4399; Brief Point VII, Attachment C; Reply Brief Point VII. If the Legislature had intended to give APA this power, it would have done so. See Hispanic Chambers of Commerce v. New York City, 2014 N.Y. Slip Op. 04804 at *8; Boreali v. Axelrod, 71 N.Y.2d at 13. Instead, it found that "[t]he plan[13] represents a sensibly balanced apportionment of land" for resource preservation and economic purposes. APA Act § 801.

[13] See APA Act § 802(29) and § 805.

APA acted "without any legislative guidelines at all for determining how the competing concerns [of adverse environmental impacts and economic benefits] are to be weighed." Boreali v. Axelrod, 71 N.Y.2d at 12; see also Hispanic Chambers of Commerce v. New York City, 2014 N.Y. Slip Op. 04804 at *6. While not involving a rulemaking that would clearly apply to all permit applications that come before it in the future (SAPA Art. 2), APA's interpretation of the statute (now upheld by the Appellate Division) resulted in it making economic and environmental policy on a case-by-case basis in an adjudicatory proceeding. See SAPA Art. 3; see also Charles A. Field Delivery Service v. Roberts, 66 N.Y.2d 516, 518 (1985)(holding that doctrine of stare decisis applies to agency decision-making).

Because this exceeded APA's powers under the APA Act, APA's action should be annulled, and the Judgment should be reversed. Hispanic Chambers of Commerce v. New York City, 2014 N.Y. Slip Op. 04804 at *9; LaCroix v. Syracuse Executive Air Service, 8 N.Y.3d 348, 353-355 (2007)(annulling agency determination after hearing because decision contravened plain language of the statute and agency was without authority to rule as it did); Boreali v. Axelrod, 71 N.Y.2d at 16; Charles A. Field Delivery Service v. Roberts, 66 N.Y.2d at 520. In addition, this case would be the first decision by the Court of Appeals to address this important question of first impression under the APA Act.

Thus, this case presents novel and important questions, and the motion for leave to appeal should be granted. Board of Ed. v. Wieder, 72 N.Y.2d at 183.

POINT IV:

IT WAS ARBITRARY AND CAPRICIOUS FOR APA TO RELY ON POST-APPROVAL STUDIES OF ADVERSE IMPACTS TO WETLANDS AND WILDLIFE

The third question on which Appellants seek leave to appeal is:

> Whether the Appellate Division erred when it held that APA's reliance upon post-approval studies of adverse impacts to wetlands and wildlife, that have not yet been conducted, as grounds for approval of the project was not arbitrary and capricious?

Appellants' Second, Fourth, and Sixth Causes of Action showed that APA's decision was arbitrary and capricious and affected by an error of law because delaying evaluation of the effects of the Project on wetlands and wildlife until after the Project was approved is an impermissible postponement of the APA's review of the Project's environmental impacts and is "substantively defective". Brander v. Town of Warren Town Bd., 18 M.3d 477, 484-485 (Sup. Ct. Onondaga Co. 2007).

This question is significant (see Board of Ed. v. Wieder, 72 N.Y.2d at 1183) because ensuring the proper and thorough review of a project's environmental impacts on the resources of the Adirondack Park is APA's responsibility as the "superagency"

established to protect and "preserv[e] the priceless Adirondack Park", which is "decidedly a substantial State concern". Hunt Brothers, Inc. v. Glennon, 81 N.Y.2d 906, 909 (1993); Wambat Realty v. State, 41 N.Y.2d at 495. The question is novel because it appears that the Court of Appeals has never addressed the extent to which it is permissible to postpone significant studies of adverse impacts until after a project has been approved and construction has begun, particularly under the APA Act.

In its approval of the Project at issue herein, APA recognized that it lacked adequate information about adverse impacts to wetlands and wildlife to support its decision. A. 33-34, 309-311, 879-885, 1080, 4164-4169; Brief Point I; Reply Brief Point I. With regard to impacts to the Cranberry Pond wetland complex, it specifically found that the impact to "fish, wildlife and other biota" and other wetland benefits "has not been determined". A. 33.

