

STATE OF NEW YORK
SUPREME COURT

ALBANY COUNTY

In the Matter of the Application of

PETITION

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

INDEX NO. 1682-12

Petitioners,

DATE OF FILING:

for a Judgment Pursuant to
CPLR Article 78

March 20, 2012

-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.

Petitioners, Protect the Adirondacks! Inc., Sierra Club,
Phyllis Thompson, Robert Harrison, and Leslie Harrison
("Petitioners"), for their verified petition herein, by their
attorneys, Caffry & Flower, allege as follows:

SUMMARY OF THE PROCEEDING

1. This CPLR Article 78 proceeding seeks to annul the
January 20, 2012 decision by respondent Adirondack Park Agency
("APA") which approved a permit application by Preserve
Associates, LLC ("Applicant") for the construction of the
"Adirondack Club & Resort" ("ACR") project in the Town of Tupper

Lake, Franklin County, New York (the "Project") pursuant to the Adirondack Park Agency Act, Executive Law Article 27, §§ 800, et seq. (the "APA Act") and other applicable laws.

2. On that date APA approved a Project Findings and Order, No. 2005-100 ("Order"), and 14 separate permits for the Project (collectively referred to herein as the "Order and Permits").

3. The Project is the largest project ever reviewed or approved by the Adirondack Park Agency pursuant to the APA Act, since the creation of the APA in 1971.

4. The APA's decision to approve the Project, and the precedents that this decision set, are the largest threat to the ecological integrity of Adirondack Park since that time.

5. The Project is proposed to be constructed on approximately 6,235 acres of land in the Town of Tupper Lake (the "Site"). Order, p. 2.

6. The Project would be sprawled over thousands of acres of the Site. Order, pp. 3-8.

7. The Project includes 659 residential units of various types, a 60 bedroom inn, a redeveloped and expanded downhill ski area, a redeveloped marina on Tupper Lake, thousands of square feet of commercial space and restaurants, over 15 miles of public and private roads, a private sewage treatment plant, amenities including a gym, recreation center, health spa, equestrian center, amphitheater, clubhouses, and related infrastructure,

maintenance facilities, and accessory structures. Order, pp. 3-8, 11.

8. In addition, the Project would include a "Valet Boat Launching Service" for the storage and transport of its customers' boats, and the launching and retrieval of those boats on Tupper Lake at the "State Boat Launch" operated by the New York State Department of Environmental Conservation ("DEC"), a facility which is located on land that is part of the New York State Forest Preserve. Order, p. 9.

9. As set forth below, the Applicant had the burden of proof in the hearing process and it failed to meet that burden on several key issues.

10. Petitioners seek judgment annulling the Order and Permits because:

a. Despite finding that it lacked adequate information on the Project's potential adverse impacts on the Site's wildlife and on the Cranberry Pond wetlands complex, APA failed and refused to require the necessary studies of these impacts before voting to approve the Project. First to Eighth Causes of Action, infra, pp. 27 to 70.

b. The 80 residential structures approved for construction on the Resource Management lands on the Project Site do not comply with the APA Act's mandate that all such structures must be on "on substantial acreages or in small clusters on carefully

selected and well designed sites”.¹ Ninth to Fourteenth Causes of Action, infra, pp. 71 to 84.

c. The 80 residential structures approved for construction on the Resource Management lands on the Project Site are not compatible with that land classification, as required by APA Act § 809(10)(b). Fifteenth to Sixteenth Causes of Action, infra, pp. 84 to 98.

d. The operation of the Applicant’s “Valet Boat Launching Service” that was approved by APA as part of the Project would violate the State Constitution, the APA Act, the Environmental Conservation Law (“ECL”), and applicable State regulations. Seventeenth to Twentieth Causes of Action, infra, pp. 99 to 119.

e. The Applicant’s proposed IDA bond financing for the Project is not approvable and the Project will not generate the projected revenues, creating a significant risk of undue fiscal impacts on municipalities and the public. Twenty-First to Twenty-Sixth Causes of Action, infra, pp. 120 to 133.

f. In making its decision to approve the Project, APA failed and refused to make the findings and determinations required by law. Twenty-Seventh Cause of Action, infra, pp. 120 to 133.

g. There were improper *ex parte* contacts between the Applicant and the APA’s “Senior Staff” who were advising the 11

¹ APA Act § 805(3)(g)(3).

"APA Members"² during the APA's deliberations on the Project. Twenty-Eighth Cause of Action, infra, pp. 137 to 142.

h. The parties were not provided with an opportunity to make written comments on the one-sided and prejudicial summaries of the hearing record which were prepared for the APA Members by the "Senior Staff" during their deliberations, as required by the APA's regulations. Twenty-Ninth Cause of Action, infra, pp. 142 to 145.

11. This Article 78 proceeding seeks annulment of the Order and Permits on grounds related to 5 of the 12 "Hearing Issues"³ that were adjudicated in the 19 day hearing on the Project:

- Issue #1 - Whether natural resources on Resource Management lands will be adequately protected. Fifth to Eighth Causes of Action.
- Issue #1 - Whether the proposed Great Camp lots comply with the APA Act's strict requirements for residential development on Resource Management lands. Ninth to Sixteenth Causes of Action.
- Issues #5 and #6 - What are the fiscal and economic impacts on the public and municipal governments? Twenty-First to Twenty-Sixth Causes of Action.

² The 11 voting members of the APA, pursuant to APA Act § 803.

³ The full text of these issues is set out in hearing record exhibit no. 57, APA Project Order, February 15, 2007, pp. 7-9 ("Hearing Order").

- Issue #7 - What are the impacts to the Forest Preserve, such as the State-owned Tupper Lake Boat Launch? Seventeenth to Twentieth Causes of Action.
- Issue #8 - What are the impacts to the Cranberry Pond wetland complex? First to Sixth Causes of Action.

12. For all of the foregoing reasons, the Order and Permits should be annulled.

THE PARTIES

13. Petitioner Protect the Adirondacks! Inc. ("PROTECT") is a New York not-for-profit corporation. It is exempt from taxation pursuant to Internal Revenue Code § 501(c)(3). PROTECT was formed by the consolidation in 2009 of two predecessor organizations: Residents' Committee to Protect the Adirondacks, Inc. (formed in 1990) and The Association for the Protection of the Adirondacks, Inc. (formed in 1902).

14. Among the purposes for which PROTECT was organized are the following statements from its Certificate of Consolidation:

Protect the Adirondacks! Inc. shall be a non-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 human communities and economies for the benefit of current and future generations.

Permanently protect the Park's wildlands, with special emphasis on the Forest Preserve.

Ensure that the Park's private farms and forests are sustainably managed to conserve their productivity, economic viability, and open-space character.

Promote the development of local communities and economies that remain strong, diverse, and vibrant.

Ensure that the "Forever Wild" clause, Article XIV of the New York State Constitution, is preserved and that the Forest Preserve and other lands are strictly managed according to such Article.

Promote the Adirondack Park as a global model of landscape-scale conservation in which strong protection of large, interconnected public wildlands are integrated with sustainably managed, economically viable, private farms and forests that are linked to healthy, diverse rural communities.

Protect, preserve, and enhance the wilderness character, ecological integrity, scenic resources, and appropriate recreational uses of the New York State Forest Preserve.

Conserve the wild, natural, open-space character and the economic viability of the private farms and forests of the Adirondack Park.

15. PROTECT currently has approximately 5,000 members, about one-half of which reside or own property within the Adirondack Park. Some of its members reside in the Town of Tupper Lake, including, but not limited to, some of whose residences immediately adjoin the Site. As set forth below, all of the individual petitioners herein are members of PROTECT.

16. Both of PROTECT's predecessor organizations, Residents' Committee to Protect the Adirondacks, Inc. and The Association for the Protection of the Adirondacks, Inc. filed timely petitions for party status in the APA adjudicatory hearing on the

Project, which petitions were granted without opposition.⁴ Following the consolidation of these two organizations, PROTECT succeeded to their positions as a party to the hearing. PROTECT and/or its predecessors actively participated in all phases of the hearing process, including the legislative hearing, pre-hearing proceedings, filing briefs, examining witnesses, and calling witnesses.

17. Petitioner Sierra Club is a not-for-profit corporation with its principal offices in San Francisco, California. Its Atlantic Chapter maintains an office in Albany, New York.

18. The corporate purposes of Sierra Club include exploring, enjoying and protecting wild places, practicing and promoting the responsible use of the earth's ecosystems and resources, educating and enlisting people to protect and restore the quality of the natural and human environment, and using all lawful means of carrying out those objectives. Protecting wildlands such as the Adirondack Park is one of its national priorities and its New York members are active in that campaign.

19. The Adirondack Committee of the Atlantic Chapter of Sierra Club was formed in 1972 for the purpose of working to protect the wild, scenic and open space lands of the Adirondack Park.

⁴ ALJ's Ruling on Party Status, February 14, 2008; <http://www.dec.ny.gov/hearings/42064.html> .

20. Sierra Club has over 1.3 million members and supporters. Its Atlantic Chapter has over 44,000 members residing in New York, many of whom reside in the Adirondack Park, and some of whom reside in the Town of Tupper Lake. As set forth below, all of the individual petitioners herein are members of Sierra Club.

21. Sierra Club participated in the legislative hearing phase of the review of the Project, including the filing of written comments on the application.

22. Petitioner Phyllis Thompson resides in Houston, Texas and Tupper Lake, New York. She is the trustee and a beneficiary of the Everwild Trust, a family trust that owns residential real property on the South Bay of Lake Simond. Her property consists of two parcels, separated by part of the Site, one of which is adjoined by the Site on three sides. Several residential lots in the Project will have waterfront on the South Bay. She draws household water from the lake and regularly recreates on it.

23. Petitioner Thompson was a party as-of-right in the APA adjudicatory hearing on the Project⁵, pursuant to 9 NYCRR § 580.5. She actively participated in all phases of the hearing, including attending pre-hearing proceedings, examining witnesses,

⁵ Id.

filing briefs, and testifying as a witness for PROTECT (Tr. 4449).⁶ She is a member of petitioners PROTECT and Sierra Club.

24. Petitioners Robert Harrison and Leslie Harrison reside in Brant Lake, New York and Tupper Lake, New York. They are the owners of residential real property consisting of an island in Tupper Lake, which has a direct view of the Site. They draw water from the lake for domestic use and regularly recreate on the lake. They use the State Boat Launch for access to their property.

25. The Harrisons were granted party status in the APA adjudicatory hearing on the Project by the presiding Administrative Law Judge ("ALJ"), who found, pursuant to 9 NYCRR § 580.7[a][2] and § 580.7[g], that they had a "material social, economic and environmental interest that could be affected by the Board's decision concerning the project."⁷ Robert Harrison actively participated in many of the pre-hearing proceedings conducted by the ALJ. They are members of petitioners PROTECT and Sierra Club. Robert Harrison is a Co-Chair of PROTECT, and a member of its Board of Directors.

26. In a prior Article 78 proceeding regarding the Project, petitioner PROTECT's two predecessor organizations, petitioner Phyllis Thompson, and 36 other adjoining or nearby property

⁶ All references to particular pages of the transcript of the adjudicatory hearing are referred to herein as "Tr. ___".

⁷ Id.

owners filed suit against the Town of Tupper Lake and other parties challenging the Town's rezoning of the Site to facilitate the Project.⁸ In that suit the respondents moved for dismissal on the grounds that the petitioners therein lacked standing. However, Hon. David Demarest, Supreme Court, Franklin County, found that all 39 of the petitioners therein had standing to sue.⁹

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

28. APA approved the Order and Permits which this proceeding seeks to have annulled.

29. Respondent DEC is an agency of the State of New York created pursuant to ECL Article 3. Its principal offices are located in the City and County of Albany, New York. Pursuant to ECL § 9-0105(1) and § 9-0101(6), DEC is responsible for the care, custody and control of the New York State Forest Preserve.

30. The Project, as approved, would use the Tupper Lake boat launch, within the Forest Preserve, for the operation of the

⁸ Association for the Protection of the Adirondacks v. Town Board of Town of Tupper Lake, 64 A.D.3d 825, 826 (3d Dept. 2009).

⁹ Association for the Protection of the Adirondacks v. Town Board of Town of Tupper Lake, Slip Op., pp. 5-6 (Sup. Ct. Franklin Co. November 2, 2007), Index No. 2007-45.

Valet Boat Launching Service, such that the State Boat Launch operated by DEC will be, in effect, part of the Project Site.

31. DEC's operation of the State Boat Launch and its care, custody and control of the Forest Preserve would be directly affected by the Project.

32. Respondents Preserve Associates, LLC, Big Tupper, LLC, and Tupper Lake Boat Club, LLC are New York limited liability companies with their principal places of business in Franklin County, New York.

33. Preserve Associates, LLC (the "Applicant") was the applicant for the Order and Permits that Petitioners seek to have annulled in this proceeding, and the Order and Permits were issued to it. It is the owner of a parcel of land that is part of the Site. Order, p. 3.

34. Respondents Big Tupper, LLC, and Tupper Lake Boat Club, LLC are subsidiaries of the Applicant, or are otherwise affiliated with it or controlled by it. Order, pp. 3, 27.

35. Respondents Big Tupper, LLC, and Tupper Lake Boat Club, LLC are owners of certain parcels of land that are part of the Site. Order, pp. 3, 27.

36. Upon information and belief, respondent Nancy Hull Godshall is the Trustee of respondent Oval Wood Dish Liquidating Trust ("OWD").

37. OWD is the owner of several thousand of acres of land that are part of the Site. Order, p. 3.

38. The Applicant is the contract vendee of said OWD lands, and/or holds a purchase option on said property. Order, p. 3. Respondent Nancy Hull Godshall, as Trustee, has previously executed consents to the permit application filed by the Applicant in furtherance of the Project.

VENUE

39. Venue of this proceeding properly lies in Albany County pursuant to CPLR § 506 because respondent DEC has its principal office in said county.

PROJECT HISTORY

40. The Applicant first presented the Project to APA in 2004, as a conceptual plan.

41. In 2005, the Applicant formally filed its application for the required APA permits.

42. After numerous attempts at filing a complete application, in 2006, the Applicant succeeded in having the application declared to be complete.

43. However, because APA decided that significant amounts of additional information were needed in order for it to make the legally required determinations under the APA Act, in February 9,

2007, it voted to issue the "Hearing Order" (Ex. 57),¹⁰ which required that an adjudicatory hearing be conducted on the Project, pursuant to its regulations at 9 NYCRR Part 580.

44. The Hearing Order (Ex. 57, pp. 7-9) certified ten different issues for hearing, as being issues on which APA believed that, inter alia, the Project did not comply with the applicable statutes and regulations, that the Project could only be approved with major modifications or substantial conditions, or that APA needed additional information to assist it in its review of the Project. Ex. 57, pp. 5-6.

45. The hearing was presided over by Hon. Daniel P. O'Connell, an ALJ on loan from DEC to APA.

46. As permitted by the Hearing Order, the ALJ later modified some of the original ten issues and added two more, for a total of twelve hearing issues. Ex. 87.

