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June 6, 2023

John M. Burth  
Adirondack Park Agency  
PO Box 99  
Ray Brook, NY 12977

**RE: Comments on Application for Variance by  
LS Marina LLC  
Project 2016-0029A: Town of Harrietstown, Franklin County**

Dear Mr. Burth:

Protect the Adirondacks (“PROTECT”) submits these comments concerning the application by LS Marina LLC (“Applicant”) for a variance from the shoreline restrictions set forth in section 806 of the Adirondack Park Agency Act (“APA Act”), Executive Law § 806, in connection with its proposed expansion of an existing commercial marina on Lower Saranac Lake. The variance application should be denied because (as discussed below) the Applicant has failed to (i) state the basis or purported need for the requested variance; (ii) identify for which part or parts of the shoreline restrictions a variance is sought; and (iii) meet its statutory and regulatory burden of demonstrating practical difficulties in complying with the shoreline restrictions. In addition, the Applicant has submitted contradictory statements regarding the number of boat slips currently existing at the two project locations and has failed to demonstrate that the existing boat slips are lawfully in existence. Lastly, the Agency cannot rationally approve any expansion of the existing marina in the absence of the carrying capacity study of Lower Saranac Lake mandated by the Unit Management Plan for the Saranac Lake Wild Forest (“SLWF UMP”).

Apart from the fatal deficiencies in the Applicant’s variance application, PROTECT objects to the Agency’s significant—and unexplained—changes to longstanding jurisdictional determinations concerning the permitting and variance requirements for the proposed project and the Agency’s apparent intention to rush forward with a final decision within weeks. Specifically, the Agency has apparently reversed, without any public notice or opportunity for comment, its previous determinations that the proposed project requires a wetland permit and a variance for the new structures proposed for Ampersand Bay. These jurisdictional determinations were initially made more than a decade ago and have been

the subject of court challenges and an Agency Declaratory Ruling. The public is entitled to an explanation of the basis for these abrupt shifts in the Agency's position and should be provided an opportunity to comment thereon. PROTECT is particularly disturbed by the Agency's sudden decision, after years of information requests and data gathering and studies concerning the potential wetland impacts of the project, that no wetland permit is necessary. Coming on the heels of the Appellate Division's overturning of the previously issued wetland permit due to the Agency's arbitrary under-valuing of the affected wetlands, this new non-jurisdictional determination has the appearance of an attempted end-run around the Court's decision.

### **The Public Comment Period Should be Extended**

At the outset, PROTECT requests that the opportunity for public comment be extended for at least an additional 60 days due to the complexity of the proposed project, the magnitude of the administrative record (nearly 3,000 pages), and the numerous legal and factual issues raised by the inadequacies in the application materials and the Agency's reversals of its prior jurisdictional determinations. PROTECT learned of the variance application on May 22, 2023, when a notice of public hearing on the application was published in the *Adirondack Daily Enterprise*. The Agency's public notice includes links to an administrative record consisting of nearly 3,000 pages. The current public comment period apparently expires on Monday, June 12 and the variance application is currently scheduled for consideration by the Agency Board at its June 15 meeting. It is respectfully submitted that a period of less than 60 days to prepare and submit comments on a project of this magnitude and significance is insufficient, and that the Agency's inclusion of the variance application on its June 15 agenda is rushed and premature.

In addition, as the Agency is aware, the proposed marina expansion has been the subject of extended litigation. One of the key issues in the litigation was the Agency's issuance of a wetlands permit for the project premised on its reclassification of wetlands impacted by the marina expansion to a lower value rating. The Appellate Division, Third Department, determined that reclassification to be arbitrary and capricious, and the Court annulled the wetland permit. *Matter of Jorling v. Adirondack Park Agency*, 185 NYS3d 354, 359 (3d Dept. 2023) (holding that the Agency's "reading of the [wetland] regulations . . . is contrary to their plain meaning [and] lacked a rational basis."). Rather than review the proposed project based on the original (higher) wetland value rating as mandated by the Court, the Agency has apparently reversed its earlier longstanding jurisdictional determination and now claims (for the first time in more than a decade) that the proposed project does not need a wetland permit at all. As far as we are aware, the Agency has offered no legal justification or public explanation for this new non-jurisdictional determination.