Regardless of this acknowledged defect in its decision, APA allowed the applicant to conduct a post-approval "comprehensive amphibian survey and impact analysis [to] identify critical habitat areas and amphibian migration corridors which require additional protection", and allowed it to "identify[] and monitor[] impacts to wetlands and their associated functions, fish, wildlife and other biota within Cranberry Pond as a result of the project's snowmaking activities" after snowmaking

operations had begun.[14] A. 22, 33-34. Allowing these studies to be done after the approval of the Project had already been granted was arbitrary and capricious and an error of law. A. 305-331, 846-915, 1078-1097; Brief Point I; Reply Brief Point I.

The studies did not, and will not, assist APA in its decision-making about whether the Project meets the approval criteria set forth in APA Act § 809(10)(e). The fact that these important studies still remain to be done shows that APA failed in its "duty" to identify, and make a "coherent evaluation" of, the Project's impacts to the land, water, air, wildlife, aesthetic, and other resources of the Park, and "address them thoroughly", "before" the approval is granted, as required by APA Act § 805(4) and § 809(10). Town of Dickinson v. County of Broome, 183 A.D.2d 1013, 1014 (3d Dept. 1992); Purchase Envt'l. Protection Ass'n. v. Strati, 163 A.D.2d 596, 597 (2d Dept. 1990); see APA Act § 805(4); see also SAPA § 306(1); 9 NYCRR 580.6(a); A. 301-304, 844-846, 1087.

APA should have required these environmental studies to be performed prior to approval of the Project because that is the only way "that there can be any guarantee of a comprehensive review of the proposed [project's] adverse environmental effects, consideration of less intrusive alternatives to the proposed

[14] The applicant intends to annually withdraw large volumes of water from this pond for snowmaking operations for its ski area. A. 23-24.

action and consideration of measures in mitigation". Town of Dickinson v. County of Broome, 183 A.D.2d at 1014; see A. 901, 1087-1088, 1094, 2458, 2587, 5216-5231, 5592-5593, 6055. If there is a "need for further analysis" of a project's impacts, then the project should not be approved. Pyramid Co. of Watertown v. Planning Bd. of Town of Watertown, 24 A.D.3d 1312, 1314 (4th Dept. 2005).[15]

Finally, allowing studies of the Project's impacts to be done after the approval was granted, and then relying upon those studies to create future "plans for mitigation measures", was arbitrary and capricious. Pyramid Co. of Watertown, 24 A.D.3d at 1314. The review, "implementation and enforcement of these mitigation measures will" take place after the approval of the Project, and as such improperly "denies the petitioners and other members of the public their intended input with respect to whether such analysis and mitigation is appropriate or acceptable". Brander v. Town of Warren Town Bd., 18 M.3d at 481-482.

[15] Despite the Appellate Division's finding that the impacts on Cranberry Pond from snowmaking "cannot be known" until the pond is actually used for snowmaking (Judgment p. 7), water withdrawal tests to simulate actual snowmaking conditions, and studies of the potential impacts to Cranberry Pond and its fish and wildlife, could have been done by the applicant during the eight years that the Project was under review by APA, yet the applicant failed and refused to do so.

As shown above, APA failed in its duty to conduct a thorough review of the Project's environmental impacts before it was approved. The Third Department erred when it upheld this decision, and in doing so, it created a conflict with prior rulings of the other departments. See Pyramid Co. of Watertown v. Planning Bd. 24 A.D.3d at 1314 (4th Dept.); Purchase Envt'l. Protection Ass'n. v. Strati, 163 A.D.2d at 597 (2d Dept.). Therefore, Appellants' motion for leave to appeal the question of whether the Appellate Division erred when it held that APA's reliance upon post-approval studies of adverse impacts to wetlands and wildlife as grounds for approval of the Project should be granted.