47. Certain issues raised herein do not fall strictly within the scope of the 12 issues that were adjudicated. The hearing issues were those for which APA believed that more information was needed in order for it to make its decision. See 9 NYCRR § 580.2(a)(3), (4), (5); Hearing Order, Ex. 57. However, APA was required to make its final decision based on all applicable laws and regulations, and not just on those for which it needed more information to do so.

¹⁰ All references to the exhibits which were admitted into evidence in the adjudicatory hearing, or were otherwise numbered as part of the administrative record, are referred to herein as "Ex. ____".

48. The ALJ granted party status in the hearing pursuant to 9 NYCRR § 580.5 and § 580.7 to over 40 parties.

49. These parties included environmental conservation organizations such as PROTECT, adjoining and nearby property owners such as the individual petitioners herein, municipalities, respondent DEC, civic organizations, and others.

50. DEC did not actively participate in the adjudicatory hearing phase of the Project's review by APA.

51. Discovery was conducted among the hearing parties, commencing in the fall of 2010.

52. After four years of delay by the Applicant, including lengthy, but ultimately unsuccessful, settlement negotiations, and various pre-hearing proceedings, the adjudicatory hearing commenced in March 2011.

53. Prefiled testimony and exhibits were submitted by several parties, and live testimony on the twelve Hearing Issues was heard over 19 days in March, April, May, and June 2011.

54. Thereafter, the parties filed closing briefs and replies, pursuant to 9 NYCRR § 580.14(b)(9), concluding in October 2011.

55. The APA then took up deliberating on the Project, which was spread over several days, at its monthly meetings in November and December 2011, and January 2012. On January 20, 2012, APA voted 10-1 to approve the Project.

56. The Order was formally issued and transmitted on January 31, 2012. The 14 permits for various parts of the

Project have not yet been formally issued, but their issuance "shall be a non-discretionary act [of the APA] upon the satisfaction of the terms" set forth in the Order. Order, p. 37.

LEGAL BACKGROUND

The APA Land Use and Development Regulation System

57. The Town of Tupper Lake lies within the six million acre Adirondack Park. Within the Park respondent APA administers a system of land use and development regulation over private lands, pursuant to the APA Act.

58. The basic structure of APA's land use regulation powers is created by the Adirondack Park Land Use and Development Plan, which was adopted by the Legislature pursuant to APA Act § 805(1), and the Adirondack Park Land Use and Development Plan Map, which was adopted by the Legislature and APA pursuant to APA Act § 805(2). The map divides private lands within the Park into six different land use areas, known as Resource Management, Rural Use, Low Intensity Use, Moderate Intensity Use, Industrial Use and Hamlet.

59. APA Act § 805(3) and § 809(10)(b) provide that within each such land use area, certain listed types of land uses are considered to be "compatible uses" with the Land Use Area.

60. Pursuant to APA Act § 805(3), other listed types of land uses are only considered to be "secondary uses" in each land use area. Secondary uses "are those which are generally compatible with such area depending upon their particular

location and impact upon nearby uses and conformity with the overall intensity guidelines for such area." APA Act § 805(3)(a).

61. Pursuant to APA Act § 809(10)(b), all other land uses not listed as compatible uses or secondary uses are presumed to be not compatible with the land use area, although a project sponsor may attempt to rebut that presumption.

62. Pursuant to APA Act § 805(3), for each of the six Land Use Areas there is also an overall intensity guideline that limits the number of principal buildings that may be constructed per square mile.

63. Pursuant to APA Act § 805(3), for each of the six Land Use Areas there are also a character description, and a list of purposes, policies and objectives of the lands which are so designated.

64. The Adirondack Park Land Use and Development Plan and its system of land use areas is similar to a zoning ordinance in some respects, but not all.

65. APA's "powers and goals thus resemble those of both a local planning board and a local zoning entity". Hunt Brothers v. Glennon, 81 N.Y.2d 906, 909 (1993). However, in many ways, these powers and goals are unique.

Statutory Protection of Resource Management Lands

66. The majority of the Project Site, some 4,739.5 +/- acres, is classified as Resource Management. Order, p. 23.

67. In Resource Management land use areas, the uses considered to be compatible include agriculture, open space recreation, forestry, game preserves and private parks, sand and gravel extractions, public utilities, hunting and fishing cabins, single family dwellings, mobile homes, campgrounds, group camps, ski centers and related tourist accommodations, sawmills and similar wood using facilities, mineral extractions, roads and golf courses, pursuant to APA Act § 805(3) (g).

68. In Resource Management Land Use Areas, a maximum of 15 structures may be constructed per square mile. APA Act § 805(3) (g) (3). This equates to approximately one principal structure for every 42.7 acres.

69. For Resource Management lands, the character description and purposes, policies and objectives include, *inter alia*:

- (1) Character description. Resource management areas, delineated in green on the plan map, are those lands where the need to protect, manage and enhance forest, agricultural, recreational and open space resources is of paramount importance because of overriding natural resource and public considerations. ...

Many resource management areas are characterized by substantial acreages of one or more of the following: shallow soils, severe slopes, elevations of over twenty five hundred feet, flood plains, proximity to designated or proposed wild or scenic rivers, wetlands, critical wildlife habitats or habitats of rare and endangered plant and animal species.

Other resource management areas include extensive tracts under active forest management that are vital to the wood using industry and necessary to insure its raw material needs. ...

- (2) Purposes, policies and objectives. The basic

purposes and objectives of resource management areas are to protect the delicate physical and biological resources, encourage proper and economic management of forest, agricultural and recreational resources and preserve the open spaces that are essential and basic to the unique character of the park. Another objective of these areas is to prevent strip development along major travel corridor in order to enhance the aesthetic and economic benefits derived from a park atmosphere along these corridors. Finally, resource management areas will allow for residential development on substantial acreages or in small clusters on carefully selected and well designed sites. APA Act § 805(3)(g).

70. Park-wide, there are over 1.6 million acres of land classified as Resource Management.

71. Resource Management lands are considered to be the most environmentally sensitive lands in the Park.

72. Pursuant to APA Act § 805(3), Resource Management lands are the most strictly regulated, as they have the lowest allowable density and the most restrictive lists of compatible and secondary uses. APA Act § 805(3)(g)(3) and (4). Indeed, even single family houses, mobile homes and small hunting camps are only listed as secondary uses of Resource Management lands. APA Act § 805(3)(g)(4).

APA's Overriding Mandate Is the Protection
of the Environment of the Adirondack Park

73. APA is charged by law with the primary duty of protecting the environment of the Adirondack Park:

The basic purpose of this article is to insure optimum overall conservation, protection, preservation, development and use of the unique scenic, aesthetic, wildlife, recreational, open space, historic,

ecological and natural resources of the Adirondack park. APA Act § 801.

74. Pursuant to that duty, the APA Act gives APA jurisdiction over many proposed development projects on private land within the Park.

75. Pursuant to APA Act § 809(10), APA "shall not approve any project" without making 5 separate determinations, which are set forth in § 809(10) (a) to (e).

76. Section 809(10) (a) to (e) provides, in pertinent part:

10. The agency shall not approve any project proposed to be located in any land use area not governed by an approved local land use program, or grant a permit therefor, unless it first determines that such project meets the following criteria:

a. The project would be consistent with the land use and development plan.

b. The project would be compatible with the character description and purposes, policies and objectives of the land use area wherein it is proposed to be located. If the project is on the classification of compatible uses list for the land use area involved, there shall be a presumption of compatibility with the character description, purposes, policies and objectives of such land use area. ...

c. The project would be consistent with the overall intensity guideline for the land use area involved. ...

d. The project would comply with the shoreline restrictions if applicable. ...

e. 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. In making this determination, as to the impact of the project upon such resources of the park, the agency

shall consider those factors contained in the development considerations of the plan which are pertinent to the project under review.

77. When reviewing projects such as ACR,

[t]he 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" (Executive Law § 809[9], [10][e]).

Association v. Town of Tupper Lake, supra, 64 A.D.3d at 826.

[APA's] environmental mandate predated SEQRA and, as reflected in the APA's regulations, it is more protective of the environment [than SEQRA]. (emphasis added) (internal citations omitted) Association, supra, at 826-827.

78. Moreover, while SEQRA¹¹ requires agencies to strike a balance between social and economic goals and the protection of the environment,

[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 (concurring opinion) (emphasis added).

79. Therefore, the APA Act places "environmental concerns above all others". Id., at 830 (concurring opinion) (emphasis added). Indeed, "the APA's mandate is more protective of the environment than that embodied within SEQRA." Id.

80. APA's legal duty to prioritize environmental concerns is rooted in:

¹¹ State Environmental Quality Review Act, ECL Article 8.

the constitutional and legislative history stretching over 80 years¹² to preserve the Adirondack area from despoliation, exploitation, and destruction by a contemporary generation in disregard of generations to come. (citations omitted)

Wambat Realty Corp. v. State, 41 N.Y.2d 490, 495 (1977).

81. While the APA may consider a project's alleged potential commercial and other benefits in assessing the ability of the public to provide public facilities and services under APA Act § 805(4) and § 809(10)(e), because it is mandated to place "environmental concerns above all others" (Association, supra, at 830 (concurring opinion), the APA Act does not authorize the APA to weigh and balance the alleged financial and fiscal benefits of a proposed project against its environmental impacts. Id., at 826-827; concurring opinion at 829-830.

82. Financial benefits are only to be considered in the context of whether or not they will offset the "burden on the public in providing facilities and services made necessary by" the project. APA Act § 805(4). See Association, supra, at 826-827; concurring opinion at 829-830. They may not be considered in the context of whether or not they will offset a project's environmental impacts.

83. The future of the Adirondack Park is a matter of state-wide, and even national concern. See Wambat Realty, supra, at 494-495; Wambat Realty v. State, 85 M.2d 489, 493 (1975); APA Act § 801. The APA Act "... serve[s] a supervening State concern

¹² Now over 110 years.

transcending local interests.” Wambat Realty, supra, at 41 N.Y.2d 495.

84. Because the APA Act mandates that, in reviewing this Project, the APA must place “environmental concerns above all others”, Association, supra, at 830 (concurring opinion), all doubts about the ACR Project’s compliance with the law and APA’s decision approving the Project must be resolved in favor of protecting the environment.

The Applicant Failed to Meet its Burden of Proving the Allegations of the Application

85. The burden of proof was entirely on the Applicant to prove that the Project complies fully with the law, and that it was absolutely entitled to a permit. The burden was not on the Petitioners and the other intervenors in the adjudicatory hearing, or on the APA, to prove otherwise.

86. Under the APA Act and APA’s regulations, if the applicant does not affirmatively prove that each and every aspect of the project complies with the law, the application must be denied.

87. Section 306(1) of the State Administrative Procedure Act provides that “the burden of proof shall be on the party who initiated the proceeding”.

88. The APA’s regulations at 9 NYCRR Part 580 make it clear that an applicant has the burden of proof with regard to all hearing issues in an adjudicatory hearing:

The [APA] staff is not required to assume the project sponsor's burden of proof. 9 NYCRR § 580.6(a).

(b) *Burden*. The burden shall be on the project sponsor to present testimony concerning the matters alleged in the application. 9 NYCRR § 580.11(b) (emphasis added).

(3) The hearing officer may order the project sponsor to make a brief, informal presentation at the outset of the hearing Such a proceeding shall not relieve the project sponsor of his burden to present competent evidence in support of the application 9 NYCRR § 580.14(b) (3) (emphasis added).

(6) Direct case. (i) In addition to proving the allegations of the application, the project sponsor shall have the burden of demonstrating that the project will be in compliance with applicable statutory and regulatory requirements. 9 NYCRR § 580.14(b) (6) (i) (emphasis added).

89. Therefore, an applicant can not merely rely on the application materials. The application is treated as mere allegations, which must be proven by competent, credible testimony introduced into evidence at the adjudicatory hearing.

90. Without such testimony, any claim made in the application remains just that, an unproven claim, and the application materials can not form the basis for a finding of fact or conclusion of law that the project meets the statutory criteria of the APA Act. 9 NYCRR § 580.11(b), § 580.14(b) (6) (i).

91. While the APA may conduct investigations, exams, tests or site evaluations to verify information contained in an

application (APA Act § 809(12)), it was the Applicant's burden to present testimony concerning the matters alleged in its application. 9 NYCRR § 580.11(b).

92. Although the APA Staff may present evidence concerning the application with respect to the required findings of § 809(10) of the APA Act, the "staff is not required to assume the project sponsor's burden of proof". 9 NYCRR § 580.6(a).

93. Furthermore, it is an applicant's burden to "present competent evidence in support of the application". 9 NYCRR § 580.14(b)(3). "[A]ll evidence must be competent, material and relevant." 9 NYCRR § 580.15(a).

94. Therefore, if there is not substantial, competent evidence in the record to allow the APA to find that a project would not have an undue adverse impact, then an application must be denied. It is not enough that there be no evidence of adverse impacts - an applicant is required to prove that there will not be any such impacts.

95. The APA regulations set forth above place a higher burden than usual on both an applicant and the APA itself when APA is reviewing a project that has been the subject of an adjudicatory hearing. It is not enough that the applicant merely get over the relatively low bar of APA and a reviewing court finding that there is "substantial evidence" to support the decision buried somewhere in the record - the applicant must have affirmatively proven in the hearing that it is entitled to the issuance of the permit that it seeks.

96. In the present case, as is further set forth below, the ACR application should have been denied by APA because the Applicant's case consisted mostly of speculation, conjecture and unsupported conclusions, which failed to satisfy its "burden of demonstrating that the project will be in compliance with applicable statutory and regulatory requirements" (9 NYCRR § 580.14 (b) (6) (i)) by competent, credible evidence.

**CAUSES OF ACTION REGARDING ADVERSE
IMPACTS TO WILDLIFE HABITAT AND WETLANDS**

97. APA may only approve a project if it determines that the Project "would be consistent with the land use and development plan" (APA Act § 809(10)(a)), "would be compatible with" the land use area in which it is located (APA Act § 809(10)(b)), "would not have an undue adverse impact" on the natural resources of the Park (APA Act § 809(10)(e)), and, where applicable, that it would comply with APA's Freshwater Wetlands Act (ECL Article 24) regulations, at 9 NYCRR Part 578.

98. In the present case, the Applicant failed to meet its burden to prove that the Project would not have an undue adverse impact on the ecology of Cranberry Pond, a large wetland complex on the Project Site, due to the withdrawal of large quantities of water for snowmaking for the ski area, and that the Project conformed with the APA's Freshwater Wetlands Act regulations at 9 NYCRR Part 578.

99. APA admitted that the impacts from snowmaking activities to the ecology of Cranberry Pond have "not been determined." Order, p. 33.

100. The fact that APA is requiring further studies of these impacts to Cranberry Pond (Order, pp. 33-34, Ski Area and Resort Permit,¹³ p. 10) demonstrates that, on the current record, the Applicant did not meet its burden of proof, and that the APA

¹³ APA Project Permit 2005-100.1, Ski Area and Resort, approved January 20, 2012.

lacked the requisite quantitative and scientific basis for its decision. As a result, there is not substantial evidence that the Project complies with the APA Act and the APA's Freshwater Wetlands Act regulations with regard to the prevention of adverse impacts to the ecology of Cranberry Pond.

