

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WARREN

In the Matter of

PROTECT THE ADIRONDACKS! INC.,

Petitioner-Plaintiff,

-against-

ADIRONDACK PARK AGENCY and
LS MARINA, LLC,

Respondents-Defendants.

**VERIFIED PETITION
AND COMPLAINT**

Index No.:

**ORAL ARGUMENT
REQUESTED**

For a Judgment Pursuant to Article 78
Of the Civil Practice Law and Rules
And for Declaratory Relief

Petitioner-Plaintiff Protect the Adirondacks! Inc. (“Protect” or “Petitioner”) by and through its attorneys, Christopher A. Amato, Esq. and Claudia K. Braymer, Esq., for its Verified Petition and Complaint allege as follows:

PRELIMINARY STATEMENT

1. This is a combined CPLR Article 78 proceeding and CPLR § 3001 declaratory judgment action seeking to annul, vacate and set aside the June 15, 2023 order (the “Order”) by Respondent-Defendant Adirondack Park Agency (“APA” or “Agency”) approving a variance application by Respondent-Defendant LS Marina, LLC (“Applicant”) pursuant to the Adirondack Park Agency Act, Executive Law Art. 27, §§ 800 *et seq.* (“APA Act”), for the expansion of a commercial marina on Lower Saranac Lake in the Town of Harrietstown, Franklin County, in the Adirondack Park (the “Project”). A copy of the APA’s June 15, 2023 Order is annexed hereto and made part of this Petition as Exhibit A.

2. The Freshwater Wetlands Act, Environmental Conservation Law (“ECL”) Article 24 (“FWA”), prohibits the undertaking of any regulated activity in or affecting jurisdictional wetlands without first obtaining a wetland permit. ECL § 24-0701(1). The APA is responsible for administering and enforcing the FWA within the boundaries of the Adirondack Park. *Id.* § 24-0801(2).

3. In addition, the APA Act requires a permit for “all land uses and development . . . involving wetlands” in areas classified as Hamlet by the Adirondack Park Land Use and Development Plan. APA Act § 810(a)(1), Executive Law § 810(a)(1).

4. The Project requires a wetland permit under both the FWA and the APA Act because it involves the construction and installation of structures in and over approximately 15,000 square feet of wetlands at two Project locations (the “Main Marina” and the “Annex Site”) on Lower Saranac Lake and the dredging and filling of wetlands at one location (the Annex Site).

5. The Project has been under review by the APA for nearly ten years due largely to the Applicant’s repeated legal challenges to the Agency’s jurisdictional determinations. The APA first informed the Applicant that the Project requires a wetland permit in July 2014. For at least eight years, the APA consistently maintained that the various iterations of the Project required a wetland permit as well as a variance from the APA Act’s shoreline setback restrictions for both the Main Marina and Annex Site locations on Lower Saranac Lake. The APA defended these jurisdictional determinations in the face of administrative and court challenges filed by the Applicant.

6. The APA first approved the Project in September 2020, when it issued a wetland permit and a variance for the new structures at the Main Marina and Annex Site. A legal challenge to the Agency’s approval of the Project was filed by Thomas Jorling, a former Commissioner of

the New York State Department of Environmental Conservation who owns a home on Lower Saranac Lake.

7. In *Matter of Jorling v. Adirondack Park Agency*, 214 AD3d 98 (3d Dept. 2023), the Appellate Division, Third Department, annulled the September 2020 wetland permit on the ground that the APA had misapplied its wetland regulations by lowering the value rating of wetlands impacted by the Project. The Appellate Division held that the Agency’s interpretation conflicted with “a plain reading of the regulations” and “lacked a rational basis.” *Id.*, 214 AD3d at 104.

8. On the heels of the Appellate Division decision overturning the Agency’s wetland permit, the APA staff and the Applicant hurriedly held two meetings during which, upon information and belief, they collaborated on a strategy to evade the import of the decision. Significantly, the meeting memoranda prepared by APA staff for the two meetings each consist of a single sentence providing no details whatsoever of what was discussed at those meetings.

9. Following the meetings with the APA staff, the Applicant submitted a new application for approval of the Project. The new application sought only a variance for the Main Marina site. The application did not seek a wetland permit and did not seek a variance for the Annex Site.

10. The Agency’s Order approving the Project was issued on June 15, 2023. The Order states that the APA determined not to require a wetland permit for the Project because the Applicant will make “efforts” to minimize the Project’s impacts on thousands of square feet of protected wetlands. Neither the FWA, the APA Act, nor the APA’s wetland regulations include an exemption from wetland permitting requirements based on “efforts” to minimize impacts to wetlands affected by a proposed project.

11. Upon information and belief, the APA decided to allow the Project to proceed without a wetland permit because if the Agency applied the wetland value rating ordered by the Appellate Division the Project would have to be completely re-designed to avoid the affected wetlands or the permit would have to be denied.

12. The APA's abrupt reversal, after eight years, of its determination that the Project requires a wetland permit is a transparent attempt to circumvent the Appellate Division decision and violates the Freshwater Wetlands Act, the APA Act and the Agency's wetland regulations.