POINT V:

APA AND THE APPELLATE DIVISION DID NOT APPLY THE COMPLETE TEST UNDER APA'S FRESHWATER WETLANDS ACT REGULATIONS

The fourth question on which Appellants seek leave to appeal is:

> Whether the Appellate Division erred when it failed to apply the complete standard under the Freshwater Wetlands Act regulations and when it created its own rationale to support APA's decision?

Appellants' Fourth Cause of Action showed that APA's decision was arbitrary and capricious and affected by an error of law because APA approved the Project in violation of APA's

Freshwater Wetlands Act regulations. Brief Point III.B; Reply Brief Point I.B.

This question is novel and significant (see Board of Ed. v. Wieder, 72 N.Y.2d at 1183) because preserving, protecting, and conserving freshwater wetlands across the State is a "desirable goal", and when the wetlands are within the Adirondack Park they are "decidedly a substantial State concern". Wedinger v. Goldberger, 71 N.Y.2d 428, 436 (1988); Wambat Realty Corp. v. State, 41 N.Y.2d at 495. "Freshwater wetlands are an integral part of the unique scenic, aesthetic, wildlife, recreational, open space, ecological and natural resources of the Adirondack park and are recognized and protected by the Adirondack park agency act." ECL § 24-0105(6); see also ECL § 24-0105(4); ECL § 24-0801(2). Wetlands make up about 14% of the Adirondack Park's land area, or about 840,000 acres.[16]

APA may only a approve a project that impacts wetlands if it will comply with APA's freshwater wetlands regulations at 9 NYCRR Part 578. These regulations prohibit APA from approving a project unless the "proposed activity: (i) would result in minimal degradation or destruction of the wetland or its associated values; and (ii) is the only alternative which reasonably can accomplish the applicant's objectives; or (2) alternatively to subparagraph (ii), is the only alternative which

[16] See http://apa.ny.gov/About_Park/natural_commun.htm.

provides an essential public benefit." 9 NYCRR § 578.10(a)(2); see 9 NYCRR § 578.5(a).

Here, the decision to approve the Project was arbitrary and capricious and affected by an error of law because, by its own admission, APA lacked the information necessary to determine whether the Project complied with the regulations, in particular, whether the Project's withdrawal of water for snowmaking operations would adversely affect the Cranberry Pond wetland and the wildlife that depends on it. A. 33.

Cranberry Pond is a large boreal wetland complex on the Project Site, and its has a wetland value rating of two[17]. See 9 NYCRR § 578.5(a); A. 5235-5245, 5644-5646. Due to the lack of evidence, APA determined that the adverse impacts from snowmaking activities to the ecology of Cranberry Pond have "not been determined." A. 33.

Therefore, APA did not make any determination about whether the impacts to Cranberry Pond "would result in minimal degradation or destruction of the wetland or its associated values". 9 NYCRR § 578.10(a)(2)(ii). Accordingly, the Project should not have been approved because the "record did not allow

[17] In keeping with APA's general failure to make the findings required by SAPA and its own hearing regulations, the APA's Order also did not make the required finding about the value rating of Cranberry Pond. See 9 NYCRR § 578.5; see also Brief Point VIII; Reply Brief Point VIII; A. 315, 459, 885-889, 1030-1031.

[APA] to find that the project would" result in minimal degradation of a wetland within the Adirondack Park. Green Island Assoc. v. APA, 178 A.D.2d 860, 862 (3d Dept. 1991); see Pfau v. APA, 137 A.D.2d 916, 917 (3d Dept. 1988) (upholding APA's denial of wetlands permit on the grounds that the evidence was not adequate for it to make requisite findings under 9 NYCRR § 578.10). The Appellate Division's Judgment (p. 8) also failed to apply this prong of the Freshwater Wetlands Act regulatory standard in its review of APA's decision.