101. Therefore, the Order and Permits must be annulled pursuant to the First through Fourth Causes of Action, infra.

102. The Project would adversely impact amphibian life on the Project Site, due to the construction of roads, houses and other facilities in their upland habitat.

103. The fact that APA is requiring further studies of such impacts to amphibians and their habitat (Order, p. 22; West Face Expansion Permit, p. 8; Small Western Great Camp Lots Permit, pp. 7-8; Small Eastern Great Camp Lots Permit, pp. 7-8)¹⁴.

demonstrates that, on the current record, the Applicant did not meet its burden of proof, and that the APA lacked the requisite quantitative and scientific basis for its decision. As a result, there is not substantial evidence that the Project complies with the APA Act and the APA's Freshwater Wetlands Act regulations, with regard to the prevention of adverse impacts to the amphibian population of the Project Site.

104. Therefore, the Order and Permits must be annulled pursuant to the Fifth and Sixth Causes of Action, infra.

¹⁴ APA Project Permits 2005-100.13, West Face Expansion; 2005-100.12, Small Western Great Camp Lots; 2005-100.4, Small Eastern Great Camp Lots, approved January 20, 2012.

105. The Project would adversely impact other wildlife, due to the fragmentation of thousands of acres of wildlife habitat by the construction of roads, driveways, houses, and other facilities.

106. The APA's February 2007 Hearing Order (Ex. 57), the hearing testimony and exhibits, and the opinions of the APA Hearing Staff,¹⁵ all showed that the necessary studies of wildlife, its habitat on the Site, and the potential for adverse impacts thereto, had not been done.

107. Therefore, the Order and Permits must be annulled pursuant to the Seventh to Eighth Causes of Action, infra.

The Use of Cranberry Pond for Snowmaking
Purposes Would Have an Undue Adverse Impact

108. The Cranberry Pond wetland complex located on the Project Site consists of Cranberry Pond, a 26 +/- acre body of water, and surrounding wetlands. Spada PFT #8, p. 2.¹⁶

109. The Cranberry Pond wetland complex contains key boreal habitat, which is ecologically significant to the Adirondacks due to its ability to support landscapes and species that are rare and iconic to the region, including moose, loons, rusty

¹⁵ The "Hearing Staff" refers to those members of the overall "APA Staff" who participated in the adjudicatory hearing pursuant to 9 NYCRR § 580.6.

¹⁶ References to the prefiled testimony of the witnesses in the adjudicatory hearing are generally abbreviated as "(Last Name) PFT #(Hearing Issue Number)".

blackbirds, and a wide variety of other birds. Glennon PFT #8, pp. 5-11.

110. The Applicant proposes to use Cranberry Pond as the source of water for snowmaking operations at the Big Tupper Ski Area. Order, p. 23.

111. Snowmaking operations could withdraw as much as 2,400,000 gallons per day from the Pond. Franke PFT #8, p. 12.

112. As a result of using the Cranberry Pond wetland complex as a source of snowmaking water, there would be adverse impacts, leading to decreased species composition and diversity, and to decreased wetland values and functions. Tr. 1164, 1794-1795, 1844, 1849, 1887-1889.

113. Withdrawing water from Cranberry Pond for snowmaking purposes would result in the loss of vegetation from freezing effects, the crowding and stressing of species that are active in the winter (such as newts, fish, tadpoles, bullfrogs and green frogs), and in "significant mortality" of those species that tend to hibernate during the winter in the mud at the edge of the Pond or in mud in the shallow waters of the Pond. Tr. 1164, 1794-1795, 1844, 1849, 1887-1889 (Glennon; 5/3/11). These losses would affect other species higher up the food chain. Tr. 1930-1931 (Glennon; 5/3/11).¹⁷

¹⁷ The Cranberry Pond wetland complex would also be adversely impacted due to the fact that the effluent from the Project's community wastewater treatment plant would discharge into the inlet of Cranberry Pond. Order, p. 10. See 9 NYCRR 578.8(g).

114. The APA Staff acknowledged that snowmaking withdrawals could result in "a whole host of potential impacts" to wetlands, fish, wildlife and other biota, but that these impacts have not been determined. Tr. 1889 (Spada); LaLonde PFT #8, p. 10; Tr. 2033 (LaLonde).

115. In approving the Project, including the use of Cranberry Pond for snowmaking, APA found that:

94. The ability to make snow is a critical component of an economically-viable Ski Area. The Project Sponsor proposes to use Cranberry Pond as the source of water for snowmaking because the costs associated with using Tupper Lake would be significantly higher. Order, p. 23 (emphasis added). ...

96. Tupper Lake represents a more reliable long-term source of water that minimizes impacts to wetlands, fish, wildlife and other biota and would ensure the long-term viability of the Ski Area. Order, p. 24 (emphasis added).

116. APA further found that:

153. The hydrologic analyses demonstrated that the volume of water in Cranberry Pond would be reduced from snowmaking operations when daily snowmaking pumping withdrawals exceed natural daily inflows.

154. The impact, if any, of a temporary net loss of flow (and pond volume) into the Cranberry Pond hydrologic system resulting from snowmaking activities to fish, wildlife and other biota within Cranberry Pond and to the value and benefits of existing wetlands associated with the pond has not been determined.

155. Unless proven otherwise by data collected during and after the withdrawal of water for snowmaking, the use of Cranberry Pond for snowmaking should be temporary in nature and should include identifying and monitoring impacts to wetlands, fish, wildlife and other biota within Cranberry Pond and associated wetlands. Order, pp. 33-34 (emphasis added).

117. Thus, despite the admitted lack of adequate scientific evidence to determine the impacts of a loss of water volume due to snowmaking withdrawals, despite determining that the use of another water source would minimize impacts, and despite recognizing that the use of the Pond for snowmaking must only be temporary, APA approved its use.

118. APA's limitation on the use of the Pond to a temporary use constitutes a recognition that snowmaking will have an undue adverse impact on its natural and ecological resources pursuant to APA Act § 809(10) (e).

119. APA's finding that these impacts could be minimized by using Tupper Lake for snowmaking instead of Cranberry Pond constitutes a recognition that the impacts on the Pond will be "undue" pursuant to APA Act § 809(10) (e).

120. APA's allowing the Applicant to use Cranberry Pond for snowmaking solely because it will be less expensive than using Tupper Lake constitutes an impermissible balancing of economic factors against environmental factors, which is not permitted under the APA Act. See pp. 19 to 23, supra.

121. While APA did require that the Applicant perform a study of the impacts of using the Pond for snowmaking, the study is not required to start until after snowmaking commences. Order, p. 34; Ski Area and Resort Permit, p. 10.¹⁸

¹⁸ APA Project Permit 2005-100.1, Ski Area and Resort, approved January 20, 2012.

122. The results of the study will not be reported during the winter, when snowmaking is occurring, but will be delayed until the following July. Ski Area and Resort Permit, p. 10.

123. In fact, APA can not stop these water withdrawals until after they have gone on for two years:

At any time after two consecutive years from such initial date, the Agency may require cessation of water withdrawal from Cranberry Pond, or impose limits on water withdrawal, if it determines that such withdrawal is substantially impairing wetland functions including but not limited to impacts related to wildlife. Ski Area and Resort Permit, p. 10 (emphasis added).

124. Thus, while the study is being conducted, damage of an undetermined amount could occur. There is no proof in the record that this will not be an "undue adverse impact", and the testimony and APA's own findings demonstrate that in fact it will be.

125. As a matter of law, any determination of a project's adverse impacts on the resources of the Adirondack Park must be made before a permit is issued, not after.

126. Moreover, performing these studies after the fact deprives the hearing parties of their right to review them, comment on them, conduct discovery regarding them, conduct cross-examination of their authors, and present rebuttal testimony, as would have been permitted under 9 NYCRR § 580.14 if they had been conducted before the hearing, rather than after it.

127. APA Act § 809(10)(e) requires that APA, in making its determination about the undue adverse impacts of a project, take

into account the Development Considerations ("DCs") set forth in APA Act § 805(4).

128. The DCs relevant to the snowmaking water withdrawal from Cranberry Pond include:

- § 805(4) (a) (1) (e) - "Existing flow characteristics"
- § 805(4) (a) (1) (f) - "Existing water table and rates of recharge"
- § 805(4) (a) (5) (c) - "Habitats of rare and endangered species and key wildlife habitats"
- § 805(4) (a) (5) (e) - "Wetlands"
- § 805(4) (a) (6) (a) - "Fish and wildlife"
- § 805(4) (c) (1) (d) - "Depth to ground water and other hydrological factors"

129. Taking these development considerations into account, both the hearing testimony and APA's findings regarding Cranberry Pond establish that the Project would "have an undue adverse impact upon the natural, scenic, aesthetic, ecological, wildlife, historic, recreational or open space resources of the park" pursuant to APA Act § 809(10) (e), and that the application should have been denied.

130. Cranberry Pond is located in the Moderate Intensity Use land use area pursuant to the Adirondack Park Land Use and Development Plan. Order, p. 2.

131. Pursuant to APA Act § 805(3) (d), Moderate Intensity Use areas "provide for development opportunities in areas where development will not significantly harm the relatively tolerant physical and biological resources."

132. Since the impacts of snowmaking are unknown, the APA could not have rationally determined that the withdrawal of water

for snowmaking "will not significantly harm" Cranberry Pond. APA Act § 805(3) (d).

133. Moreover, these findings by APA regarding Cranberry Pond establish that the Project would not be compatible with the Moderate Intensity Use land use area, in violation of APA Act § 809(10) (b), and that the application should have been denied.

134. Because the Project will have undue adverse impacts on Cranberry Pond, in violation of APA Act § 809(10) (e), is not consistent with the Moderate Intensity Use land use area as required by APA Act § 809(10) (b), and is not consistent with the Adirondack Park Land Use and Development Plan, in violation of APA Act § 809(10) (a), the application should have been denied.

**AS AND FOR A FIRST SEPARATE
AND DISTINCT CAUSE OF ACTION**

135. Each and every allegation set forth above is hereby repeated and realleged.

136. There is no testimony, nor are there field studies, expert reports, or other competent evidence, that support any finding or determination that the Project, in particular the use of Cranberry Pond for snowmaking, "would be consistent with the land use and development plan" (APA Act § 809(10) (a)), "would be compatible with" the land use area in which it is located (APA Act § 809(10) (b)), and "would not have an undue adverse impact" on the natural resources of the Park (APA Act § 809(10) (e)).

137. The Applicant has failed to meet its burden of proof on this issue.

138. Therefore, APA's decision to approve the Project is not supported by substantial evidence, and the Order and Permits should be annulled.

**AS AND FOR A SECOND SEPARATE
AND DISTINCT CAUSE OF ACTION**

139. Each and every allegation set forth above is hereby repeated and realleged.

140. The use of Cranberry Pond as a source of snowmaking water would not be "consistent with the land use and development plan" (APA Act § 809(10)(a)), would not "be compatible with" the land use area in which it is located (APA Act § 809(10)(b)), and would "have an undue adverse impact" on the natural resources of the Park (APA Act § 809(10)(e)).

141. Requiring that the study of the effects on Cranberry Pond be done only after the Project was approved is an impermissible postponement of the APA's review of the Project's environmental impacts.

142. Therefore, APA's decision to approve the Project was arbitrary and capricious and affected by error of law, and the Order and Permits should be annulled.

The Use of Cranberry Pond for Snowmaking
Would Violate the Freshwater Wetlands Act

143. It is the "policy of the state to preserve, protect and conserve freshwater wetlands and the benefits derived therefrom, to prevent the despoliation and destruction of freshwater wetlands, and to regulate use and development of such wetlands to secure the natural benefits of freshwater wetlands," which include "flood protection, wildlife habitat, open space and water resources." ECL § 24-0103; ECL § 24-0105(1).

144. Conservation, protection and regulation of freshwater wetlands in the Adirondack Park is a matter of state concern that is overseen by APA. ECL § 24-0105(4); ECL § 24-0105(6); ECL § 24-0801(2).

145. Cranberry Pond consists of freshwater, boreal wetland habitat and, as such, pursuant to APA's Freshwater Wetlands Act regulations, it has a wetland value rating of "two". See Glennon PFT #8, pp. 5-11; 9 NYCRR § 578.5(a).¹⁹

146. As set forth in APA's Freshwater Wetlands Act regulations, the APA "shall not issue a permit" unless it determines that the "proposed activity would result in minimal degradation or destruction of the wetland or its associated values; and . . . is the only alternative which provides an essential public benefit." 9 NYCRR § 578.10(a)(2); see 9 NYCRR § 578.5(a).

¹⁹ The APA's Order and Permits do not make any findings about the value rating of Cranberry Pond. See 9 NYCRR § 578.5.

147. Using Cranberry Pond for snowmaking is likely to result in "lower[] average water table elevations," "increase[d] downstream peak flows," and secondary impacts, "such as a successional change in wetland vegetative covertime toward drier types, increased water temperatures, and changes in fish and wildlife use." 9 NYCRR § 578.8(a).

148. Despite these potential impacts, APA found, in approving the Project, including the use of Cranberry Pond for snowmaking, that:

96. Tupper Lake represents a more reliable long-term source of water that minimizes impacts to wetlands, fish, wildlife and other biota and would ensure the long-term viability of the Ski Area. Order, p. 24 (emphasis added).

149. APA further found that:

154. The impact, if any, of a temporary net loss of flow (and pond volume) into the Cranberry Pond hydrologic system resulting from snowmaking activities to fish, wildlife and other biota within Cranberry Pond and to the value and benefits of existing wetlands associated with the pond has not been determined.

155. Unless proven otherwise by data collected during and after the withdrawal of water for snowmaking, the use of Cranberry Pond for snowmaking should be temporary in nature and should include identifying and monitoring impacts to wetlands, fish, wildlife and other biota within Cranberry Pond and associated wetlands. Order, pp. 33-34 (emphasis added).

150. The limitation on the use of the Pond to a temporary use constitutes a recognition that snowmaking would result in more than a minimal degradation or destruction of Cranberry Pond or its associated values. See 9 NYCRR § 578.10(a)(2); see 9 NYCRR § 578.5(a).

151. The finding that Tupper Lake was a more reliable long-term source of water for snowmaking than Cranberry Pond constitutes a recognition that the use of Cranberry Pond is not the only alternative which can reasonably accomplish the Applicant's objectives of long-term viability of the Ski Area. See 9 NYCRR § 578.10(a)(2).

152. Without knowing the actual impacts of the snowmaking operations, the APA could not have rationally found that use of Cranberry Pond for snowmaking "would result in minimal degradation or destruction of the wetland or its associated values." 9 NYCRR § 578.10(a)(2).

153. The information that is available does show that the use of Cranberry Pond for snowmaking could indeed lead to significant "degradation or destruction of the wetland or its associated values." 9 NYCRR § 578.10(a)(2).