13. The APA also acted arbitrarily and capriciously by determining—for the first time in more than eight years—that a variance is not needed for new structures at the Annex Site even though those structures will not comply with the shoreline setback restrictions of the APA Act. The Agency erroneously claims that structures at the Annex Site constitute a “replacement in kind” of pre-existing nonconforming structures. In fact, the new structures do not meet the regulatory definition of “replacement in kind” because they are in a different location from the prior nonconforming structures and because they significantly increase the amount of non-conformance with the shoreline setback restrictions as compared to the prior structures.

14. The Agency also acted arbitrarily and capriciously by approving the variance even though the Applicant failed to demonstrate practical difficulties or unnecessary hardships in complying with the shoreline setback restrictions, which is the statutory standard for the granting a variance under the APA Act. Indeed, the Order approving the variance includes no finding that the Applicant has demonstrated practical difficulties or unnecessary hardships in complying with the shoreline setback restrictions.

15. The APA's approval of the Project was therefore an abuse of discretion, arbitrary and capricious, and otherwise not in accordance with law.

16. As relief, Petitioner seeks an Order (i) annulling, vacating and setting aside the APA's June 15, 2023 Order granting a variance from the APA Act's shoreline setback restrictions for new structures at the Main Marina; (ii) declaring that the Applicant's construction and installation of docks and pilings in and over wetlands and material alteration of wetlands at the Main Marina and Annex Site and dredging and filling of wetlands at the Annex Site are regulated activities requiring a wetland permit; (iii) declaring that the placement of approximately 14,040 square feet of new structures extending approximately 150 feet into Ampersand Bay at the Annex Site is not a "replacement in kind" within the meaning of the APA's shoreline regulations, and that such placement therefore requires a variance from the shoreline setback restrictions; and (iv) enjoining Respondent-Defendant LS Marina LLC to remove, by a date certain, any structures constructed, installed or placed in violation of the FWA and the APA Act.

PARTIES

17. Protect is a not-for-profit, grassroots membership organization dedicated to the protection and stewardship of the public and private lands of the Adirondack Park, and to building the health and diversity of its natural and human communities for the benefit of current and future generations. Protect pursues this agenda through advocacy, independent public oversight, grassroots organizing, education, scientific research, and legal action. Its offices are located in the Adirondack Park at 105 Oven Mountain Road, Johnsburg, New York. Affidavit of Peter Bauer, sworn to on August 1, 2023 ("Bauer Aff."), annexed hereto and made part of this Petition as Exhibit B, ¶ 4.

18. One of Protect's priorities is to ensure that the APA's regulation of private lands in the Adirondack Park complies with all applicable statutory and regulatory requirements,

including the APA Act and the FWA. To this end, Protect routinely monitors APA's review of permit and variance applications. *Id.* ¶¶ 13-14.

19. Although Protect relies in most cases on direct advocacy before the APA staff and leadership to achieve its goals, it does on occasion resort to court action when appropriate and necessary to ensure that the Agency complies with applicable statutory and regulatory requirements.

20. Protect has over 2,000 members, many of whom live in the Adirondack Park. Many of Protect's members enjoy a variety of recreational activities, including hiking, camping, canoeing, kayaking, snowshoeing, skiing, and biking, on Forest Preserve lands and waters in the Adirondack Park through all four seasons. *Id.* ¶ 5.

21. Protect's members frequently engage in recreational activities on Lower Saranac Lake, including paddling, swimming, camping and wildlife viewing, and plan to return there to engage in those activities in the future. The Protect members who recreate on Lower Saranac Lake are attracted to the area because it is part of the Saranac Lake Wild Forest, and by its wild character, the opportunities for quiet paddling of canoes and kayaks, and the opportunities to fish, view wildlife and enjoy the surrounding undeveloped and mountainous landscape, much of which is part of the "forever wild" Forest Preserve. *Id.* ¶ 27.

22. The proposed Project directly harms Protect's members who recreate on Lower Saranac Lake because it will result in a substantial increase in motorboat traffic on the lake, thereby diminishing the wild nature of the lake and the opportunities for quiet paddling and wildlife viewing. The increased motorboat traffic will also harm Protect's members who recreate there by creating water and noise pollution. In addition, the construction of new structures in and over wetlands in Crescent Bay at the Main Marina and at Ampersand Bay at the

Annex Site will diminish the enjoyment by Protect's members of those areas because the functions and values of the wetlands will be adversely impacted by the development, including the ability of the wetlands to protect and improve water quality and to support fish and wildlife. *Id.* ¶ 28.

23. In addition, at least two of Protect's members own property in the vicinity of the Main Marina and the Annex Site. The Project will significantly increase the level and intensity of uses at both locations and will increase the visibility of those uses. The increased noise, light, activity, and stormwater runoff; reduction in property values; and negative aesthetic and visual impacts resulting from the proposed marina expansion will irreparably alter the character of that part of Lower Saranac Lake, and will adversely affect these landowners' use and enjoyment of their property. *Id.* ¶ 29.

24. Protect also administers the Adirondack Lake Assessment Program ("ALAP"), now in its 26th year, in partnership with the Adirondack Watershed Institute at Paul Smith's College. Protect organizes lake associations, local governments, and volunteers; trains them in the water quality sampling protocol developed by the Institute; and provides them with the necessary materials to monitor water quality at waterbodies throughout the Adirondack Park. The samples are analyzed by the Institute and an annual water quality report is published based on the results. Through ALAP, Protect helps to monitor the water quality of approximately 80 lakes and ponds throughout the Adirondacks. Water quality in Lower Saranac Lake has been monitored as part of ALAP since 2001. *Id.* ¶¶ 11-12, 26.