Further, APA made no finding about the whether the use of the Cranberry Pond wetland: "(ii) is the only alternative which reasonably can accomplish the applicant's objectives; or (2) alternatively to subparagraph (ii), is the only alternative which provides an essential public benefit." 9 NYCRR § 578.10(a)(2).[18] Neither the Attorney General's Office or the Appellate Division (see Judgement pp. 7-8) can supply grounds for a decision after-

[18] Contrary to the Appellate Division's *sua sponte* finding (Judgment p. 8), APA never made a finding that, due to the higher cost of using Tupper Lake for snowmaking water, the use of Cranberry Pond was "the only alternative which reasonably can accomplish the applicant's objective". 9 NYCRR § 578.10(a). All that APA found was that "the costs associated with using Tupper Lake would be significantly higher." A. 23. APA also found "Cranberry Pond is not a reliable long-term source of snowmaking water" and that Tupper Lake is the "more reliable long-term source of water that minimized impacts to wetlands, fish, wildlife and other biota and would ensure the long-term viability of the Ski Area". A. 24.

the-fact if APA did not do so. Barry v. O'Connell, 303 N.Y. 46, 50 (1951).

APA's decision should be annulled because it approved the Project in violation of APA's freshwater wetlands regulations. Appellants' motion for leave to appeal should be granted because the Appellate Division erred when it failed to apply the complete regulatory standard when it upheld that decision, and when the Court created its own reasons to justify it, after APA failed to do so itself.

POINT VI:

AN AGENCY CAN NOT RELY ON A NON-APPROVED INTERNAL POLICY MEMORANDUM THAT WAS OUTSIDE THE RECORD AS THE PRIMARY BASIS FOR ITS DECISION

The fifth question on which Appellants seek leave to appeal is:

> Whether the Appellate Division erred when it held that an administrative agency that conducted an adjudicatory hearing at which evidence and testimony was taken may base its decision after the hearing primarily on an unapproved internal guidance document that was not introduced at the hearing?

Appellants' Eighth Cause of Action showed that APA's decision was arbitrary and capricious and affected by an error of law because it relied upon an internal policy memorandum that was never properly adopted as agency guidance under SAPA and the APA Act, and was outside the record of the adjudicatory hearing. A. 331-348, 916-931; Brief Point II; Reply Brief Point II. This

question is novel and significant because it goes to the very heart of the integrity of the administrative adjudication process in this state under SAPA Article 3. See Board of Educ. v Wieder, 72 N.Y.2d at 183; Simpson v. Wolansky, 38 N.Y.2d 391, 395 (1975).

While an administrative hearing "may be more or less informal", a "fundamental requirement of a fair trial" is that the parties "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 v. Wolansky, 38 N.Y.2d at 395; see SAPA § 306(2) ("all evidence, including records and documents in the possession of the agency of which it desires to avail itself, shall be offered and made a part of the record"). Relying upon "matters not appearing in the record in making the determination under scrutiny" is "in violation of the salutary general proposition . . . that it is not proper for an administrative agency to base a decision of an adjudicatory nature, where there is a right to a hearing, upon evidence or information outside the record". Id. at 396. Doing so "render[s] the administrative determination subject to annulment upon review". Id. at 395.

Nor, in the context of an adjudicatory hearing, may an agency rely upon an internal policy memorandum that was never properly promulgated under SAPA or its own regulations. Such a document may not be officially noticed under SAPA § 306(4). See

CPLR § 4511 (allowing official notice of agency regulations, but not of internal agency documents).[19]

The Guidelines are not available on the APA website, along with APA's other "Guidelines and Methodology",[20] so they are not generally available to the hearing parties or the public. See SAPA § 202-e. Further, the Guidelines are not a document that the APA Members could take "official notice" of after the close of the record because it lacks sufficient "common notoriety" as required by 9 NYCRR § 580.15(b)(1), and because the hearing parties were not given proper notice and an opportunity to dispute its planned use, as required by 9 NYCRR § 580.15(b)(2). See SAPA § 302(3); Beverly Farms v. Dyson, 53 A.D.2d 720, 721 (3d Dept. 1976) (annulling as "improper and prejudicial" an administrative determination based upon evidence that decision-maker took "official notice of" after the close of the hearing because the "documents were never entered into evidence and form no part of the record on review"). Finally, the Guidelines have no legal or binding effect on any party because they were not

[19] See also Matter of Wilco Props. Corp. v Department of Envtl. Conservation of State of N.Y., 39 A.D.2d 6, 9 (3d Dept. 1972) (noting that a "hearing officer may take official notice of duly promulgated regulations of agencies").