154. Further, the use of Cranberry Pond for snowmaking is not "the only alternative." 9 NYCRR § 578.10(a)(2).

155. For these reasons, the application should have been denied.

**AS AND FOR A THIRD SEPARATE
AND DISTINCT CAUSE OF ACTION**

156. Each and every allegation set forth above is hereby repeated and realleged.

157. There is no testimony or other competent evidence that supports any finding or determination that the "proposed activity would result in minimal degradation or destruction of the wetland

or its associated values; and . . . is the only alternative which provides an essential public benefit" as required by the APA Freshwater Wetlands Act regulations at 9 NYCRR § 578.10(a)(2).

158. The Applicant has failed to meet its burden of proof on this issue.

159. Therefore, APA's decision to approve the Project is not supported by substantial evidence, and the Order and Permits should be annulled.

**AS AND FOR A FOURTH SEPARATE
AND DISTINCT CAUSE OF ACTION**

160. Each and every allegation set forth above is hereby repeated and realleged.

161. The use of Cranberry Pond as a source of snowmaking water would result in more than a "minimal degradation or destruction of the wetland or its associated values." 9 NYCRR § 578.10(a)(2).

162. The use of Cranberry Pond as a source of snowmaking water is not the "only alternative which provides an essential public benefit." 9 NYCRR § 578.10(a)(2).

163. Requiring that the study of the impacts on Cranberry Pond be done only after the Project was approved is an impermissible postponement of the APA's review of the Project's environmental impacts.

164. Therefore, APA's decision to approve the Project was arbitrary and capricious and affected by error of law, and the Order and Permits should be annulled.

The Project Would Have an Undue
Adverse Impact Upon Amphibian Life

165. At least four years before the hearing, the APA Staff advised the APA that there was a dearth of information in the application on the Project's potential adverse impacts to amphibians and their habitat:

The wildlife functional assessment failed to provide a detailed species inventory and was not conducted over a number of days nor during different seasons. It did not identify vernal pools and amphibian crossing locations.

Consequently, lack of information makes it difficult to assess possible habitat fragmentation and potential wildlife impacts or to determine potential localized changes in animal species composition, diversity and functional organization from the development of any changes to the biotic integrity of the site and adjacent properties. Ex. 50, p. 9, Staff Memo, January 31, 2007 memo from Agency Staff Review Team to [then-Executive Director Richard] Lefebvre.

166. In the intervening four years, the Applicant did not provide this missing information.

167. Accordingly, Dr. Michael Klemens, a noted expert on amphibians and the effects of development on them and their habitat, who also has many years of experience in land use planning (Ex. 167), testified in the adjudicatory hearing on behalf of intervenor Adirondack Wild.

168. It was his scientific opinion that the Applicant had not done proper field assessments for amphibians.

169. However, in a single day of fieldwork, he found 11 such species immediately adjacent to the Site.²⁰

170. Dr. Klemens also testified that the Project had not properly taken into account the habitat needs of amphibians and had ignored the impacts of development on the upland habitats that amphibians use for much of the year. His testimony also established that the Project would fragment their habitat by cutting off access between their various critical habitat areas, particularly vernal pools and upland habitat.

171. Amphibians "serve as the base of the food chain," have "important ecological functions," and "maintain the balance and ecological connections within the forest ecosystem." Tr. 1005 (Klemens).

172. Amphibians' primary habitat consists of wetlands and vernal pools, plus the "critical upland habitat zone," which ranges from 100 to 750 feet from the wetland or pool. Tr. 1086 (Klemens).

173. Vernal pools, which are often "embedded in larger wetland complexes," provide a "huge amount of ecological services." They serve an energy transport function, and a flood control function, as well as serving as the amphibian breeding

²⁰ See Prefiled Testimony of Michael Klemens, 4/27/11, Tr. 1004, Attachment A; Supplemental Prefiled Testimony of Michael Klemens, 6/7/11, Tr. 3137, Attachment A; Tr. 1002-1191 (4/27/11), 3134-3222 (6/7/11).

grounds, and providing "very, very high denitrification values." Tr. 1087-1088 (Klemens).

174. Vernal pools are a "major, major key habitat." Even without the presence of rare, threatened, endangered, or special concern species, vernal pools are a key habitat due to their important values and functions relative to the "entire ecosystem." Tr. 1130-1131 (Klemens); see APA Act § 805(4) (a) (5) (c).

175. Vernal pools are "a key wildlife habitat", within the scope of DC (a) (5) (c), because they "provide valuable food, shelter, water and rearing areas for a variety of wildlife species, some of which live primarily within the [pool] itself and others which depend upon the [pool] during certain periods of their life cycle." DAP, p. 16A-2.²¹

176. APA Staff witness Daniel Spada ("Spada") agreed that protecting the "critical upland habitat zone" is essential to protecting wetland functions. Tr. 1882-1883.

177. Spada also testified that the instances where the Project's development happened to avoid some portions of the critical upland habitat zone were "inadvertent." Tr. 1872.

178. Spada produced a map which was introduced into evidence as Ex. 244. This map, entitled "Amphibian Habitat", delineated the "750 foot critical terrestrial habitat" areas on

²¹ "Development in the Adirondack Park, Objectives and Guidelines for Planning and Review," ("DAP") by Adirondack Park Agency, 1977, last updated April 1991; <http://apa.ny.gov/Documents/Guidelines/DAP1.pdf>

most of the Project Site, excluding only the far eastern end of the Site and the noncontiguous Marina parcel.

179. Exhibit 244 showed that roughly half of the acreage of the Project Site depicted thereon is within the "750 foot critical terrestrial habitat" areas.

180. Exhibit 244 showed that roughly three-quarters of the 659 proposed residential units, and most of the commercial development, are within the "750 foot critical terrestrial habitat" areas.

181. Thus, the Project's housing and commercial development is overwhelmingly concentrated in the "750 foot critical terrestrial habitat" area.

182. Exhibit 244 showed that the following elements of the Project were entirely within the "750 foot critical terrestrial habitat" areas:

- Lake Simond View subdivision (Resource Management and Moderate Intensity Use land use areas);
 - Cranberry Village subdivision (Moderate Intensity Use land use area);
 - East Village subdivision (Moderate Intensity Use land use area);
 - Tupper Lake View North subdivision (Moderate Intensity Use land use area);
 - Artists' Cabins (Moderate Intensity Use land use area);
- and

- Inn and other Resort facilities (Resource Management and Moderate Intensity Use land use areas).

183. Exhibit 244 showed that the majority of the following elements of the Project were within the "750 foot critical terrestrial habitat" areas:

- Sugarloaf East subdivision (Moderate Intensity Use land use area); and
- West Face Expansion subdivision (Resource Management and Moderate Intensity Use land use areas).

184. Exhibit 244 showed that the following elements of the Project were at least partially within the "750 foot critical terrestrial habitat" areas:

- Large Eastern Great Camp Lots (Resource Management land use area);
- Small Eastern Great Camp Lots (Resource Management and Moderate Intensity Use land use areas);
- Small Western Great Camp Lots (Resource Management and Moderate Intensity Use land use areas);
- West Slopeside subdivision (Moderate Intensity Use land use area);
- Tupper Lake View South subdivision (Resource Management and Moderate Intensity Use land use areas); and
- Ski Area (Resource Management and Moderate Intensity Use land use areas).

185. Exhibit 244 showed that only the Marina and the Sugarloaf North subdivision were not at least partly within the "750 foot critical terrestrial habitat" areas.

186. APA found (Order, p. 22) that:

81. A preliminary amphibian survey completed by an independent consultant identified 11 species of amphibians located adjacent to public and private roads which traverse the project site. No threatened or endangered amphibian species were found during this survey.

82. Some development is proposed in areas comprising upland amphibian habitat. It is possible that some of this proposed development would prevent amphibian migration patterns and that human/amphibian interactions would result in amphibian mortality. A comprehensive amphibian survey and impact analysis will identify critical habitat areas and amphibian migration corridors which require additional protection. (emphasis added)

187. APA also found (Order, p. 33) that:

152. Requiring a comprehensive amphibian survey on certain R[esource] M[anagement] lands to identify protected species and to determine migration routes will ensure that best management practices and low cost mitigation techniques will be employed to reduce impacts to amphibian populations in R[esource] M[anagement]. The absence of curbs, avoidance of wetlands, and maintenance of a 100-foot buffer from wetlands in the project design will also limit impacts to amphibians throughout the project site, consistent with Agency guidelines and procedures.

188. These findings constituted recognition by APA that it lacked substantial evidence to find that adverse impacts to amphibians and their habitat had been adequately assessed and avoided.

189. Therefore, APA required a comprehensive amphibian survey to be conducted for the Resource Management lands in the

West Face Expansion subdivision (Permit 2005-100.13, p. 8), the Small Western Great Camp Lots (Permit 2005-100.12, pp. 7-8), and the Small Eastern Great Camp Lots (Permit 2005-100.4, pp. 7-8). The Small Eastern Great Camp Lots permit also required that certain other roads in Resource Management be assessed.

190. Despite the fact that 6 elements of the Project were entirely within the "750 foot critical terrestrial habitat" areas of amphibian habitat, 2 elements were mostly within these areas, and 6 elements were at least partly within them, only 3 of the 12 applicable permits required that these after-the-fact studies of amphibian habitat be conducted.

191. Oddly, as shown above and by Ex. 244, the 3 Project elements that will be assessed are among those that are the least affected by the "750 foot critical terrestrial habitat" areas.

192. No after-the-fact studies were required for any of the Project elements that would be entirely within the "750 foot critical terrestrial habitat" areas.

193. Also, a study is required for the West Face Expansion subdivision (Permit, p. 8), but not for the Sugarloaf East subdivision, even though a majority of both of these elements of the Project is within the "750 foot critical terrestrial habitat" areas.

194. There is no rational basis in the record for excluding the other 9 relevant Project elements from these studies of the "750 foot critical terrestrial habitat" areas, particularly when the 3 elements to be studied are those that are the least

affected by this habitat, and the 9 elements that will not be studied are the ones that are the most affected.

195. It appears that, rather than do the studies where there was the most risk of an undue adverse impact being found, APA only required that the Applicant study the areas of the Site where development was the least dense, or in the case of the West Face Expansion, would be done in the last phase of the Project (Order, p. 18), so that there would be the least risk of finding any impacts, and the least risk of the Applicant having to modify its plans.

196. Dr. Klemens testified that a "fundamental piece" of a plan for any development is first "understanding these wildlife resources and these connections;" and that it "begs credulity" to approve a Project and then conduct after-the-fact ecological resource studies. Tr. 1091-1092. Dr. Klemens made this point several times. Tr. 1069-1072, 1091-1092, 1144-1146, 1188-1189, 3141-3142, 3177, 3219.

197. Nevertheless, APA ignored his testimony and asked for after-the-fact studies, rather than withholding approval of the Project until the necessary studies were done.

198. There is no basis in the record for the Order's limitation (p. 33) of the amphibian studies and required mitigation to certain Resource Management lands.²²

²² Likewise, the 3 permits in question also limit the amphibian studies to Resource Management lands. See permits for West Face Expansion subdivision (# 2005-100.13, p. 8), Small Western Great Camp Lots (# 2005-100.12, pp. 7-8), and Small

199. The "Amphibian Habitat" map, which delineated the "750 foot critical terrestrial habitat" areas, shows that these areas are located in both the Resource Management and Moderate Intensity Use land use areas.

200. Therefore, there was no legal or evidentiary basis to limit the required future amphibian studies to Resource Management lands.

201. The Order (p. 33) references mitigation measures that can be employed, but relying upon this contingency plan, after the Project has already been approved, improperly defers consideration of the mitigation measures and denies the hearing parties an opportunity to provide input as to whether or not the mitigation would be appropriate or acceptable and to test the study in an adjudicatory process.

202. The Order (p. 33) limits the potential mitigation measures to "low cost" techniques, but there is no rational basis to establish that these "low cost mitigation techniques" will be enough to prevent undue adverse impacts to amphibians and their upland habitat.

203. Additionally, because the "critical habitat areas and amphibian migration corridors which require additional protection" (Order, p. 22) have not yet been identified, there is no rational basis for limiting mitigation to these "low cost" techniques and "best management practices", when certain

Eastern Great Camp Lots (# 2005-100.4, pp. 7-8).

subdivisions or other elements of the Project might need to be eliminated or moved in order to provide adequate protection for amphibians and their habitat.

204. Also, the mitigation techniques that might get identified in the study will do absolutely nothing to avoid undue adverse impacts from those elements of the Project that will not be studied, which, coincidentally or otherwise, happen to be the Project elements that will affect the "750 foot critical terrestrial habitat" the most. See pp. 44 to 47, supra.

205. This deficiency highlights the folly of conducting an amphibian study after the Project has already been approved.

206. Moreover, performing these studies after the fact deprives the hearing parties of their right to review them, comment on them, conduct discovery regarding them, conduct cross-examination of their authors, and present rebuttal testimony, as would have been permitted under 9 NYCRR § 580.14 if they had been conducted before the hearing, rather than after it.

207. As set forth in APA Act § 805(4), the DCs relevant to undue adverse impacts to amphibians include:

- § 805(4) (a) (5) (c) - "Habitats of rare and endangered species and key wildlife habitats"²³
- § 805(4) (a) (5) (e) - "Wetlands"
- § 805(4) (a) (6) (a) - "Fish and wildlife"

208. Taking these DCs into account, pursuant to APA Act § 809(10) (e), APA's findings regarding amphibian impacts establish that the Project would "have an undue adverse impact

²³ See pp. 42-43, supra.

upon the natural, scenic, aesthetic, ecological, wildlife, historic, recreational or open space resources of the park", and that the application should have been denied.

209. Pursuant to APA Act § 805(3)(g), a basic purpose of Resource Management areas is to "protect the delicate physical and biological resources."

210. The Project's impacts to amphibians, their upland habitat, and vernal pools in Resource Management areas are not known, but it is certain that, when it comes to amphibians and their habitat, the Project has not been designed so as to "protect the [Site's] delicate physical and biological resources." APA Act § 805(3)(g).

211. Further, pursuant to APA Act § 805(3)(d), Moderate Intensity Use areas "provide for development opportunities in areas where development will not significantly harm the relatively tolerant physical and biological resources."

212. Since the impacts of the Project on amphibian life and upland amphibian habitat are unknown, the APA could not have determined that the Project "will not significantly harm" amphibians and their habitat. APA Act § 805(3)(d).

213. Moreover, the findings that were made by APA regarding amphibians establish that the Project would not be compatible with the Resource Management and Moderate Intensity Use land use areas, in violation of APA Act § 809(10)(b), and that the application should have been denied.

214. Because the Project will have undue adverse impacts on amphibians, in violation of APA Act § 809(10)(e), is not consistent with the Resource Management and Moderate Intensity Use land use areas as required by APA Act § 809(10)(b), and is not consistent with the Adirondack Park Land Use and Development Plan, in violation of APA Act § 809(10)(a), the application should have been denied.

**AS AND FOR A FIFTH SEPARATE
AND DISTINCT CAUSE OF ACTION**

215. Each and every allegation set forth above is hereby repeated and realleged.

216. There is no testimony or other competent evidence that supports any finding or determination that the Project, in particular the Project's impacts on amphibians and their upland habitat, "would be consistent with the land use and development plan" (APA Act § 809(10)(a)), "would be compatible with" the land use areas in which it is located (APA Act § 809(10)(b)), and "would not have an undue adverse impact" on the natural resources of the Park (APA Act § 809(10)(e)).