25. Respondent-Defendant APA is an executive agency of the State of New York created pursuant to APA Act § 803, Executive Law § 803. Its office is located at Ray Brook in the Town of North Elba, County of Essex, New York.

26. Upon information and belief, Respondent-Defendant LS Marina, LLC is a New York limited liability corporation with its principal place of business located at 4901 State Route 3, Saranac Lake, New York, in Franklin County.

VENUE

27. Venue of this proceeding properly lies in Warren County pursuant to CPLR § 506(b) because it is in the judicial district in which Respondent-Defendant APA has its principal office.

FACTS

A. The APA Determines That the Project Requires a Variance at Both the Main Marina and Annex Site

28. Upon information and belief, the Main Marina and the Annex Site have operated as a commercial marina since the 1920s.

29. Both the Main Marina and the Annex Site are located in an area designated as Hamlet by the Adirondack Park Land Use and Development Plan.

30. Section 806(1)(a)(2) of the APA Act, Executive Law § 806(a)(a)(2), establishes a 50-foot shoreline setback requirement for structures greater than 100 square feet in size located in a Hamlet area.

31. On August 28, 2013, CB Marina LLC (“CB Marina”), the prior owner of the marina, filed a jurisdictional inquiry form with the APA for a proposed expansion of the marina.

32. By letter dated September 10, 2013, the APA staff informed CB Marina that a variance would be needed for the proposed marina expansion.

33. On September 29, 2013, CB Marina filed a Petition for Declaratory Ruling with the APA seeking a determination that the structures proposed for the marina expansion were not subject to the shoreline setback restrictions and therefore did not require a variance.

34. By letter dated October 14, 2013, the APA Executive Director upheld the staff determination that the Project's proposed structures required a variance from the shoreline setback restrictions.

35. Upon information and belief, the Applicant, in anticipation of its purchase of the marina from CB Marina, submitted a preapplication form to the APA on December 10, 2013, for a variance to allow expansion of the Main Marina and Annex Site. The preapplication stated that the Main Marina would be expanded from 70 to 175 boat slips and that the Annex Site would be expanded from 80 to 125 boat slips.

36. Upon information and belief, the Applicant purchased the marina in March 2014.

37. In April 2014, in furtherance of its plan to expand the marina, the Applicant applied to the APA for a variance from the APA Act's shoreline setback restrictions for proposed new structures at both the Main Marina and Annex Site locations. The 2014 variance application sought approval to construct new floating dock structures at both locations and to increase the number of total boat slips from 162 to 292.

B. The APA Determines That the Project Requires a Wetland Permit and Defends the Determination From the Applicant's Legal Challenges

38. By letter dated July 30, 2014, the APA informed the Applicant that both the Main Marina and Annex Site locations contain jurisdictional wetlands and that the Project would require a wetland permit. A copy of the July 30, 2014 letter is annexed hereto and made part of this Petition as Exhibit C.

39. The APA wetland regulations establish a value rating system of “1” to “4” for wetlands, with “1” being highest value rating and “4” being the lowest. 9 NYCRR § 578.5.

40. APA staff subsequently informed the Applicant that the wetlands at the Main Marina have a wetland value rating of “3” and that the wetlands at the Annex Site have a wetlands value rating of “1.”

41. On April 2, 2015, the Applicant filed a Petition for Declaratory Ruling with the APA challenging the Agency staff’s determination that the wetlands at the Annex Site have a value rating of “1.”

42. On May 8, 2015, the APA Executive Director upheld the Agency staff’s determination that the wetlands at the Annex Site have a value rating of “1.”

43. In 2015, the Applicant requested approval from the APA for removal of one of the existing boathouses on the shoreline at the marina due to the collapse of the boathouse roof. The APA issued a general wetland permit authorizing removal of the collapsing boathouse.

44. On October 26, 2015, the Applicant filed a Supplemental Petition for Declaratory Ruling with the APA again challenging the Agency staff’s determination that the wetlands at the Annex Site have a value rating of “1.”

45. On December 18, 2015, the APA Executive Director reversed the Agency staff determination and revised the value rating of the Annex Site wetlands to “2.”

46. On February 3, 2016, the Applicant applied to the Agency for a wetland permit for the construction and installation of new boating slip structures at the Main Marina and the Annex Site.

47. On March 24, 2016, the APA issued a Notice of Incomplete Permit Application (“NIPA”) which stated, among other things, that:

Your application indicates that there “will not be a loss of wetlands or wetlands value” as a result of your proposal. *However, preliminary calculations by staff indicate that the project may result in significant wetlands loss due to filling, shading, boat traffic and other factors.*

NIPA at 7; (emphasis added). A copy of the APA’s March 24, 2016 NIPA is annexed hereto and made part of this Petition as Exhibit D.