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

promulgated as a rule under the State Administrative Procedure Act. See SAPA Art. 2.[21]

Here, prior to the adjudicatory hearing, despite APA's staff having repeatedly asked the applicant for comprehensive wildlife studies of the site, it consistently refused to provide them. A. 333-334. The APA found in 2007 that the lack of information about the Project's impacts on fish and wildlife would not allow for approval of the project. A. 334, 2458; Brief Point II; Reply Brief Point II.

During the adjudicatory hearing, the applicant presented no additional competent information on wildlife and its habitat. A. 334. After the hearing, the APA's staff found that "[n]ot enough was done to identify biological resources or to assess the impacts of the proposed project on those resources". Therefore, continued the APA Staff, "wildlife information is lacking" and "the [applicant] should have done more wildlife work here". The staff concluded that a "it is not possible to make specific findings concerning impacts to habitat from the proposed project". A. 340-342; Brief Point II; Reply Brief Point II.

Faced with this complete lack of evidence, in the final Order approving the Project, APA's sole "Finding of Fact" on wildlife and wildlife habitat expressly stated (A. 21) that the

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[21] See also Zelanis v. New York State APA, 27 M.3d 1229(A), * 6 (Sup. Ct. Essex Co. 2010) (noting that internal agency policy statements lack force of law).

applicant's "site visits" followed the Agency's "Guidelines for Biological Surveys" ("Guidelines"). The Guidelines was not in the record of the administrative hearing and it was not officially noticed. A. 343. APA's final Order was the first time that the Guidelines was used in this case.

Therefore, because it "acknowledged [its] reliance on matters not appearing in the record in making the determination under scrutiny", APA's decision should have been annulled. Simpson v. Wolansky, 38 N.Y.2d at 396; see SAPA § 302(3) ("findings of fact shall be based exclusively on the evidence and on matters officially noticed"). APA also could not reply on the Guidelines memorandum because, as discussed above, it was never properly promulgated under SAPA, the APA Act, or APA's regulations.

The Appellate Division erred by basing its decision on a finding that the Appellants had "not identified any prejudice" to their interests. Judgment p. 8, fn 9. APA's actions were inherently prejudicial and it was not up to the Appellants to prove that they were. See Beverly Farms v. Dyson, 53 A.D.2d at 721.

The Appellate Division also erred by holding that the APA's reliance on the Guidelines did not result in "such a harmful or unfair effect as to vitiate the hearing". Judgment p. 8, fn 9 (citations and internal quotations omitted). Contrary to the

Appellate Division's holding, an agency's post-hearing material reliance upon documentary evidence outside the record, or an unapproved policy memo, creates a fundamentally unfair effect on the hearing. See Simpson v. Wolansky, 38 N.Y.2d at 396; Korth v. McCall, 275 A.D.2d 511, 512 (3d Dept. 2000); Matter of Erdman v. Ingraham, 28 A.D.2d 5, 9 (1st Dept. 1967).

The Guidelines document was never applied to the facts of the Project during the administrative hearing. No APA staff witnesses, no applicant witnesses, and no other witnesses testified about the Guidelines, and no witnesses stated that they had considered them, or reviewed them in preparing or reviewing the proposed Project. No witness testified that the Guidelines had any scientific validity. No witness testified that the applicant had actually "followed standard Agency guidelines and procedures", or the Guidelines, in particular. A. 343-344.