217. The Applicant has failed to meet its burden of proof on this issue.

218. Therefore, APA's decision to approve the Project is not supported by substantial evidence, and the Order and Permits should be annulled.

**AS AND FOR A SIXTH SEPARATE
AND DISTINCT CAUSE OF ACTION**

219. Each and every allegation set forth above is hereby repeated and realleged.

220. The Project's impacts on amphibians and their upland habitat would not be "consistent with the land use and development plan" (APA Act § 809(10)(a)), would not "be compatible with" the land use areas in which it is located (APA Act § 809(10)(b)), and would "have an undue adverse impact" on the natural resources of the Park (APA Act § 809(10)(e)).

221. Requiring that the study of the impacts on Cranberry Pond be done only after the Project was approved is an impermissible postponement of the APA's review of the Project's environmental impacts.

222. Relying upon a contingency plan for future mitigation of amphibian impacts is improper.

223. Therefore, APA's decision to approve the Project was arbitrary and capricious and affected by error of law, and the Order and Permits should be annulled.

The Application Was Approved Despite
the Dearth of Wildlife Habitat Studies
of the Site's Resource Management Lands

224. The Applicant failed, and in fact refused, to meet its burden of proving that the Project "would be consistent with the land use and development plan" (APA Act § 809(10)(a)), "would be compatible with" the land use area in which it is located ((APA

Act § 809(10)(b)), and "would not have an undue adverse impact" on the natural resources of the Park ((APA Act § 809(10)(e)).

225. In making its determination of undue adverse impact on the wildlife resources of the Adirondack Park, as required by APA Act § 805(4) and § 809(10)(e), APA is required to take into account the DCs found in APA Act § 805(4).

226. The DCs relevant to the issue of wildlife resources include:

- § 805(4)(a)(2) - "Land"
- § 805(4)(a)(2)(f) - "Forest Resources"
- § 805(4)(a)(2)(g) - "Open-space resources"
- § 805(4)(a)(2)(h) - "Vegetative cover"
- § 805(4)(a)(5) - "Critical resource areas"
- § 805(4)(a)(5)(c) - "... key wildlife habitats"
- § 805(4)(a)(6) - "Wildlife"

227. The Applicant utterly failed to meet its burden of proving that the Project would not have undue adverse impacts on the DCs relating to wildlife and its habitat.

228. The Applicant submitted no competent proof to establish that the Project, in particular the Great Camp lots on Resource Management lands, would not have an undue adverse impact. In particular, it totally failed to present competent evidence on the question of wildlife habitat fragmentation and other impacts to wildlife. Instead, it presented only conclusory conjecture and unsupported opinion.

229. For instance, the sum total of the "scientific" literature that was cited by the Applicant's consultants on wildlife issues, other than studies that the APA Staff forced the Applicant's consultants to review, consisted of two 1980s-era

field guides for lay persons, of the sort that anyone could have purchased in their local Waldenbooks store at the time.²⁴ Ex. 35 (Oct. 2006), pp. 88-89; Ex. 90.

230. The Applicant's witnesses admitted that they did no specific fieldwork to locate wildlife species on the Project Site. Tr. 3677-78, 3756. The only evidence that they presented was a list of eighteen animal species that was the result of casual observations that were made while they were on the property for other reasons. Tr. 3757.

231. The Applicant was repeatedly asked by the APA Staff for comprehensive wildlife studies of the Site, yet it consistently refused to provide them. See Ex. 18, Notice of Incomplete Application ("NIPA"), p. 33 (2005); Ex. 26, 2nd NIPA, p. 29 (2006); Ex. 38, Letter, p. 4, (November 21, 2006).

232. The APA Hearing Staff testified that despite these requests, it never got what it was asking for. Tr. 712, 732, 733, 776, 872, 1615, 1616.

233. As discussed above, the APA Staff's January 31, 2007 memo (Ex. 50), which recommended sending the application to an

²⁴ "A Guide to Field Identification - Birds of North America - Expanded, Revised Edition", Golden Books, 1983 (list price - \$7.95) and "Harper & Row's Complete Field Guide to North American Wildlife - Eastern Edition", 1981. These documents are part of Exhibit 90 which includes all documents produced in discovery. Rather than being cited by name in the application materials, they were cited as "Chandler et al. (1983)" and "Collins (1981)" (Ex. 35, October 2006, pp. 88-89), to create the illusion that they were actual scientific references.

adjudicatory hearing, specifically requested this information, yet the Applicant still did nothing. That memo stated:

The wildlife functional assessment failed to provide a detailed species inventory and was not conducted over a number of days nor during different seasons. It did not identify vernal pools and amphibian crossing locations.

Consequently, lack of information makes it difficult to assess possible habitat fragmentation and potential wildlife impacts or to determine potential localized changes in animal species composition, diversity and functional organization from the development of any changes to the biotic integrity of the site and adjacent properties. Ex. 50, p. 9. (emphasis added)

234. The APA accepted the Staff's recommendation and issued the February 15, 2007 Hearing Order (Ex. 56) which included this issue. The Hearing Order (p. 5) specifically found that:

There are several issues that do not appear to comply with Agency approval criteria set forth in APA Act §805(4). "Development Considerations" and 9 NYCRR 574.5, "Further definitions of the development considerations"; for example:

e. The presence of, and effect upon, fish and wildlife on the project site. [§ 805(4)(a)(6)].

235. Nevertheless, the Applicant still took no further steps to address this deficiency in its proof over the four years after the issuance of the Hearing Order. That would have been ample time to do high quality wildlife and habitat assessments, yet the Applicant did nothing.

236. In the adjudicatory hearing, the Applicant presented no additional substantive information on wildlife and its habitat.

237. Therefore, despite having multiple opportunities to do the necessary studies and to be able to meet its burden of proof in the hearing, the Applicant did nothing. Instead, it resorted to conclusory conjecture and unsupported opinion. That is not enough to meet its burden of proof.

238. Hearing Staff witness Mark Sengenberger testified that, although "habitat fragmentation" is not specifically listed as a DC in the APA Act, it is a valid concern under the APA Act and the DCs. Tr. 867-868.

239. Although the Applicant's lack of credible proof on wildlife impacts, and in particular, habitat fragmentation, is, alone, adequate grounds for denial of the application, intervenor parties presented highly qualified expert witnesses who proved that the Project would have undue adverse impacts on the wildlife resources of the Park.

240. Michale J. Glennon, Ph.D. and Heidi E. Kretser, Ph.D., of the Wildlife Conservation Society's Adirondack Communities and Conservation Program, testified on behalf of intervenor The Adirondack Council, Inc. that the Project would fragment the wildlife habitat of the Resource Management lands on the Site, and have undue adverse impacts on the land and wildlife.²⁵

241. These experts demonstrated that the fragmentation of this habitat would have significant consequences for the Site,

²⁵ See Prefiled Testimony of Michale J. Glennon, Ph.D. and Heidi E. Kretser, Ph.D., Issue #1, 6/24/11, Tr. 4242, Attachment A; Tr. 4224-4272 (June 24, 2011).

its habitat, and its wildlife. The many problems that will be caused include that:

- Fragmentation has serious "negative ecological and evolutionary consequences." Glennon/Kretser PFT #1, p. 71.
- Fragmentation results in "decreased biotic integrity" due to a the increased viability of invasive species, "edge effects, loss of core forest blocks, reduced habitat availability and suitability for some species, reduced connectivity, and degradation of ecological integrity of important features such as boreal wetlands." Glennon/Kretser PFT #1, p. 69; see Tr. 4323-4324.
- The "declining biotic integrity associated with exurban development in the Adirondack Park and elsewhere generally results in replacement of the rare with the common and a decline in the very species that are primarily confined to the Adirondack Park." Glennon/Kretser PFT #1, p. 70.

These adverse impacts are well documented throughout their prefiled and live testimony.

242. They concluded that the Project "would have undue adverse impacts upon the natural resources, including wildlife and habitat." Glennon/Kretser PFT #1, p. 16; see also Glennon/Kretser PFT #1, pp. 11, 22, 46, 63, 68, 71.

243. The Applicant's own witnesses admitted that Drs. Glennon and Kretser's 2005 report on the effects of exurban

development in the Adirondack Park (Ex. 236)²⁶ was "a very credible publication" and "an excellent compilation of the literature". Tr. 3750:4-13.

244. APA Staff had specifically requested that the Applicant's consultants prepare a wildlife assessment of the Project Site based on this report. Tr. 3748-3751. Drs. Glennon and Kretser testified that the Applicant's consultants had not properly done this assessment using their methodology. Glennon/Kretser PFT #1, pp. 18-22.

245. The Applicant did not present any rebuttal testimony to contradict these expert witnesses.

246. In addition, Dr. Klemens, a noted expert on amphibians and the effects of development on them and their habitat (p. 41, supra), testified that the Applicant had not done proper field assessments for amphibians. In a single day of fieldwork, he found 11 such species immediately adjacent to the site.²⁷

247. On the other hand, the Applicant's consultants reported finding a grand total of zero (0) species of amphibians. Ex. 11, April 2005, Vol. 1, p. 3-18.²⁸

²⁶ "Impacts to Wildlife From Low Density, Exurban Development, Information and Considerations for the Adirondack Park", Michale J. Glennon, Ph.D. and Heidi E. Kretser, Ph.D., Wildlife Conservation Society, October 2005.

²⁷ See Prefiled Testimony of Michael Klemens, 4/27/11, Tr. 1004, Attachment A; Supplemental Prefiled Testimony of Michael Klemens, 6/7/11, Tr. 3137, Attachment A; Tr. 1002-1191 (4/27/11), 3134-3222 (6/7/11).

²⁸ Supplemental Prefiled Testimony of Michael Klemens, 6/7/11, Tr. 3137, Attachment A.

248. Dr. Klemens also testified that the Project's design had not properly taken into account the habitat needs of amphibians, focusing only on spring breeding wetland habitat, and ignoring the impacts of development on the upland habitats that amphibians use for much of the year. His testimony also established that the Project would fragment their habitat by cutting off access between their various critical habitat areas, particularly vernal pools and the surrounding uplands.²⁹

249. Again, the Applicant did not present any rebuttal testimony to contradict this expert witness.

250. Finally, PROTECT presented testimony by Dr. Phyllis Thompson,³⁰ an adjoining property owner, long-time local seasonal resident (Thompson PFT,³¹ pp. 2-5), experienced birder (Thompson PFT, pp. 5-6, 10-11), and citizen scientist (Thompson PFT, pp. 6-10; Ex. 253-255), regarding her observations of bird species that are present on the Project Site.

251. Dr. Thompson testified that in her almost 50 years of birding on and near the Project Site, she had observed at least 84 species of birds. Thompson PFT, pp. 11-12. She then described these observations, and the habitat types in which they were made, in detail. Thompson PFT, pp. 12-19. These observations were documented in bird checklists that she

²⁹ Id.

³⁰ Dr. Thompson is a petitioner herein.

³¹ Prefiled testimony of Dr. Phyllis Thompson, 6/24/11, Tr. 4449-4453, Attachment B (hereinafter "Thompson PFT").

compiled. Ex. 256 and 257. She also testified regarding her observations on the adverse effects of human-bird interactions on and near the Site. Thompson PFT, pp. 20-22.

252. Dr. Thompson's testimony of seeing 84 bird species on the Site (Thompson PFT, pp. 11-12), is in sharp contrast to the Applicant's consultants reporting only 10 species (Ex. 11, April 2005, Vol. 1, p. 3-18).

253. No testimony was offered to rebut Dr. Thompson's testimony.

254. The testimony of these individuals demonstrates that there are many, many times more species of wildlife on the Project Site than the 18 species that were acknowledged by the application materials.

255. This testimony also demonstrates that the Applicant did none of the work necessary to assess the potential for adverse impacts on these species.

256. Finally, it demonstrates that there will, indeed, be undue adverse impacts on wildlife and its habitat as a result of the Project.

257. The APA Hearing Staff's testimony also demonstrates that the Applicant failed to do the necessary wildlife assessments to meet its burden of proof.

258. As explained by Staff witness Mark Sengenberger, even at the time when the APA Staff declared the application to be complete, it knew that the wildlife assessments were still

deficient, but it believed that this problem would be addressed in the adjudicatory hearing record. Tr. 1644-1649.

259. The APA Staff made this clear to the Applicant too. Mr. Sengenberger testified that the Staff had extensive discussions with the Applicant as to what was needed, and that despite an initial lack of understanding, by the end of the process, this had been adequately explained. Tr. 1633-1634.

260. After discussing the evidence and testimony in the record that was provided by intervenor parties, Mr. Sengenberger stated that "[t]he project sponsor had an opportunity to provide additional materials in that regard. They did not." Tr. 1648.

261. During the briefing phase of the hearing process, the Staff Brief³² found with regard to amphibian habitat³³:

due to the lack of information in the record it is impossible to make complete conclusions about protection of this specific habitat in R[esource] M[anagement]. (footnote omitted) (p. 26)

[T]he adjudicatory hearing revealed that additional protection could be provided with respect to upland habitat and travel corridors for amphibians. (p. 113)

262. With regard to wildlife in general, the Staff Brief found:

³² Closing Statement, APA Hearing Staff, September 23, 2011.

³³ The record contains a great deal of discussion about amphibian habitat. This occurred because intervenor Adirondack Wild's expert ecologist is a specialist in amphibians. Tr. 105; Ex. 167. Because he testified about these species, that became a focus of the discussion. However, that does not mean that other types of wildlife should be ignored. Instead, the same lack of data on amphibians that plagues the record also affects the record regarding other types of animals, such as birds and mammals. See e.g. Thompson PFT regarding birds; Tr. 3050-3053 (Spada); Tr. 1173 (Klemens).

Not enough was done to identify biological resources or to assess the impacts of the proposed project on those resources. (p. 113)

263. The Staff Reply Brief³⁴ continued in this same vein:

APA hearing staff agree that wildlife information is lacking. (p. 7)

Staff agree that more robust wildlife assessment likely would have led to a design with fewer wildlife impacts. (p. 8)

Staff agree that the Project Sponsor should have done more wildlife work here. If additional work had been done, it is quite possible that an alternative project design and additional mitigation measures for wildlife would be reflected in the project... . (footnotes omitted) (p. 12)

264. In the "Revised Draft Order" attached to the Staff Reply Brief, the Hearing Staff recommended that the following finding be adopted by the APA under the heading of "Habitat/Wetlands":

206. A comprehensive biological inventory of the project site was not conducted, so it is not possible to make specific findings concerning impacts to habitat from the proposed project or to identify the presence or location of specific areas on the project site that should be prioritized for protection. (p. 49) (emphasis added)

265. The Hearing Staff did claim that these impacts could be mitigated by various permit conditions. See e.g. Staff Reply Brief, pp. 8, 11, 13.

266. However, those claims were based on speculation, conjecture, and unsupported conclusions, contained in conclusory testimony that was not supported by any actual evidence. As set

³⁴ Reply, APA Hearing Staff, October 24, 2011.

forth at pages 23 to 25 above, this is not a valid basis upon which APA may approve an application.