The Agency has also failed to provide any legal justification or public explanation for why the Agency is requiring a variance application for proposed structures in Crescent Bay but not for the similar proposed structures in Ampersand Bay. This is particularly puzzling because the Agency previously determined that the new structures at both locations require a variance. *See* LS Marina LLC, Application for Variance from Shoreline Restrictions (April 10, 2014). Moreover, the Agency previously confirmed in a Declaratory Ruling involving the Applicant that such structures require a variance. Declaratory Ruling: Jurisdictional Determination J2013-0548 (Oct. 4, 2013) at 3 (concluding that "because your client's proposed structure is not a boathouse or dock and is more than 100 square feet in size, a variance must be obtained for its construction").

At the very least, the public should have additional time to be provided with the Agency's rationale for the new wetland permit and Ampersand Bay variance non-jurisdictional determinations and an opportunity to respond to them.

### **The Applicant's Submissions Fail to Meet the Legal Standard for the Granting of a Variance**

The Agency's regulations governing review of variances require that applications include "the basis of the variance request." 9 NYCRR 576.5(b). Neither the Applicant's submissions nor the publicly available materials on the Agency's website provide any basis for the variance request. The application is therefore deficient on its face, and the Agency has no rational basis for granting a variance. Indeed, the Agency cannot possibly make the findings required for the granting of a variance in the absence of any stated basis for modifying the shoreline restrictions. *See id.* § 576.1(c).

Moreover, the Applicant has failed to meet its burden of demonstrating that the legal standard for the granting of a variance has been met. The APA Act provides that the Agency may grant a variance from the shoreline restrictions "*where there are practical difficulties or unnecessary hardships* in the way of carrying out the strict letter of the restrictions." Executive Law § 806(3)(a) (emphasis added). The Agency's regulations echo this requirement, providing that the Agency may grant a variance "*where there are practical difficulties* in carrying out the strict letter of the provisions of the plan or the shoreline restrictions." 9 NYCRR § 576.1(a) (emphasis added).

As stated by the New York Court of Appeals,

While it would appear that no precise definition of the term 'practical difficulties' has yet been formulated, in general, petitioner must show that as a practical matter he cannot utilize his property or a structure located thereon 'without coming into conflict with certain of the restrictions of the [zoning] ordinance.'

*Fuhst v. Foley*, 45 NY2d 441, 445 (1978).

The regulations make clear that "[t]he burden of demonstrating compliance with the standards set forth in this Part shall rest with the applicant." 9 NYCRR § 576.5(e)(3). Here, there has been no showing of practical difficulties by the Applicant, including no demonstration per the Court of Appeals test in *Fuhst* that the property cannot be utilized without coming into conflict with the shoreline restrictions. In fact, by the Applicant's own admission, the property was successfully operated as a commercial marina "for 90 years and three generations" until it began to fall into disrepair due to a lack of funds to maintain and improve the marina. LS Marina LLC, Saranac Lake Marina Business Plan (Redacted Version) (2016) at 1. Thus, because there is nothing in the application demonstrating practical difficulties in meeting the shoreline restrictions, the Applicant has failed to meet its burden of demonstrating compliance with the regulatory standard for issuance of a variance.

### **The Applicant Has Submitted Contradictory Statements Concerning Existing Structures**

The administrative record shows that the applicant has submitted contradictory statements to the Agency and the courts concerning the number of boat slips that exist at the marina. Those statements also call into question which, if any, of the existing boat slips are lawful. For example, in an affidavit submitted in a real property court proceeding (included in the administrative record), one of the Applicant's principals stated:

In September of 1924, my Grandfather built the main boat house, which is still at the marina today. *From there, as the boating and marina business grew, my Grandfather built 50 covered boat slips, six rental cabins and other buildings, including a house in 1926 and a garage on Route 3 in 1936.*

Affidavit of Donald Kimball Duso, Jr., sworn to on Oct. 31, 2017, ¶ 5 (emphasis added). According to this sworn statement, the affiant's grandfather operated the marina individually and later through Crescent Bay, Inc. until his death in 1979. *Id.* ¶¶ 5, 7. Thus, the affidavit is proof that there were 50 covered boat slips that were constructed at the marina between 1924 and 1979, meaning that there were a maximum of 50 boat slips at the Crescent Bay location on the effective date of the APA Act. Indeed, the Applicant claimed in 2013 that the proposed *expansion* of the Crescent Bay marina would result in 52 boat slips. Declaratory Ruling: Jurisdictional Determination J2013-0548 (Oct. 4, 2013) at 1 (stating that “the proposed development [at Crescent Bay] includes a floating structure with 52 boat slips”).