Therefore, the hearing parties had no opportunity to conduct cross-examination or rebuttal regarding the Guidelines, or its application to this Project, in the adjudicatory hearing process. See SAPA § 306; Matter of Erdman v. Ingraham, 28 A.D.2d at 9 (annulling the department's decision because the consideration of evidence that was received "without the opportunity of cross-examination, had the effect of depriving petitioner of the fair and proper hearing to which he was entitled"); see also Matter of

Multari v. Town of Stony Point, 99 A.D.2d 838, 839 (2d Dept. 1984).

Therefore, APA's reliance upon the Guidelines was an error of law. Moreover, as shown above, there is no competent evidence within the record that could otherwise support APA's finding that the applicant's "site visits" followed the Guidelines or any other "standard Agency guidelines and procedures". A. 21. See Matter of Johnson v. Town of Arcade, 281 A.D.2d 894, 895 (4th Dept. 2001). Accordingly, in order that the Court of Appeals may restore fundamental fairness to the State's adjudicatory hearing process, Appellants' motion for leave to appeal the question of whether an administrative agency that conducted an adjudicatory hearing may base its decision on an unadopted internal guidance document, that was outside the record, should be granted.

POINT VII:

IT WAS AN ABUSE OF DISCRETION TO DENY APPELLANTS THE OPPORTUNITY TO CONDUCT DISCOVERY ON THE ISSUE OF IMPROPER *EX PARTE* CONTACTS BETWEEN THE EXECUTIVE CHAMBER AND APA

The sixth question on which Appellants seek leave to appeal is:

> Whether Supreme Court abused its discretion in denying Appellants leave pursuant to CPLR § 408 to conduct discovery regarding APA's improper *ex parte* communications with the Executive Chamber, and whether the Appellate Division erred when it answered this question in the negative and also dismissed that cause of action?

Appellants' Twenty-Eighth Cause of Action showed that the APA's decision-making process on the Project was so tainted by improper *ex parte* contacts between the voting members of the APA ("Members") and other parties, including the Executive Chamber[22] and the applicants' attorney, that the approval of the Project must be annulled. A. 415-420, 1038-1050, 1123, 1176-1178, 1321-1326, 1409-1410, 1529-1530, 1532-1533, 1550-1552, 1556, 5022-5062); Brief Point XI; Reply Brief Point XI. These contacts were prohibited by SAPA § 307(2) and the APA's regulations at 9 NYCRR § 587.4(c). "Such contacts are in violation of administrative procedural due process and mandate an annulment of [APA's] determination." Signet Constr. Corp. v. Goldin, 99 A.D.2d 431, 432 (1st Dept. 1984); see Rivera v. Espada, 3 A.D.3d 398, 398-399 (1st Dept. 2004) (annulling determination "tainted by the *ex parte* communication").

In this case, there was evidence that such contacts occurred between the Executive Chamber and the APA Members. This evidence included the 18 sets of communications documents between the Executive Chamber and APA that were withheld from the Record herein by the State. A. 1176-1178, 1321-1326, 1529-1530, 1550-1552. The likely content thereof was demonstrated when the Mayor of the Village of Tupper Lake, a supporter of the Project, was reported by the press to have personally "thanked the Governor

[22] See Executive Law § 2.

for his support with the APA commissioners' vote on the ACR permit".[23] A. 1532-1533, 1556.

The obvious implication of these facts is that the Executive Chamber somehow interfered with the APA's deliberative process so as to ensure that the Project's application was approved. While vehemently denying that the well-documented *ex parte* contacts between the applicants' attorney and the APA were improper (Judgment p. 14), none of the respondents ever denied that such *ex parte* contacts had occurred between the Executive Chamber and the APA Members, or that these contacts were improper. A. 1362-1480. This is the equivalent of an admission of these allegations. Reply Brief Point XI.

Although Article 78 proceedings are ordinarily decided upon the record that was before the agency whose actions are being challenged (see CPLR § 7804(c)), by their very nature, documentary proof of *ex parte* contacts is not usually going to be found in the record. Thus, in order to prove such a claim, leave to conduct discovery pursuant to CPLR § 408 is essential.