267. Also, the Hearing Staff may not assume the Applicant's burden of proof (pp. 23-25, supra), and the Applicant produced no such testimony. Mere opinions of the APA Staff can not make up for the Applicant's failures.

268. Moreover, the Hearing Staff admitted that these conditions would only "provide substantial mitigation of wildlife impacts in Resource Management." Staff Reply Brief, p. 8, (footnote omitted).

269. This is not the legal standard under the APA Act for the issuance of a permit, including for determining whether or not a project will have an "undue adverse impact" on the resources of the Adirondack Park under APA Act § 809(10)(e).

270. Therefore, the Hearing Staff's qualifiers are legally irrelevant, and what truly matters is its recognition that the Applicant's wildlife studies were completely inadequate to satisfy the APA Act's requirements.

271. At APA's December 2011 meeting, it was advised by Ed Snizek of the APA "Senior Staff"³⁵ or "Executive Staff" that:

Most everyone who's read the record would agree that there was really no wildlife survey done on it. Consequently, the lack of information really makes it difficult to assess possible habitat fragmentation and potential impacts.

³⁵ The "Senior Staff" or "Executive Staff" is those members of the APA Staff who provided aid and advice to the APA Members during their post-hearing deliberations pursuant to 9 NYCRR § 580.18(b).

272. However, in the end, the final Order completely glossed over all of this testimony and the recommendations of the Hearing Staff and Mr. Snizek. In its zeal to get the Project approved, the Senior Staff sanitized the draft order and removed all of the former recognition of the gross deficiencies in the Applicant's proof on this issue.

273. Instead, the final Order, as prepared by the Senior Staff, stated (p. 21):

78. Site investigations to evaluate wildlife and wildlife habitat on the project site followed standard Agency guidelines and procedures. In addition to reviewing historical records for threatened and endangered species, qualitative biological surveys including onsite visual assessments as defined in Agency guidance "Guidelines for Biological Surveys" were completed during site visits. Other than identifying the deer wintering yard as a "key wildlife habitat," no other wildlife habitat was identified as containing threatened, endangered or species of special concern on the project site. (emphasis added)

274. This finding, and the APA's reliance on these so-called "Guidelines" were patently improper for the following reasons:

- The Guidelines were not in the hearing record.
- The Guidelines are not available on the APA website along with APA's other "Guidelines and Methodology",³⁶ so they are not generally available to the hearing parties or the public.
- The Guidelines are not a document that the APA Members could take "official notice" of because it lacks sufficient "common notoriety" as required by NYCRR § 580.15(b) (1), and

³⁶ <http://apa.ny.gov/Documents/Guidelines.html>

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).

- Neither the APA Staff, or the Hearing Staff's witnesses, testified that they had considered the Guidelines or relied upon them in reviewing the Project.
- The Applicant's witnesses did not testify that they had considered the Guidelines or relied upon them in preparing the application or their testimony.
- No witness testified that the Guidelines had any scientific validity.
- The hearing parties had no opportunity to conduct cross-examination or rebuttal of the Guidelines in the adjudicatory hearing process.
- No witness testified that the Applicant had "followed standard Agency guidelines and procedures", or the Guidelines, in particular.
- The Guidelines have no legal or binding effect on any party because they were not promulgated as a rule under the State Administrative Procedure Act.
- The Guidelines (p. 1) state that:

The first step in any protective effort is to identify the pieces. After identification it can be determined whether or not those components are at risk from a particular proposed activity.

In this case, as set forth above, the Applicant never did the studies necessary to "identify the pieces". Therefore,

APA could not properly determine "whether or not those components are at risk".

- The Guidelines (p. 1) state that the DCs (listed in APA Act § 805(4)) "require that the Agency have enough information upon which to make the necessary findings." It is clear from the record that it did not.

- The Guidelines (p. 2) state that:

These are guidelines, not rules. Each application will be judged on its particular merits, taking into account other information known about the project site and potential for impact to the biological resources of the Park. (emphasis added)

As set forth above, in this case, judging the Project "on its particular merits", the APA Staff had requested a full-scale detailed study of the Site's wildlife, and the APA sent the application to a hearing, in part, to obtain this information. However, this study was never done.

Therefore, under its own terms, the site investigations for this Project did not "follow[] standard Agency guidelines and procedures" as alleged in Finding #78 of the Order (p. 21).

- As set forth at page 5 of the Guidelines, several smaller, but similar, projects had previously been required to undergo full scale biological surveys.
- The claim (Order, p. 21) that there is no "key wildlife habitat" on the Site, other than a deer wintering yard, is blatantly false. The record shows that there are numerous

vernal pools on the Site, are "key wildlife habitat", pursuant to the DAP, such that they require special attention and protection. DAP, p. 16A-1 to 16A-3. See pp. 42 to 43, supra.

- Finding #78 (Order, p. 21) includes the puzzling claim that:

Other than identifying the deer wintering yard as a "key wildlife habitat," no other wildlife habitat was identified as containing threatened, endangered or species of special concern on the project site.

This is inherently self-contradictory and exemplifies the total lack of legal and factual rationality in this finding. The white-tail deer is not listed as a "threatened, endangered or species of special concern" by either the state or federal government.

For all of the foregoing reasons, Finding #78 (Order, p. 21) is not supported by substantial evidence and there is no rational basis for it.

275. What apparently occurred was that the Senior Staff, recognized at the eleventh hour that APA could not risk issuing a permit which recognized that:

it is not possible to make specific findings concerning impacts to habitat from the proposed project or to identify the presence or location of specific areas on the project site that should be prioritized for protection

(Staff Reply Brief-Revised Draft Order, p. 49), so they had to find a way around that problem. To do so, they dug out an old, long-ignored memo about wildlife studies, and substituted their judgment for that of all of the expert witnesses and the Hearing

Staff, claiming that the Applicant's wildlife assessments complied with these obscure two decade old Guidelines, for which there is no record that anyone had used, looked at, or applied them during the entire 8+ year history of the Project.

276. These Guidelines do not provide a rational basis for the APA's decision.

**AS AND FOR A SEVENTH SEPARATE
AND DISTINCT CAUSE OF ACTION**

277. Each and every allegation set forth above is hereby repeated and realleged.

278. The application was approved:

- despite findings by APA that acknowledged that there was insufficient information in the record to determine the Project's impacts to Cranberry Pond;
- despite findings by APA that acknowledged that there was insufficient information in the record to determine the Project's impacts on amphibians on the site; and
- despite the absolute lack of a valid inventory and assessment of the Site's wildlife and of the Project's impacts upon it and its habitat.

279. Therefore, there was no testimony or other competent evidence that supports any finding or determination that the Project "would be consistent with the land use and development plan" (APA Act § 809(10)(a)), "would be compatible with" the land use area in which it is located (APA Act § 809(10)(b)), and

"would not have an undue adverse impact" on the natural resources of the Park (APA Act § 809(10)(e)), in particular, the wildlife and wildlife habitat of the Resource Management lands of the Site.

280. The Applicant has failed to meet its burden of proof on this issue.

281. Therefore, APA's decision to approve the Project is not supported by substantial evidence, and the Order and Permits should be annulled.

**AS AND FOR AN EIGHTH SEPARATE
AND DISTINCT CAUSE OF ACTION**

282. Each and every allegation set forth above is hereby repeated and realleged.

283. The Project's impacts on the wildlife and wildlife habitat resources would not be "consistent with the land use and development plan" (APA Act § 809(10)(a)), would not "be compatible with" the land use area in which it is located (APA Act § 809(10)(b)), and would "have an undue adverse impact" on the wildlife and wildlife habitat resources of the Adirondack Park (APA Act § 809(10)(e)).

284. Therefore, APA's decision to approve the Project was arbitrary and capricious and affected by error of law, and the Order and Permits should be annulled.

**CAUSES OF ACTION REGARDING APA'S APPROVAL
OF 80 HOUSES ON RESOURCE MANAGEMENT LANDS**

285. The Project includes a total of 80 houses on 4,739.5 +/- acres of Resource Management land on the Site (Order, pp. 4-6, 23), as follows:

- 8 "Large Great Camp" lots, in the eastern end of the Site, ranging in size from 111 to 1,211 acres, averaging 335.5 acres and occupying a total of 2,684 acres;³⁷
- 14 so-called "Small Great Camp" lots, east of the Ski Area and west of the Large Great Camp lots, ranging in size from about 18.6 to 34.7 acres, averaging about 26.5 acres and occupying a total of about 371 acres;³⁸
- 13 so-called "Small Great Camp" lots, west of the Ski Area, ranging in size from about 20.1 to 30.5 acres, averaging about 26.2 acres and occupying a total of about 341 acres;³⁹
- 44 houses in the West Face Expansion subdivision, southwest of the Ski Area, on lots of about 1 to 2 acres;⁴⁰

³⁷ Order, p. 6; Permit #2005-100.3; Ex. 81, p. 30.

³⁸ Order, p. 5; Permit #2005-100.4; Ex. 81, p. 30. Two more of these eastern smaller Great Camp lots are located in the Moderate Intensity Use land use area.

³⁹ Order, p. 4; Permit #2005-100.12; Ex. 81, p. 30. Two more of these western smaller Great Camp lots are located in the Moderate Intensity Use land use area.

⁴⁰ Order, p. 4; Permit #2005-100.13; Ex. 244. Two more of these West Face Expansion lots are located in the Moderate Intensity Use land use area.

- 1 house in the Lake Simond View subdivision, on an approximately 2 to 5 acre lot, north of the Ski Area;⁴¹ and
- In addition, another house would be allowed on Resource Management lands on a 34 acre lot intended to be transferred to an adjoining landowner,⁴² Thomas Lawson, who is one of the principals of the Applicant (Tr. 2667).

286. Pursuant to APA Act § 805(3)(g)(1),

Resource management areas... are those lands where the need to protect, manage and enhance forest, agricultural, recreational and open space resources is of paramount importance because of overriding natural resource and public considerations. (emphasis added)

287. Pursuant to APA Act § 805(3)(g)(2),

The basic purposes and objectives of resource management areas are to protect, manage and enhance forest, agricultural, recreational and open space resources is of paramount importance because of overriding natural resource and public considerations. (emphasis added)

288. Even though single family residences are "secondary uses" on Resource Management lands (APA Act § 805(3)(g)(4)), they are disfavored and are only allowed under very limited circumstances:

Finally, resource management areas will allow for residential development on substantial acreages or in small clusters on carefully selected and well designed sites. APA Act § 805(3)(g)(2).

⁴¹ Order, p. 5; Permit #2005-100.5; Ex. 81, p. 9. The other 43 of these Lake Simond View lots are located in the Moderate Intensity Use land use are).

⁴² Order, p. 6; Permit #2005-100.3.

289. Of all of the uses that are "compatible" or "secondary" uses on Resource Management lands, only residential development is subject to such a restriction.

290. As set forth above at pages 17 to 19, Resource Management is the most protected and most strictly regulated land use area classification under the APA Act.

291. Thus, the exceptions that allow for residences "on substantial acreages" or "in small clusters" must be strictly interpreted to favor the overriding purpose of Resource Management lands, which is the protection of their natural resources. APA Act § 805(3)(g)(1).

292. In addition, all such residences, whether they are in small clusters or on substantial acreages, must also be on "carefully selected and well designed sites". APA Act § 805(3)(g)(2).

293. Finally, residential structures are only allowed in Resource Management areas if they are:

compatible with the character description and purposes, policies and objectives of the land use area wherein it is proposed to be located. APA Act § 809(10)(b).

294. The Order and Permits must be annulled because:

- The smaller Great Camp lots on Resource Management lands will not be in "small clusters" as required by APA Act § 805(3)(g) (Ninth to Tenth Causes of Action, infra);
- The large Great Camp lots on Resource Management lands will not be on "substantial acreages" as required by APA Act § 805(3)(g) (Eleventh to Twelfth Causes of Action, infra);

- Many of the Great Camp lots on Resource Management lands are not on "carefully selected and well designed sites" as required by APA Act § 805(3)(g)(2) (Thirteenth to Fourteenth Causes of Action, infra); and
- The 80 residential structures proposed for the Resource Management lands are not compatible with "the character description and purposes, policies and objectives of the" Resource Management classification (Fifteenth to Sixteenth Causes of Action, infra).

The Smaller Great Camp Lots Are Not in
Small Clusters As Required by the APA Act

295. Residential development is only allowed on Resource Management lands if it is "on substantial acreages or in small clusters". APA Act § 805(3)(g).

296. No evidence was introduced, and no party even claimed, that the 27 smaller Great Camp lots in Resource Management were "on substantial acreages".

297. Therefore, these lots could only comply with the APA Act if they are "in small clusters".

298. During the hearing, the Applicant did not prove that these 27 lots were in "small clusters".

299. During the hearing, the APA Hearing Staff agreed that these 27 houses were not in "small clusters".

300. There are 14 smaller Great Camp lots in Resource Management east of the Ski Area, totaling about 371 acres. Ex.

81, p. 30. There are 13 in Resource Management west of the Ski Area, totaling about 341 acres.⁴³ Ex. 81, p. 30.⁴⁴

301. Section 805(3)(g) does not merely require that the lots be small. "Small" is an adjective which modifies "cluster" in § 805(3)(g). Thus, the clusters must be small, not just the lots.

302. So-called clusters of 13 or 14 houses on 341 to 371 acres each are not "small"⁴⁵ clusters by any standard and there is no testimony that would support any rational determination that they are.

303. The two groups of smaller Great Camp lots total 27 houses on 712 +/- acres. By any logical definition, 712 acres is hardly a "small cluster".

304. The Applicant has claimed that the Large Great Camp lots, with an average size of 335.5 acres per lot are on "substantial acreages".

305. Thus, the so-called clusters of 341 acres and 371 acres are not "small". In fact, they are on "substantial

⁴³ The actual average acreage per lot for the smaller Great Camp lots appears to be about 26.4 acres, rather than the 27.2 claimed by the Applicant. See Ex. 81, p. 30.

⁴⁴ Ex. 81, p. 30 shows that there are 14 such lots in Resource Management. However, the Order (p. 4) states that there are 13. This is confirmed by maps of the Project, e.g., Ex. 244, which show that Lot #11 is in Moderate Intensity Use.

⁴⁵ "Small" is defined as "having comparatively little size or slight dimensions", "little or close to zero in an objectively measurable aspect (as quantity)", and "made up of few or little units". www.merriam-webster.com/dictionary.

acreages". This logical inconsistency, in and of itself, demonstrates that the 27 lots in question are not in small clusters, as required by APA Act § 805(3)(g).

306. At the close of the hearing, the APA Hearing Staff agreed that these 27 lots are not in small clusters: "the other [smaller] Great Camp Lots do not comprise 'substantial acreage', nor in staff's opinion are they 'in small clusters'." Staff Brief, p. 114.