48. On August 16, 2016, the Agency issued another NIPA identifying deficiencies in the application for the Project and potential adverse impacts to wetlands, including the placement of approximately five square feet of fill in wetlands at the Main Marina and the Annex Site; the dredging of approximately 4,750 square feet of wetlands at the Annex Site; additional impacts to wetlands from the expansion of motorboat use through wetlands at the Annex Site; and impacts to 19,124 square feet of wetlands at the Annex Site and 2,415 square feet of wetlands at the Main Marina from shading caused by the proposed structures. NIPA at 4. A copy of the August 16, 2016 NIPA is annexed hereto and made part of this Petition as Exhibit E.

49. On September 15, 2016, the Applicant filed an administrative appeal with the APA Board of the August 16, 2016 NIPA seeking, among other things, the withdrawal of the NIPA and the reversal of the APA staff’s requests for additional information concerning the Project’s impacts to wetlands at the Main Marina and Annex Site.

50. On November 10, 2016, the APA Board unanimously denied the Applicant’s administrative appeal of the staff’s August 2016 NIPA.

C. The Agency Defends its Variance Jurisdictional Determination

51. By a petition dated November 29, 2016, the Applicant again sought a declaratory ruling from the APA reconsidering and invalidating the Agency’s September 10, 2013 variance jurisdictional determination and October 4, 2013 declaratory ruling confirming that determination.

52. On January 5, 2017, the APA Executive Director refused to issue a declaratory ruling on the ground that the request was identical to the declaratory ruling request that had been denied several years previously.

53. The Applicant subsequently filed an Article 78 proceeding challenging the APA Executive Director's refusal to issue a declaratory ruling on the variance jurisdictional determination.

54. By decision dated July 13, 2017, the Supreme Court, Essex County (Meyer, J.), dismissed the petition as time-barred. *Matter of LS Mar. LLC v. Adirondack Park Agency*, 56 Misc.3d 1207(A) (Sup. Ct. Essex Co. 2017).

D. The APA's Prior Approval of the Project is Overturned

55. On May 22, 2020, the Applicant submitted a revised application to the APA for the Project.

56. In an Active Projects Report for the period July 1-August 31, 2020, the APA described the revised Project as follows:

[T]he variance request involves the construction of 577± square feet of shoreline structures above the mean high water mark and 20,773± square feet of shoreline structures below the mean high water mark at the Main Marina site, and the construction of 15,018± square feet of shoreline structures below the mean high water mark at the Annex site. The permit request involves the construction of covered structures over 2,230± square feet of wetlands at the Main Marina site, and the dredging of road sediment, the placement of 5± square feet of fill, the construction of docks and opensided covered structures with skylights over 25,403± square feet of wetlands, and the removal of 14,871± square feet of buildings in wetlands at the Annex.

A copy of the Active Projects Report is annexed hereto and made part of this Petition as Exhibit F; see Ex. F at 2.

57. In August 2020, the APA issued a Notice of Complete Application for the Project.

58. At its September 10-11, 2020 meeting, the APA Board approved issuance of a variance for structures at the Main Marina and Annex Site and a wetland permit for construction and installation of structures at both locations and dredging of wetlands at the Annex Site.

59. Thomas Jorling, a former Commissioner of the Department of Environmental Conservation who owns a home on Lower Saranac Lake, subsequently filed a combined Article 78 proceeding and declaratory judgment action challenging the APA's approval of the Project.

60. The Petition was dismissed by Supreme Court, Essex County (Meyer, J.), and Petitioner Jorling appealed.

61. By Decision dated March 2, 2023, the Appellate Division, Third Department, reversed Supreme Court's decision and annulled and vacated the permit, concluding that the Agency's reclassification of wetlands at the Annex Site from a value rating of "1" to a rating of "2" was arbitrary and capricious because it was contrary to the Agency's regulations governing the wetland value rating system. *Matter of Jorling v. Adirondack Park Agency*, 214 AD3d 98 (3d Dept. 2023).

E. The APA Attempts to End-Run the Appellate Court Decision

62. Upon information and belief, following the Appellate Division decision, the Applicant and the APA staff colluded to devise a strategy to circumvent the decision.

63. Upon information and belief, the reason for the collusion between the APA and the Applicant was that applying a value rating of "1" to wetlands at the Annex Site, as required by the Appellate Division decision, would require either a complete redesign of the Project to avoid those wetlands or a denial of the wetland permit. *See* 9 NYCRR § 578.10(a)(1) (requiring that an activity affecting a value "1" wetland must "be compatible with preservation of the entire

wetland” and “not result in degradation or loss of any part of the wetland or its associated values.”).

64. To that end, the Applicant and the APA staff met on March 14 and March 27, 2023. Upon information and belief, the discussions at the March 14 and March 27 meetings involved, among other things, devising a means for the Agency to approve the Project without requiring the Applicant to apply for and obtain a wetland permit.

65. In furtherance of the collusion between the Applicant and the APA staff, the meeting memos prepared by the APA staff for the March 14 and March 27 meetings each consist of a single sentence that does not describe the substance of what was discussed at those meetings.

66. The entirety of the March 14 meeting memo states: “Discussed Agency jurisdiction and requirements for potential proposals moving forward.”

67. The entirety of the March 27 meeting memo states: “Additional discussions Agency jurisdiction and requirements for potential proposals moving forward. Anticipate a submission soon.” Copies of the March 14 and March 27, 2023 meeting memos prepared by APA staff are annexed to and made part of this Petition as Exhibit G.