However, in a prior submission to the Agency, the Applicant claimed that “in the past” there was “docking and mooring capacity for 82 boats” at Crescent Bay. LS Marina LLC, Adirondack Park Agency Application for Major Projects General Information Request (February 1, 2016) at 4; *see also Matter of LS Marina, LLC v. Adirondack Park Agency*, 56 Misc.3d 1207(A) (Sup. Ct. Essex County 2017) (stating that the Crescent Bay site contains “facilities and structures for the docking of 70 boats and moorings for 12 additional boats.”). The Applicant has not provided any information regarding when the additional 20 docking berths were added, but it appears that they must have been added (without the required Agency review and approval) after the APA Act's effective date.

The Applicant also claimed that the “annex” site in Ampersand Bay contains 80 docking slips, and that the total (Crescent Bay plus the annex) is therefore 162 docking slips. *Id.* Yet the Applicant's Business Plan states that there is a total of 165 docking slips at both sites, and this discrepancy is not explained. LS Marina LLC, Saranac Lake Marina Business Plan (Redacted Version) (2016) at 1. Adding to the confusion is a subsequent email claiming that Crescent Bay has 102 boat slips and the annex has 82 boat slips, bringing the total purported number of “existing” slips to 184. Email from Erin L. Burns, DEC Deputy Regional Permit Administrator, to Michael Damp, Saranac Lake Marina (Aug. 7, 2020). And in the recent court case involving the proposed project, the Applicant apparently informed the Court that there are a total of 219 “existing” boat slips at both sites. *Matter of Jorling v. Adirondack Park Agency*, 185 NYS3d 354, 357 (3d Dept. 2023). Thus, the Applicant has provided at least four different figures, ranging from 162 to 219, in various contexts and proceedings for the number of boat slips “currently existing” at the two project locations.

In light of the contradictory information provided by the Applicant, the Agency must (i) presume, based on the affidavit submitted by one of the Applicant's principals, that there was a maximum of 50 boat slips at the Crescent Bay site on the effective date of the APA Act; (ii) determine, based on verifiable evidence, how many boat slips existed at the annex (Ampersand Bay) site on the effective date of the APA Act; (iii) determine how many boat slips exist currently at both sites; (iv) the dates on which additional boat slips were added at both site; and (v) whether those additional boat slips were reviewed and approved by the Agency and are thus lawfully existing. There is simply no rational basis for the Agency to approve any aspect of the proposed marina expansion in the absence of this crucial baseline information.

**The Agency Cannot Grant the Variance or Issue Any Other Approvals for the Proposed Marina Expansion in the Absence of the Mandated Carrying Capacity Study of Lower Saranac Lake**

Lower Saranac Lake is illustrative of the intermingling of public and private lands that characterizes the Adirondack Park. Even though the lake is part of the SLWF and the Department of Environmental Conservation ("DEC") operates approximately 60 public campsites on the shoreline and on islands in the lake, SLWF UMP at 177-181, much of the lake's shoreline is privately owned, including the LS Marina site. The SLWF is located in the middle of the largest population centers in the Adirondack Park; lies within one day's drive of over 70 million people in the northeastern United States and Canada; and is easily accessed by motor vehicle. *Id.* at 1-3. The ease of access, coupled with construction of new and expanded commercial and public boat launches and access sites has resulted in a proliferation of boat traffic in the Saranac Lakes Complex. *Id.* at 59, Table 8.

According to the Applicant, the proposed expansion will (allegedly) increase the number of boat slips at the marina from 219 to 277—an increase of 58 motorboats on an already overburdened lake.<sup>1</sup> As noted in the SLWF UMP, motorboats "have the potential to cause a greater variety and more significant impacts than non-motorized watercraft." SLWF UMP at 75. To address these impacts, the UMP identifies the need for "a comprehensive [carrying capacity] study" of Lower Saranac Lake and other waterbodies in the Saranac Lakes Complex. *Id.* at 112. To date, neither the DEC nor the APA have conducted the mandated carrying capacity study.