307. This finding in the Staff Brief is consistent with the Staff's hearing testimony:

Good design collapses and overlaps the zones of impact from the development activities to minimize negative effects. The proposed project does not overlap impact zones to the greatest extent practicable. **The twenty-seven small Great Camp Lots in Resource Management are not clustered as tightly as possible nor are their zones of impact overlapped to the greatest extent possible. One alternative would be to eliminate the eight large Great Camp Lots east of Simon Pond [sic], and reduce the size and spatial spread of the smaller western and eastern Great Camp Lots in Resource Management. It's possible under such a scenario that the eight large Great Camp Lots eliminated from east of Simon Pond could be relocated closer to the small eastern and western Great Camp Lots and closer to the ski resort.** This would reduce road mileage and infrastructure costs, minimize loss of open space, minimize habitat fragmentation, and allow for continued effective sustainable forest management east of Simon Pond. This alternative scenario, although suggested by Agency staff, was never proposed by the Project Sponsor nor was it evaluated to the same level as the existing proposal, i.e. soil suitability for onsite wastewater treatment, development suitable slopes, etc.

Spada PFT #1, pp. 8:16-9:15 (emphasis added).

308. The requirement that housing lots in Resource Management shall be in small clusters or on substantial acreages

is a statutory mandate, and is not merely a consideration or a conceptual objective.

309. Again, APA Act § 805(3)(g) states, in pertinent part:

Finally, resource management areas will allow for residential development on substantial acreages or in small clusters on carefully selected and well designed sites.

310. There is nothing optional about this statutory language. It is not just conceptual guidance. It is a mandate. The APA can not read discretion into the statute where none exists.

311. Indeed, in framing the issues for the hearing, the APA Members asked in Hearing Issue #1: "are the proposed great camp lots 'substantial acreage...on carefully selected and well designed sites'?" Ex 57, p. 7. Thus, APA defined this as a requirement to be met, and not merely an aspirational goal.

312. APA may only approve a project if it "would be consistent with the land use and development plan" (APA Act § 809(10)(a)) and if it "would be compatible with the character description and purposes, policies and objectives of the land use area wherein it is proposed to be located." APA Act § 809(10)(b).

313. Because the 27 smaller Great Camp lots occupying 712 +/- acres are not "in small clusters", as required by APA Act § 805(3)(g)(2), the Project does not comply with APA Act § 809(10)(a) and § 809(10)(b).

**AS AND FOR A NINTH SEPARATE
AND DISTINCT CAUSE OF ACTION**

314. Each and every allegation set forth above is hereby repeated and realleged.

315. There is no testimony or other competent evidence that supports any finding or determination that the 27 smaller Great Camp lots on 712 acres are in "small clusters" as required by APA Act § 805(3)(g)(2), § 809(10)(a) and § 809(10)(b).

316. The Applicant failed to meet its burden of proof to show that these lots are in "small clusters".

317. Therefore, APA's decision to approve the Project is not supported by substantial evidence, and the Order and Permits should be annulled.

**AS AND FOR A TENTH SEPARATE
AND DISTINCT CAUSE OF ACTION**

318. Each and every allegation set forth above is hereby repeated and realleged.

319. The 27 smaller Great Camp lots on 712+/- acres are not in compliance with the statutory requirement that residential development is only allowed on Resource Management lands if it is "on substantial acreages or in small clusters" pursuant to APA Act § 805(3)(g)(2), § 809(10)(a) and § 809(10)(b).

320. Therefore, APA's decision to approve the Project was arbitrary and capricious and affected by error of law, and the Order and Permits should be annulled.

The Large Great Camp Lots
Are Not On Substantial Acreages

321. The Applicant claimed that its 8 Large Great Camp lots are on "substantial acreages" because they are larger than the 42.7 acre average lot size required on Resource Management lands. ACR Brief,⁴⁶ p. 101.

322. In the context of what is currently a several thousand acre block of unbroken timberland, adjoining similar large blocks of land, the 111 acre to 1,211 acre (Order, p. 6) Large Great Camp lots are not "substantial acreages".

323. In the context of the historical concept of Adirondack Great Camps, on several thousand acre parcels, lots of one hundred to a few hundred acres are not "substantial". In this context, parcels of thousands of acres would be substantial. See Memo from George Outcalt, Jr. (APA Staff) to Mark Sengenberger (APA Staff), January 3, 2005 (Ex. 130, p. 2).

324. Harry Dodson, a planning expert retained by intervenor The Adirondack Council, testified that:

- The Project Site is "surrounded by large undeveloped tracts of mountainous forest land, lakes, and ponds, including extensive tracts of wilderness land [and] . . . Great Camps on tracts ranging from over a thousand to over ten thousand acres." Dodson PFT p. 5-6.

⁴⁶ Applicant's Brief of the Hearing Record and Closing Statement, September 23, 2011.

- The existing Great Camps near the Project Site are located on 6,000 to 12,000 acre parcels. Tr. 818.
- "The ACR plan is based on an outmoded model of resort development that is out of place in the Tupper Lake area and the Adirondack Park." Dodson PFT p. 6.
- "The proposed Great Camp lots have very little in common with the true, historic great camps lots that they are named after. They are much more similar to large lot exurban development than the historic great camp lots on thousands of acres." Dodson PFT p. 7.

325. APA Staff's hearing witness, Mr. Sengenberger, testified that the Project's proposed residential development on Resource Management areas would not enhance forest management. Tr. 868. See also Ex. 129, p. 6.

326. APA may only approve a project if it "would be consistent with the land use and development plan" (APA Act § 809(10)(a)) and if it "would be compatible with the character description and purposes, policies and objectives of the land use area wherein it is proposed to be located." APA Act § 809(10)(b).

327. Because the 8 Large Great Camp lots are not on "substantial acreages", the Project does not comply with APA Act § 805(3)(g)(2), §809(10)(a) and § 809(10)(b).

**AS AND FOR AN ELEVENTH SEPARATE
AND DISTINCT CAUSE OF ACTION**

328. Each and every allegation set forth above is hereby repeated and realleged.

329. There is no testimony or other competent evidence that supports any finding or determination that the 8 Large Great Camp lots are on "substantial acreages" as required by APA Act § 805(3)(g)(2), § 809(10)(a) and § 809(10)(b).

330. The Applicant failed to meet its burden of proof to show that these lots are on "substantial acreages".

331. Therefore, APA's decision to approve the Project is not supported by substantial evidence, and the Order and Permits should be annulled.

**AS AND FOR A TWELFTH SEPARATE
AND DISTINCT CAUSE OF ACTION**

332. Each and every allegation set forth above is hereby repeated and realleged.

333. The 8 Large Great Camp lots on 2,684 +/- acres are not in compliance with the statutory requirement that residential development is only allowed on Resource Management lands if it is "on substantial acreages or in small clusters" pursuant to APA Act § 805(3)(g)(2), § 809(10)(a) and § 809(10)(b).

334. Therefore, APA's decision to approve the Project was arbitrary and capricious and affected by error of law, and the Order and Permits should be annulled.

Many of the Great Camp Lots
In Resource Management Are Not On
Carefully Selected and Well Designed Sites

335. Pursuant to APA Act § 805(3)(g)(2), in addition to residences in Resource Management being mandated to be located on substantial acreages or in small clusters, they must also be on "carefully selected and well-designed sites".

336. The Hearing Staff testified at the hearing that many of these sites do not comply with the APA's regulations and/or do not have an approved water supply or septic system plan. These problems are summarized at Staff Brief pages 30 to 33.

337. From this testimony and the Staff Brief, it appears that many of the 36 Great Camp lots on Resource Management lands suffer from non-compliance with the applicable regulations.

338. These violations include such things as inappropriate septic system locations, lack of septic system plans, and driveways and wastewater system lines crossing the Village of Tupper Lake's municipal drinking water supply line. Staff Brief, pp. 31-33.

339. Upon information and belief, the plans for these lots were not modified after the close of the hearing.⁴⁷

340. The fact that these lots do not comply with the applicable regulations demonstrates that they are not on

⁴⁷ Initially, there were 26 such non-compliant lots, but one problem has been apparently resolved, affecting some of these lots, because the Applicant has apparently agreed that the Great Camp lots will not use the Village water supply, as was previously proposed for some of them. Staff Brief, p. 31; Order, p. 10.

"carefully selected and well-designed sites" as required by APA Act § 805(3) (g) (2).

341. APA may only approve a project if it "would be consistent with the land use and development plan" (APA Act § 809(10) (a)) and if it "would be compatible with the character description and purposes, policies and objectives of the land use area wherein it is proposed to be located." APA Act § 809(10) (b).

342. The Order (pp. 36-37) proposes that these defects can be solved with various amended plans, after the fact.

343. However, there is no evidence in the record that these problems can be solved. Therefore, the application does not comply with APA Act § 805(3) (g) (2), § 809(10) (a) and § 809(10) (b).

**AS AND FOR A THIRTEENTH SEPARATE
AND DISTINCT CAUSE OF ACTION**

344. Each and every allegation set forth above is hereby repeated and realleged.

345. There is no testimony or other competent evidence that supports any finding or determination that these Great Camp lots comply with the applicable regulations, and are on "carefully selected and well designed sites" as required by APA Act § 805(3) (g), § 809(10) (a) and § 809(10) (b).

346. The Applicant has failed to meet its burden of proof on this issue.

347. Therefore, APA's decision to approve the Project is not supported by substantial evidence, and the Order and Permits should be annulled.

**AS AND FOR A FOURTEENTH SEPARATE
AND DISTINCT CAUSE OF ACTION**

348. Each and every allegation set forth above is hereby repeated and realleged.

349. These Great Camp lots are not in compliance with the statutory requirement that residential development is only allowed on Resource Management lands if it is located on "carefully selected and well designed sites" pursuant to APA Act § 805(3)(g)(2), § 809(10)(a) and § 809(10)(b).

350. Therefore, APA's decision to approve the Project was arbitrary and capricious and affected by error of law, and the Order and Permits should be annulled.

The Project as a Whole Is Not Compatible
With the Site's Resource Management Lands

351. The Applicant failed to meet its burden of proving that "the project would be compatible with the character description and purposes, policies and objectives of the land use area wherein it is proposed to be located." APA Act § 809(10)(b).

352. Therefore, the Project does not comply with APA Act § 805(3)(g), § 809(10)(a) and § 809(10)(b).

353. As set forth in APA Act § 805(3)(g), the character description, purposes, policies, and objectives for Resource Management areas include:

(1) Character description. Resource management areas ... are those lands where the need to protect, manage and enhance forest, agricultural, recreational and open space resources is of paramount importance because of overriding natural resource and public considerations. Open space uses, including forest management, agriculture and recreational activities, are found throughout these areas.

Many resource management areas are characterized by substantial acreages of one or more of the following:
... critical wildlife habitats

Other resource management areas include extensive tracts under active forest management that are vital to the wood using industry and necessary to insure its raw material needs.

...

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

Finally, resource management areas will allow for residential development on substantial acreages or in small clusters on carefully selected and well-designed sites. APA Act § 805(3)(g) (emphasis added).

354. The Project is not compatible with the Resource Management lands because:

- As set forth above at pages 74 to 81, the Great Camp house lots on Resource Management lands are in not small clusters or on substantial acreages, and they are not on carefully selected and well-designed sites as required by APA Act § 805(3)(g)(2).

- As set forth below at pages 86 to 98, the 80 houses are not compatible with the character description and purposes, policies and objectives of Resource Management areas as required by APA Act § 805(3)(g)(1) & (2).
- As set forth below at pages 93 to 98, the proposed housing is only a "secondary use" on Resource Management lands, and the Applicant failed to prove that the housing was compatible with its specific proposed locations and nearby uses as required by APA Act § 805(3)(a).

355. The Applicant did not meet its burden of proving that the Project was compatible with any of the criteria of APA Act § 805(3)(g)(4) and § 809(10)(b).

356. An item by item review of the character description and purposes, policies and objectives of Resource Management areas shows that the Project is in fact not compatible with any of the Resource Management land use area's character description and purposes, policies and objectives.

357. Part of the character description of Resource Management areas is "the need to protect, manage and enhance forest ... resources [] of paramount importance because of overriding natural resource and public considerations". APA Act § 805(3)(g)(1).

358. The Project is not compatible with this criterion because, as set forth below at pages 89 to 93, it will result in significant damage to, and fragmentation of, forest habitat and in the cessation of unified timber management over thousands of

acres of working timberlands. This land will no longer be enhanced. Much of it will no longer be protected.

359. Another aspect of the character description is that "[o]pen space uses, including forest management ... are found throughout these areas." APA Act § 805(3)(g)(1).

360. Again, the Project is not compatible with this criterion because of the loss of wildlife habitat and the elimination of unified forest management of the tract.

361. "Many resource management areas are characterized by substantial acreages of one or more of the following: ... critical wildlife habitats ... ". APA Act § 805(3)(g)(1).

362. As set forth above at pages 27 to 53, the Project Site includes critical habitats, such as vernal pools and upland amphibian habitat in the "750 foot critical terrestrial habitat" areas. (Ex. 244).

363. The Project is not compatible with this criterion because, as set forth above at pages 27 to 53, these habitats will be fragmented, vernal pools will be separated from upland habitat and development activities will adversely affect the wildlife of the area, far into the future.

364. "Other resource management areas include extensive tracts under active forest management that are vital to the wood using industry and necessary to insure its raw material needs." APA Act § 805(3)(g)(1).

365. As set forth below at pages 89 to 93, the Project is not compatible with this criterion because the land will no

longer be under unified forest management. Instead, an "extensive tract" of 5,800 acres, that is currently "under active forest management", will be chopped up into dozens of house lots. As set forth below at pages 89 to 93, some of these lots might undergo forest management, but most will not, thereby reducing the available supply of raw materials "that are vital to the wood using industry".

366. "The basic purposes and objectives of resource management areas are to protect the delicate physical and biological resources ...". APA Act § 805(3)(g)(2).

367. The Project is not compatible with this criterion because, as set forth above at pages 53 to 70, it will result in significant damage to, and fragmentation of, forest habitat and wildlife habitat on the Resource Management lands.

368. The basic purposes and objectives of resource management areas are to ... encourage proper and economic management of forest resources...". APA Act § 805(3)(g)(2).

369. The Project is not compatible with this criterion because, as set forth below at pages 89 to 93, the forest resources of the land will no longer be under "proper and economic management".

370. "The basic purposes and objectives of resource management areas are to ... preserve the open spaces that are essential and basic to the unique character of the park." APA Act § 805(3)(g)(2).

371. The Project is not compatible with this criterion because, as set forth above at pages 71 to 72, it will take several thousand acres of open space and chop it up into dozens of housing lots, destroying its open space character. There is nothing "unique" about that.

372. The final clause of APA Act § 805(3)(g)(2) requires that residential use only be permitted on Resource Management land under very limited circumstances, if is "on substantial acreages or in small clusters on carefully selected and well-designed sites".

373. As set forth above at pages 72 to 84, the housing proposed for Resource Management lands does not satisfy any of these conditions.

374. Therefore, the Project is not in any way compatible with the character description and purposes, policies and objectives of Resource Management lands, as required by APA Act § 805(3)(g) and § 809(10)(b).

The Elimination of Thousands of Acres of
Working Forest is Not Consistent With the
Purposes and Policies of Resource Management Lands

375. The approval of the Project will result in the loss of thousands of acres of timberlands from the working forests of the Adirondack Park. The forest management plan proposed by the Applicant is only voluntary and will not ameliorate this loss.