68. Upon information and belief, the meeting memos prepared by the APA staff do not provide any details of what was discussed at the March 14 and March 27 meetings with the Applicant because the staff wanted to conceal that information from the public and they knew that the meeting memos would be obtainable by members of the public pursuant to the Freedom of Information Law.

69. On March 30, 2023, the Applicant filed a new variance application with the APA seeking a variance only for the new structures at the Main Marina. A copy of the application is annexed hereto and made part of this Petition as Exhibit H.

70. The Applicant did not submit, and the Agency failed to require, a variance application for the new structures at the Annex Site even though those structures do not comply with the shoreline setback restrictions.

71. The Applicant did not submit, and the Agency failed to require, an application for a wetland permit for the construction and installation of new structures in and over wetlands at the Main Marina and Annex Site, the dredging of wetlands at the Annex Site, and the placement of fill in wetlands at the Annex Site even though each is a regulated activity requiring a wetland permit under the FWA and the APA Act.

72. At its June 15, 2023 meeting, the APA Board approved by Agency Order 2016-0029A issuance of a variance for structures at the Main Marina. *See* Ex. A.

73. The Order states: “No wetlands permit is required for this proposal, and no variance is required for this proposal at the Annex site.” Ex. A at 8.

74. Upon information and belief, the Applicant has undertaken construction and installation of docks and pilings in and over wetlands at the Main Marina and Annex Site and dredging and filling of wetlands at the Annex Site without a wetland permit and without a variance for structures at the Annex Site.

AS AND FOR A FIRST CAUSE OF ACTION

75. Petitioner repeats and realleges each of the preceding allegations as if set forth in full herein.

76. The APA is responsible for administration, implementation and enforcement of the FWA within the boundaries of the Adirondack Park. ECL § 24-0801(2).

77. The Agency’s regulations implementing the FWA provide that “[n]o person shall undertake any regulated activity without first obtaining an agency permit.” 9 NYCRR § 578.2(a).

78. A “regulated activity” includes, within the boundaries of a wetland, any land use and development; any form of dredging or excavation; any form of filling; and erecting any structures, driving pilings, or placing of any other obstructions whether or not changing the pattern of flow or elevation of the water. *Id.* § 578.3(n)(1).

79. A “regulated activity” also includes, whether or not within the boundaries of a wetland, any form of pollution draining into a wetland and “any other activity which substantially impairs the functions served by or the benefits derived from freshwater wetlands.” *Id.* § 578.3(n)(2).

80. The Applicant’s construction and installation of structures, including floating docks and pilings, in and over wetlands at the Main Marina and Annex Site, and its dredging and filling of wetlands at the Annex Site each constitute a “regulated activity” and therefore cannot be lawfully undertaken without a wetland permit. *Id.* § 578.3(n).

81. The Applicant requested approval for the construction and installation of approximately 49,000 square feet of new structures in Crescent Bay at the Main Marina and approximately 14,000 square feet of new structures in Ampersand Bay at the Annex Site. Ex. H, APA Variance Application Form at 3.

82. Engineering drawings submitted in support of the application show that structures at the Main Marina and the Annex Site are being constructed in and over submerged aquatic vegetation (“SAV”) that are part of the wetlands identified by the APA at those locations. *See* Ex. H, Engineering Drawing C40, Main Marina Aquatic Vegetation Diagram (March 30, 2023); Engineering Drawing C41, Annex Marina Aquatic Vegetation Diagram (March 30, 2023).

83. The engineering drawings show that 14,550 square feet of wetland SAV will be impacted by new structures at the Annex Site. *Id.*

84. The APA wetland regulations state: “*Erecting structures* in wetlands, irrespective of other associated developmental activities, may shade and thus alter wetland vegetation, obstruct or interfere with surface or subsurface water flow, and interfere with fish and wildlife use.” 9 NYCRR § 578.8(e); (emphasis in original).

85. The APA wetland regulations further state: “*Placing obstructions or driving piles* in wetlands may interfere with surface or subsurface water flow, or increase water levels, thus affecting wetland water supply, flooding potential and vegetative patterns.” *Id.* § 578.8(f); (emphasis in original).

86. The Applicant’s dredging of approximately 5,000 square feet of wetlands at the Annex Site constitutes a “regulated activity” and therefore cannot be lawfully undertaken without a wetland permit.

87. The APA wetland regulations state: “*Dredging, excavating, or channelizing wetlands . . .* may increase water depth and remove wetland plant species, altering the basic substrate characteristics. Wetlands may be eliminated by creating water levels too deep for wetland vegetation to survive. Fish and wildlife feeding or reproductive use may be altered. Water storage capacity may be increased while changes in covertime variability, turbidity, sediment deposition and substrate erosion may result.” *Id.* § 578.8(b); (emphasis in original).

88. The Applicant’s placement of fill in wetlands at the Annex Site constitutes a “regulated activity” and therefore cannot be lawfully undertaken without a wetland permit.

89. The APA wetland regulations state: “*Filling . . .* may decrease wetland area, hence decreasing the multiple benefits derived from wetlands. Impacts may extend beyond the boundaries of the filled area especially if surface or subsurface water movement is affected. For

example, loss of storage capacity may result in increased sedimentation of adjacent waters . . . Ultimately, filling may eliminate a wetland entirely.” *Id.* § 578.8(c); (emphasis in original).