Appellants made a motion to Supreme Court for leave to undertake that discovery. A. i-ix; Brief Point XI; Reply Brief

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[23] An earlier statement by the Mayor to the press was confirmed when it led to the discovery of the *ex parte* contacts between the applicants' attorney and the APA. A. 1529-1532. Thus, it is extremely likely that if the 18 sets of documents exchanged between the Executive Chamber and the APA were released, and other discovery were permitted, the actions of the Executive Chamber would likewise be confirmed.

Point XI. The motion was denied. A. i-ix. Appellants then moved for, and were granted, leave to appeal that decision to the Appellate Division. A. xviii. That court denied the appeal on the grounds that the court below had not abused its discretion. The court concurrently dismissed the Twenty-Eighth Cause of Action due to a lack of evidence of improper *ex parte* contacts.[24] Judgment p. 14. This dismissal was perhaps inevitable, given Appellants' inability to conduct discovery.

In denying the appeal, the Appellate Division applied the proper legal standard, but it incorrectly ruled that Supreme Court had not abused its discretion. Judgment p. 15. Discovery should be allowed under CPLR § 408 where the discovery "sought [is] likely to be material and necessary to the prosecution or defense of [the] proceeding." Stapleton Studios v. City of New York, 7 A.D.3d 273, 275 (1st Dept. 2004); see Allen v. Crowell-Collier Publ. Co., 21 N.Y.2d 403, 406-407 (1968). The fact that the Twenty-Eighth Cause of Action was dismissed for lack of evidence (Judgment p. 14) proves that discovery was absolutely "material and necessary". Id. Therefore, Supreme Court should have granted the appeal and allowed Appellants to

[24] For reasons that are not apparent, the Appellate Division only discussed the *ex parte* contacts between the APA and the developers, and failed to address the *ex parte* contacts between the Executive Chamber and the APA. Judgment pp. 14-15.

conduct discovery before ruling upon the Twenty-Eighth cause of action.

Appellants were caught in a Catch-22. The Appellate Division found that the claims of *ex parte* contacts were "speculative", yet without discovery, it was not possible to garner sufficient facts to establish additional proof, when those facts were within the exclusive knowledge of the opposing parties. Discovery would not be a "fishing expedition" because Appellants have already provided "some factual predicate" showing that discovery is "reasonably likely" to produce new evidence of improper *ex parte* communications between the Executive Chamber and the APA. A. 1489-1493, 1532-1533, 1556. Niagara Mohawk Power Corp. v. Town of Moreau Assessor, 8 A.D.3d 935, 937 (3d Dept. 2004). The new evidence sought by the Appellants is more than "marginally relevant" to the question of *ex parte* communications - the information sought is at the heart of the Twenty-Eighth Cause of Action. General Electric Co. v. Macejka, 117 A.D.2d 896 (3d Dept. 1986).

This question is both novel and significant. See Board of Ed. v. Wieder, 72 N.Y.2d at 1183. There appear to be no Court of Appeals cases addressing this issue. Resolving it is essential to preserving the integrity of the SAPA Article 3 adjudicatory hearing process for the APA, and for all agencies of the state's government, by ensuring that off-the-record interference with

their deliberations does not taint the hearing process. Discovery regarding such communications would be "material and necessary to the prosecution" of the Appellants' proceeding, and should be granted in light of the courts' "important responsibility to protect [against] arbitrary or discriminatory conduct". Stapleton Studios v. City of New York, 7 A.D.3d 273, 275 (1st Dept. 2004); Dougherty v. Bahou, 67 A.D.2d 739, 741 (3d Dept. 1979); see Freidus v. Guggenheimer, 57 A.D.2d 760 (1st Dept. 1977). Therefore, the motion for leave to appeal should be granted.

CONCLUSION

This case presents novel and significant questions of statewide importance. Leave to appeal should be granted.

Dated: August 24, 2014

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