The Appellate Division, Third Department, has recognized the importance of the carrying capacity study:

APA itself has acknowledged the importance of such an assessment, including in the [SLWF UMP] . . . which governs the Saranac Lakes Wild Forest planning area, of which Lower Saranac Lake is a part. In keeping with the principles stated in that document — i.e., that the Saranac Lakes Wild Forest "cannot withstand ever-increasing and unlimited visitor use without suffering the eventual loss of its essential natural and wild character" . . . — the SLWF UMP sets forth an objective

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<sup>1</sup> As discussed above, the Applicant has submitted contradictory information concerning how many boat slips exist at the two marina sites and has failed to demonstrate how many (if any) are lawfully existing. Consequently, the increase in the number of motorboats resulting from the proposed expansion may be considerably higher.

of conducting a comprehensive study of lakes and ponds to determine their carrying capacity . . . . *The state respondents' failure to comply with these principles, and specifically with the stated objective contained in the SLWF UMP, is wholly unexplained and, indeed, inexplicable.*

*Matter of Jorling*, 185 NYS3d at 359-360 (emphasis added) (internal citations omitted).

Although the Appellate Division did not need to reach the carrying capacity issue because it annulled the Agency's issuance of a wetlands permit on other grounds, the Court was clearly skeptical of the Agency's decision to allow the significant expansion of a commercial marina in the absence of a carrying capacity study. The Court's skepticism is well-founded, because the Applicant's own Boat Traffic Study concluded that the proposed marina expansion would exceed the boat traffic carrying capacity of Lower Saranac Lake:

It is no surprise that the project, with its increased number of boat slips, will result in increased numbers of boats on the water. Under the peak use scenario when 23% of all boats from all locations utilize just Lower Saranac Lake, there is potential for boat density to be higher than the carrying capacity . . . .

The LA Group, Marina Boat Traffic Study (January 2014) at 6. It is important to note that the parameters used in the Applicant's Boat Traffic Study were based on a similar study conducted at Canandaigua Lake, and thus probably underestimated the likelihood of the project causing an exceedance of the boat use carrying capacity in Lower Saranac Lake. As the study acknowledged, Canandaigua Lake is not reflective of conditions on Lower Saranac Lake because of "Canandaigua Lake's more urban setting, its location not within or adjacent to Forest Preserve and many other factors." *Id.* at 5. In any event, a subsequent supplemental boat traffic study submitted on behalf of the Applicant also concluded that boat carrying capacity will be exceeded because "under the worst case scenario of all boats remaining on Lower Saranac Lake, that peak period boat traffic would slightly exceed Lower Saranac Lake's carrying capacity by 10%." The LA Group, Updated Boat Traffic Assessment (July 2014) at 8.

It bears emphasis that the findings of both the initial and supplemental boat traffic studies that the proposed project will cause the boat density carrying capacity of Lower Saranac Lake to be exceeded addresses only a single aspect of carrying capacity. Neither study evaluated other critical components of carrying capacity, such as impacts to water quality, fish and wildlife, invasive species, or noise levels from the increased motorboat traffic associated with the marina expansion. Given that the Applicant's own consultant concluded that the proposed project will cause the boat density carrying capacity to be exceeded, it is incumbent upon the Agency to suspend consideration of the Applicant's proposal pending completion of a full carrying capacity of Lower Saranac Lake.

## **Conclusion**

For more than a decade, the Agency has been evaluating the Applicant's planned expansion of its commercial marina on Lower Saranac Lake. During that time, the Agency has consistently taken the position that the proposed project requires a wetland permit and variances for structures at both the Crescent Bay and Ampersand Bay locations. Now, in the aftermath of an Appellate Division

decision invalidating its previously issued wetland permit, the Agency has mysteriously reversed itself and now claims that a wetland permit is not required after all. For reasons that are equally unclear, the Agency has also reversed its prior determination (confirmed in a Declaratory Ruling) that a variance is necessary for the proposed structures in Ampersand Bay.

The public deserves an explanation from the Agency for these sudden reversals and an opportunity to comment on them. Thus, for the reasons set forth above, PROTECT urges the Agency to extend the public comment period by at least 60 days or, in the alternative, to deny the variance application.

On behalf of the Board of Directors of Protect the Adirondacks, please let me express our gratitude for the opportunity to submit these comments.

Sincerely,

A handwritten signature in black ink, appearing to read "Chris Amato". The signature is fluid and cursive, with a large initial "C" and a stylized "A".

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