90. The Applicant’s construction and installation of docks and pilings in and over wetlands at the Main Marina and Annex Site and dredging and filling of wetlands at the Annex Site also constitute land use and development involving wetlands in an area classified as Hamlet and are therefore a Class A regional project requiring an APA permit pursuant to Section 810(1)(a) of the APA Act, Executive Law § 810(10(a)).

91. The Order states that “the applicant . . . minimized potential for impacts to water quality and wetlands” and that “[t]hese minimization efforts eliminated the need for any Agency permit for activities involving wetlands.” Ex. A at 6.

92. The Order does not cite to any legal authority for the proposition that “efforts” to minimize impacts to wetlands from regulated activities eliminates the need for a wetland permit and, indeed, no such authority exists.

93. Neither the FWA, the APA Act, nor the APA wetland regulations include any exemption from wetland permitting requirements based on “efforts” by an applicant to minimize impacts to wetlands affected by a regulated activity. *See* ECL Article 24; Executive Law § 810(1)(a); 9 NYCRR Part 578.

94. The fact that the Order acknowledges that the Applicant is attempting to minimize the Project’s impacts on wetlands is proof positive that the Project will impact protected wetlands and thus requires a wetland permit and/or a Class A regional project permit.

95. Indeed, the cover letter submitted with the application states that “[t]he project has been adjusted *to reduce wetland impacts*,” thus conceding that the Project will impact protected wetlands. Ex. H, Letter from Joseph A. Garso, P.E, North Woods Engineering PLLC, to John

Burth, Adirondack Park Agency (March 30, 2023) at 1; *see also id.*, (claiming that “the roof areas at the main area are all over deep water, *thereby limiting impact to submerged aquatic vegetation and fisheries that may exist.*”) (emphasis added); Ex. H, APA Variance Application at 6 (“While wetlands can be found at both marina locations, the applicant has now designed the project to lessen any impact to wetlands and eliminate altogether the need for a wetland permit from the Agency.”).

96. The application also concedes that dredging of wetlands at the Annex Site has already occurred. Ex. H, Email from Jason A. Garso, P.E., North Woods Engineering PLLC, to John Burth, Adirondack Park Agency (March 30, 2023) (stating that “the dredging work . . . had been completed” and that “[t]he wetland plan . . . for the Annex had underwater contours that were based on predredging information. The contours in the area that was dredged were updated.”).

97. Upon information and belief, the APA may also claim that the Applicant’s construction and installation of docks and pilings in and over wetlands at the Main Marina and Annex Site constitute a “replacement in kind” and therefore do not require a wetland permit.

98. The APA’s wetland regulations provide:

This Part does not apply to the replacement in kind or to the routine repair of structures, roads, or onsite wastewater treatment systems lawfully existing in wetlands on May 1, 1983, provided there is no (1) draining, (2) filling, (3) substantial increase in erosion, siltation or sedimentation, (4) diversion of surface or subsurface drainage that adversely affects the natural hydrologic regime, or (5) other material alteration of the wetland.

9 NYCRR § 578.1(c).

99. The structures lawfully existing in wetlands on May 1, 1983 at the Main Marina and Annex Site were boathouses and docks built on the shoreline of Crescent Bay at the Main Marina and on the shoreline of Ampersand Bay at the Annex Site. *See* Ex. H, Engineering Plan

D10, Main Marina Demolition Plan (May 1, 2020); Engineering Plan D20, Annex Site Demolition Plan (May 1, 2020).

100. The Order issued by the APA granting the variance for the Main Marina structures states:

In consultation with the Agency, the applicant removed 14,907± square feet of pre-existing structures *from the shoreline* of the Main Marina during the course of project review. 12,347± square feet of these structures consisted of five pre-existing, non-conforming boat storage buildings *that lined the shoreline of the bay* and were attached to each other and/or other shoreline structures. 2,560± square feet *of the structures removed from the shoreline* consisted of lawfully conforming docks. At least 1,260± square feet of the structures that were removed had been located in wetlands on the site.

Ex. A at 2; (emphasis added).

101. The Order also states the following concerning pre-existing structures at the Annex Site:

In consultation with the Agency, the applicant removed more than 14,871 square feet of preexisting structures *from the shoreline of the Annex site* during the course of project review. 14,871± square feet of these structures consisted of four pre-existing, non-conforming boat storage buildings that were attached to each other and/or other shoreline structures and were entirely located in the wetlands on the site; *two of these buildings lined the shoreline of Ampersand Bay, and two lined the shoreline of the lagoon.*

Id. at 3; (emphasis added).

102. Thus, the Order makes clear that the pre-existing structures in wetlands at the Main Marina and Annex Site were located on and along the shoreline.

103. The pre-existing structures were discontinued and removed in 2015, more than five years ago, and an Agency permit is required to rebuild them. 9 NYCRR § 573.6(f).

104. The Applicant's construction and installation of new docks and pilings extending over 250 feet into Crescent Bay and approximately 150 feet into Ampersand Bay are new floating structures that are entirely different in character and location from the shoreline structures in

wetlands lawfully existing on May 1, 1983 and therefore do not meet the regulatory definition of “replacement in kind.”

105. In addition, the construction and installation of new docks and pilings in wetlands at the Main Marina and the Annex Site constitutes a “material alteration” of wetlands at those sites and thus does not meet the regulatory definition of “replacement in kind.”

106. Moreover, the dredging and filling and material alteration of wetlands at the Annex Site cannot under any interpretation of the wetland regulations constitute a “replacement in kind” and such activities are specifically excluded from the regulatory definition of “replacement in kind.” 9 NYCRR § 578.1(c).

107. Moreover, should the APA claim that the Applicant’s construction and installation of docks and pilings in and over wetlands at the Main Marina and Annex Site and dredging and filling of wetlands at the Annex Site constitute a “replacement in kind,” such a claim would be contrary to the Agency’s publicly stated position for the prior eight years that those activities require a wetland permit.

108. The Agency’s failure to require the Applicant to apply for and obtain a wetland permit and/or a Class A regional project permit for the aforementioned activities is arbitrary and capricious and otherwise not in accordance with law.

109. The Applicant’s construction and installation of docks and pilings in and over wetlands at the Main Marina and Annex Site and dredging and filling of wetlands at the Annex Site without a wetland permit and/or a Class A regional project permit violates the FWA and the APA Act.

AS AND FOR A SECOND CAUSE OF ACTION

110. Petitioner repeats and realleges each of the preceding allegations as if set forth in full herein.

111. The APA Act establishes a 50-foot shoreline setback restriction for structures greater than 100 square feet in size in Hamlet areas. APA Act § 806(1)(a)(2), Executive Law § 806(1)(a)(2).

112. Upon information and belief, the APA determined that the placement in Ampersand Bay at the Annex Site of 14,040 square feet of new structures that do not comply with the 50-foot shoreline setback restriction does not require a variance because it constitutes a “replacement in kind” of 14,871 square feet of lawfully pre-existing non-conforming structures.

113. The Agency’s shoreline setback regulations provide that “[a]ny existing structure lawfully in nonconformance with the building setback restrictions, or any such structure which was existing on August 1, 1973 and was thereafter removed or destroyed, *may be replaced in kind on the same foundation or location or in the same immediate vicinity, provided the previously existing setback nonconformance is not increased.*” 9 NYCRR § 575.5(a); (emphasis added).

114. The new structures placed by the Applicant in Ampersand Bay at the Annex Site do not constitute a “replacement in kind” because they are not on the same foundation or location as the previously existing nonconforming structures and are not in the same immediate vicinity as the previously existing structures.

115. The Order acknowledges that the previously existing non-conforming structures at the Annex Site were located on the shoreline and did not extend into Ampersand Bay. The Order states that “[i]n consultation with the Agency, the applicant removed more than 14,871 square feet of preexisting structures *from the shoreline of the Annex site.*” Ex. A at 3; (emphasis added).

116. The Order also states the following concerning pre-existing structures at the Annex

Site:

In consultation with the Agency, the applicant removed more than 14,871 square feet of preexisting structures *from the shoreline of the Annex site* during the course of project review. 14,871± square feet of these structures consisted of four pre-existing, non-conforming boat storage buildings that were attached to each other and/or other shoreline structures and were entirely located in the wetlands on the site; *two of these buildings lined the shoreline of Ampersand Bay, and two lined the shoreline of the lagoon.*

Id. at 3; (emphasis added).

117. In contrast to the location of the pre-existing nonconforming structures on the shoreline of Ampersand Bay (as acknowledged in the Order), the new non-conforming structures proposed by the Applicant extend approximately 150 feet into Ampersand Bay. *See* Ex. H, Engineering Drawing C20, Annex Marina Overall Site Plan (March 30, 2023).

118. Thus, the new structures are not a “replacement in kind” because they are not on the same foundation or location as the pre-existing structures and are not in the immediate vicinity of the pre-existing structures.

119. Moreover, because the pre-existing nonconforming structures at the Annex Site were located on the shoreline, the previously existing setback nonconformance of those structures was approximately 50 feet.

120. In contrast, the new structures extend approximately 150 feet into Ampersand Bay and the setback nonconformance of the new structures is therefore approximately 150 feet, which is an increase in setback nonconformance compared to the previously existing shoreline structures.

121. Because the new structures substantially increase the setback nonconformance compared to the previously existing nonconforming structures, they do not constitute a “replacement in kind” and require a variance from the shoreline setback restrictions.

122. The APA's determination that the new structures at the Annex Site constitute a "replacement in kind" is contrary to the Agency's shoreline setback regulations and is therefore arbitrary and capricious, an abuse of discretion, and otherwise not in accordance with law.

123. The APA's failure to require a variance for the new structures at the Annex Site was arbitrary and capricious, an abuse of discretion, and otherwise not in accordance with law.

AS AND FOR A THIRD CAUSE OF ACTION

124. Petitioner repeats and realleges each of the preceding allegations as if set forth in full herein.

125. The APA Act provides that "where there are practical difficulties or unnecessary hardships in the way of carrying out the strict letter of the [shoreline] restrictions," the APA may "vary or modify the application of such restrictions relating to the use, construction or alterations of buildings or structures, or the use of land, so that the spirit of such restrictions shall be observed, public safety and welfare secured and substantial justice done." APA Act § 806(3)(a); 9 NYCRR § 576.1(a).

126. The APA cannot lawfully grant a variance without making the findings required by the APA Act and by the APA's shoreline regulations.

127. The Applicant has the burden of proof to demonstrate practical difficulties or unnecessary hardships sufficient to warrant the granting of a variance. 9 NYCRR § 576.5(e)(3).

128. The Applicant failed to demonstrate practical difficulties or unnecessary hardships in complying with the shoreline setback restrictions and was therefore not entitled to a variance from those restrictions for the Main Marina.

129. A practical difficulty in the context of a variance would, for instance, be for reasons of topography or geology (*e.g.*, a large outcropping or ledge) that are unique to the site of the proposed project.

130. Here, the Applicant did not claim and offered no proof that it faces practical difficulties at the Main Marina site warranting a variance from the shoreline setback restrictions.

131. The Applicant did not claim and offered no proof that it will suffer unnecessary hardships in complying with the shoreline setback restrictions.

132. Indeed, the Order approving the variance application includes no discussion or analysis of whether the Applicant met its burden of meeting the statutory standard of demonstrating practical difficulties or unnecessary hardships in the absence of a variance.

133. The Order does not—and cannot—include a finding that the Applicant has demonstrated practical difficulties or unnecessary hardships in complying with the shoreline setback restrictions.

134. The Applicant also failed to meet the criteria for issuance of a variance set forth in the APA regulations, 9 NYCRR § 576.1(c).

135. The APA's granting of the variance for the Main Marina was arbitrary and capricious, an abuse of discretion and otherwise not in accordance with law because the Applicant failed to show practical difficulties or unnecessary hardships in complying with the shoreline setback restrictions and did not otherwise meet the regulatory criteria for a variance.

WHEREFORE, Petitioner respectfully requests that this Court enter judgment as follows:

1. Annulling, vacating and setting aside the APA's June 15, 2023 Order granting the a variance from the APA Act's shoreline setback restrictions for the Main Marina;

2. Declaring that the Applicant's construction and installation of docks and pilings in and over wetlands and material alteration of wetlands at the Main Marina and the Annex Site and dredging and filling of wetlands at the Annex Site are regulated activities requiring a wetland permit and constitute land use and development involving wetlands in a Hamlet area requiring a Class A regional project permit;

3. Declaring that the placement of approximately 14,040 square feet of new structures extending approximately 150 feet into Ampersand Bay at the Annex Site is not a "replacement in kind" of pre-existing nonconforming shoreline structures within the meaning of the APA's shoreline regulations, and that such placement therefore requires a variance from the shoreline setback restrictions;

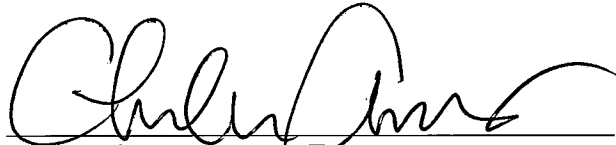
4. Declaring that the Applicant's construction and installation of docks and pilings in and over wetlands and material alteration of wetlands at the Main Marina and the Annex Site and dredging and filling of wetlands at the Annex Site without a wetland permit and without a Class A regional project permit constitute violations of the Freshwater Wetlands Act and the APA Act;

5. Enjoining Respondent-Defendant LS Marina LLC to remove, by a date certain, any pilings, docks and structures constructed, installed or placed at the Main Marina and the Annex Site in violation of the Freshwater Wetlands Act and the APA Act;

6. Awarding Petitioner the costs, disbursements, and attorneys' fees incurred in connection with this proceeding; and

7. Awarding Petitioner such other and further relief as this Court shall deem just, proper, or equitable.

Dated: August 1, 2023
Johnsburg, New York



Christopher A. Amato, Esq.
Conservation Director and Counsel
Protect the Adirondacks! Inc.
Claudia K. Braymer, Esq.
Deputy Director
Protect the Adirondacks! Inc.
Attorneys for Petitioner-Plaintiff
105 Oven Mountain Road
Johnsburg, NY 12843
(518) 860-3696
(518) 251-2700

VERIFICATION

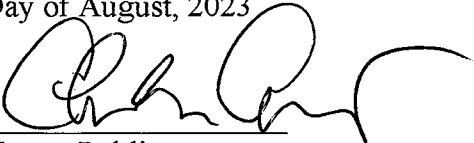
STATE OF NEW YORK)
) ss.:
COUNTY OF WARREN)

PETER BAUER, being duly sworn, deposes and says:

1. I am the Executive Director of Protect the Adirondacks! Inc., the Petitioner-Plaintiff in the above action and proceeding.

2. I have read the foregoing Verified Petition and Complaint and affirm that the allegations set forth therein are true to my own knowledge, except as to those matters stated to be upon information and belief, and as to those matters, I believe them to be true.



Sworn to Before Me This 15th
Day of August, 2023


Notary Public
CHRISTOPHER A. AMATO
NOTARY PUBLIC-STATE OF NEW YORK
No 02AM6317295
Qualified in Albany County
My Commission Expires ~~12-29-2018~~ ²⁵