376. The uncontested live testimony in the adjudicatory hearing showed that OWD had managed its approximately 5,800 acres

of timberlands (Order, p. 3) for forestry purposes for many decades.

377. The uncontested live testimony in the adjudicatory hearing showed that, even if the Great Camp lots were managed for forestry after the Project is constructed, the forestry benefits of these timberlands would be adversely affected, compared to their being managed as a unified whole by OWD.

378. The Order (p. 32) found that:

Forest Resources/Open Space

147. While the proposed project will result in the elimination of the commercial timber harvesting activities that are currently occurring on the R[esource] M[anagement] lands west of Lake Simond Inlet, some forestry management may continue on RM lands east of Lake Simond Inlet under a proposed forest management plan. (emphasis added)

148. Development and implementation of the forest management plan on the Large Eastern Great Camp lots will help maintain local forestry jobs as well as create the conditions that will lead to a healthy working forest.

379. Thus, by the APA's own admission, thousands of acres of commercial timberlands will be removed from production, and the continued forestry and economic benefits from those lands "may continue", but this is dependent upon a proposed plan that may never be implemented.

380. The Order does require that, after the APA's approval of the Project, the Applicant shall cause to be prepared a forest management plan for the 8 Large Great Camp lots. Order, p. 19, 37; Large Eastern Great Camps Permit (#2005-100.3), p. 7.

381. The Order (p. 19) states that:

68. The Project Sponsor has proposed that Great Camp Lots A-H will be provided with a comprehensive forest management plan. The plan is to be developed and administered by a Society of American Foresters certified professional forester.

382. The Large Eastern Great Camps Permit (p. 7) states that:

23. By January 1, 2015, the Project Sponsor shall ensure that a Forest Management Plan has been developed by a professional forester according to the standards set by the Forest Stewardship Council or the Sustainable Forestry Initiative for implementation on the project site.

383. However, neither the Order or the Large Eastern Great Camps Permit requires that this plan actually be given to the owners of said lots, or requires said owners to implement this forest management plan, or any other means of forest management. See Order, pp. 19, 37; Large Eastern Great Camps Permit, p. 7.

384. The Applicant has merely "proposed" to give it to the lot owners (Order, p. 19), and the Large Eastern Great Camps Permit (p. 7) does not even require that this actually be done.

385. Therefore, this plan is entirely voluntary and there is no proof in the record that it will actually be provided to the lot owners, or that if it is given to them, that it will result in any forest management actually occurring.

386. Indeed, the Order (p. 32) merely found that:

some forestry management may continue on R[esource] M[anagement] lands east of Lake Simond Inlet under a proposed forest management plan. (emphasis added)

387. Tellingly, the Order did not find that forestry management will continue, or even that it was likely to continue. The Order only found that it "may continue".

388. In addition, this proposal will only apply to the 8 Large Great Camp lots. Order, pp. 19, 32; Large Eastern Great Camps Permit, p. 7.

389. There is no similar provision in any of the other permits affecting Resource Management lands such as those for the Small Eastern Great Camp Lots (#2005-100.4), the Small Western Great Camp Lots (#2005-100.12), and the West Face Expansion subdivision (#2005-100.13).

390. The 8 Large Great Camp lots, which will be subject to the completely voluntary forest management plan, cover a total of 2,684 acres (Order, p. 6), which is less than half of the OWD property.

391. The OWD timberlands cover a total of 5,800 acres (Order, p. 3), so that the remaining 3,116 +/- acres of OWD timberlands will no longer be available for forest management to be carried out on.

392. Therefore, by its own terms, the Order has found that the OWD timberlands will be lost to timber production and forest management, yet the Order and Permits do nothing to ensure that this will be prevented.

393. Therefore, the Applicant failed to meet its burden to prove that the Site's Resource Management lands will continue to be used for timber management, consistent with the "character

description and purposes, policies and objectives" of Resource Management lands.

394. The certain loss of 3,116 acres of timberlands and the likely loss of another 2,684 acres is not compatible with the "character description and purposes, policies and objectives" of Resource Management lands, as required by APA Act § 805(3)(g) and § 809(10)(b).

The 80 Residences Proposed for the Site's Resource Management Lands Are Not Compatible With Those Lands

395. The Applicant has proposed to construct 80 single family dwellings in the Resource Management area. See pp. 71 to 72, supra.

396. The residential development proposed for the Resource Management lands in the Project is not compatible with any of the stated purposes, policies and objectives of Resource Management areas or with the character description for such lands.

397. Single family dwellings are "secondary uses" in Resource Management areas. APA Act § 805(3)(g)(4). While land uses on the list of compatible uses benefit from a rebuttable presumption that they are compatible with the land use area (APA Act § 805(3)(a), § 809(10)(b)), that is not the case with secondary uses. For secondary uses, the statute contains additional requirements that must be met before a use is found to be compatible.

398. Therefore, an applicant must prove that they are compatible, and the rebuttable presumption is only triggered if these requirements are first met.

399. APA Act § 805(3)(a) provides in pertinent part that:

The secondary uses on such list are those which are generally compatible with such area depending upon their particular location and impact upon nearby uses and conformity with the overall intensity guideline for such area. (emphasis added)

400. The Applicant failed to meet its burden of proving that its proposed houses, as secondary uses, were compatible with their specific locations and nearby uses, so the Project does not comply with APA Act § 805(3)(g) and § 809(10)(b).

401. In addition to the failure of the Applicant to meet its burden of proving that the 80 proposed residences are compatible with their particular locations on the Resource Management lands, the fact that, as set forth at pages 82 to 84 above, many of the 35 Great Camps to be built in Resource Management do not meet the basic criteria for approval, shows that these houses are not compatible with their proposed locations and nearby uses.

402. Perhaps a single residence in the Resource Management area of the Project Site might be compatible, or perhaps fewer residences located close to existing roads, without several miles of roads and driveways breaking up the woodland habitat, might be compatible. Perhaps if the design had been truly clustered, the Project might be compatible. Perhaps if almost all of the

Resource Management land were certain to remain in timber production, some residences on these lands might be compatible.

403. But dozens of residences, sprawled across the landscape in Resource Management, will not be compatible in those "particular locations", as required by APA Act § 805(3)(a). At those locations, they will have an undue impact on the wildlife habitat and other natural values of the lands in question, as well as other nearby lands, both on and off the Project Site. See pp. 27 to 70, supra.

404. Thus, the "particular location and impact upon nearby uses" (APA Act § 805(3)(a)) of the proposed residences on the Project Site's Resource Management lands are not compatible with those lands, and the Project does not comply with APA Act § 805(3)(a), § 809(10)(a) and § 809(10)(b).

The Alleged Mitigation for The Adverse
Impacts of the Great Camp Sprawl is Specious

405. The Order (p. 33), the Large Eastern Great Camp Lots Permit (#2005-100.3) (p. 11), the Small Eastern Great Camp Lots Permit (#2005-100.4) (p. 13), and the Small Western Great Camp Lots Permit (#2005-100.12) (pp. 13-14), all contain a condition requiring that there be deed covenants on these lots preventing further development or subdivision.

406. The Order (p. 33) then claims that due to this restriction, "[w]ildlife habitat ... will be protected as long as there is no further subdivision of those lands, and development

is restricted to the designated 3-acre building envelope and one principal building.”

407. This claim is completely contradicted by the hearing evidence. As set forth above at pages 41 to 53, APA itself found that there is not adequate information in the record regarding amphibian habitat in the Resource Management area. As further set forth at pages 53 to 70, there is no rational basis to make any findings or determinations regarding the risks of adverse impacts due to the Project’s fragmentation of habitat for all types of wildlife.

408. Moreover, adding a deed covenant to these lots does nothing to protect them. Each of them already carries with it only one principal building right (Order, pp. 6, 23), pursuant to the overall intensity guidelines of APA Act § 805(3)(g)(3) and § 809(10)(c). Each of them is already restricted by permit conditions to a certain building envelope. Order, pp. 26, 33, 37.

409. All additional principal building opportunities for the Resource Management lands on the Project Site will be transferred to another 34 acre parcel, near the Ski Area, and retained by the Applicant for future use. Order, pp. 9, 21, 23, 33, 38. Thus, these principal building opportunities can not be used on the Great Camp lots.

410. Therefore, this permit condition is nothing but a smokescreen, and does nothing to protect wildlife habitat on Resource Management lands, as required by the APA Act.

**AS AND FOR A FIFTEENTH SEPARATE
AND DISTINCT CAUSE OF ACTION**

411. Each and every allegation set forth above is hereby repeated and realleged.

412. The Project would cause a loss of thousands of acres of managed timberlands, contrary to APA Act § 805(3)(g), § 809(10)(a) and § 809(10)(b).

413. There is no testimony or other competent evidence that supports any finding or determination that the Great Camp lots are "on substantial acreages or in small clusters on carefully selected and well-designed sites" as required by APA Act § 805(3)(g)(2), § 809(10)(a) and § 809(10)(b).

414. There is no testimony or other competent evidence that supports any finding or determination that the 80 residential lots in Resource Management "would be compatible with the character description and purposes, policies and objectives of the land use area wherein it is proposed to be located" as required by APA Act § 805(a), § 805(3)(g), § 809(10)(a) and § 809(10)(b).

415. The Applicant failed to meet its burden of proof on this issue.

416. Therefore, APA's decision to approve the Project is not supported by substantial evidence, and the Order and Permits should be annulled.

**AS AND FOR A SIXTEENTH SEPARATE
AND DISTINCT CAUSE OF ACTION**

417. Each and every allegation set forth above is hereby repeated and realleged.

418. The Project would cause a loss of thousands of acres of managed timberlands, contrary to APA Act § 805(3)(g), § 809(10)(a) and § 809(10)(b).

419. The Great Camp lots are not "on substantial acreages or in small clusters on carefully selected and well-designed sites" as required by APA Act § 805(3)(g)(2), § 809(10)(a) and § 809(10)(b).

420. The 80 Resource Management residential lots are not in compliance with the statutory requirement that these 80 lots in Resource Management must "be compatible with the character description and purposes, policies and objectives of the land use area wherein it is proposed to be located" as required by APA Act § 805(a), § 805(3)(g), § 809(10)(a) and § 809(10)(b).

421. Therefore, APA's decision to approve the Project was arbitrary and capricious and affected by error of law, and the Order and Permits should be annulled.

**CAUSES OF ACTION REGARDING THE VALET BOAT
LAUNCHING SERVICE AT THE STATE BOAT LAUNCH**

422. The operation of the Applicant's "Valet Boat Launching Service" that was approved by APA as part of the Project (Order, p. 9) would violate the APA Act, and the State Constitution, the ECL, and applicable State regulations.

423. The Order and Permits must be annulled because:

- The Project and the Valet Boat Launching Service do not conform to the APA Act because the service will usurp the entire capacity of the State Boat Launch, thereby preventing the public from using it (Seventeenth to Eighteenth Causes of Action, infra); and
- The Valet Boat Launching service would be an illegal commercial business operating on the State Boat Launch, in violation of Constitution Article 14, § 1, the ECL, and DEC's regulations for the management of the Forest Preserve (Nineteenth to Twentieth Causes of Action, infra).

424. An application before APA may only be approved if APA determines, *inter alia*, that it will not have an undue adverse impact on the recreational resources of the Park, and "... upon the ability of the public to provide supporting facilities and services made necessary by the project...". APA Act § 809(10) (e).

425. In addition, APA Act § 805(4) and § 809(10) (e) require that the Act's listed Development Considerations ("DCs"), as set

forth in APA Act § 805(4), must be taken into account when making that determination.

426. The DCs relevant to the approval and operation of the Valet Boat Launching Service include:

- § 805(4) (a) (5) (e) - "wetlands"
- § 805(4) (c) (2) (a) - "Adjoining and nearby land uses"
- § 805(4) (c) (2) (b) - "Adequacy of site facilities"
- § 805(4) (d) (1) (a) - "Ability of government to provide facilities and services"
- § 805(4) (e) (1) (a) - "Conformance with other governmental controls"

427. The only waterfront facility owned or controlled by the Applicant is the former McDonald's Marina on Tupper Lake ("Marina"). Order, pp. 2-3.

428. However, that facility, when redeveloped, will only have about 40 boat slips (Ex. 81, p. 10; Order, p. 9) for the 659 residences and the 60 room inn in the Project, will have very limited parking, and is not physically suitable for a boat launch. Franke PFT #7, p. 7:6-22.⁴⁸

429. To make up for this shortcoming, and to allow the resort's residents and hotel guests to keep and launch boats on Tupper Lake, the Applicant has proposed to operate the Valet Boat Launching Service at the "State Boat Launch" located near the Site, on the shores of Tupper Lake. Order, p. 9.

⁴⁸ Kevin Franke Issue #7 Prefiled Testimony, Tr. 172, Attachment A, 3/23/11 (hereinafter "Franke PFT #7").

430. The State Boat Launch is part of the State-owned Forest Preserve.⁴⁹

431. However, in the Order and the "Marina Permit",⁵⁰ APA failed to recognize that the State Boat Launch is in the Forest Preserve. See Order, pp. 9, 24-25, and Marina Permit, p. 6.

The Private Valet Boat Launching
Service Will Usurp All of the Capacity
of the Publicly Owned State Boat Launch

432. During the adjudicatory hearing, APA Staff's prefiled testimony showed that:

As ACR builds out over time, there is a potential that heavy use of the proposed "valet service" may limit or affect the ability of the general public to use the State boat launch and cause congestion and user conflicts, particularly on high use weekend and holiday periods. Parker PFT #7, pp. 3:23-4:3.

433. As set forth below, the live testimony proved that this was a valid concern, and that the Project would indeed "limit or affect the ability of the general public to use the State Boat Launch and cause congestion and user conflicts" as the APA Staff had feared. Id.

434. The Applicant estimated that the Valet Boat Launching Service will typically launch up to 47 boats per day. Tr. 195:21-196:8; Parker PFT #7, p. 3:3-9.

⁴⁹ Bog River Unit Management Plan (2002); www.dec.ny.gov/docs/lands_forests_pdf/bogriver.pdf

⁵⁰ APA Project Permit 2005-100.2, Marina, approved January 20, 2012. See Order, pp. 1, 36-38.

435. On cross-examination, the Applicant's witness admitted that the State Boat Launch can only accommodate about 48 boats per day. Tr. 186-195.

436. Prior to this testimony, the Applicant had claimed that the capacity of the State Boat Launch was 96 boats per day. Tr. 194:14-21.

437. However, its consultants had apparently forgotten that every boat that goes into the water, must also come out, thereby cutting the alleged capacity of the State Boat Launch in half, to 48 per day. Tr. 186-195.

438. The Applicant's witness conceded that the private Valet Boat Launching Service would only leave one spot per day for use by the general public at this public facility:

Q. -- if the daily capacity is forty-eight boats and the daily usage from the A.C.R. project is forty-seven boats, which you've just testified to, how many boats per day from the general public would be able to use the boat launch under those circumstances?

A. Based on those numbers, one additional one.

Q. One. Very good. Thank you. Tr. 196:16-24.

439. Even after the Town of Tupper Lake's attorney tried to rehabilitate the testimony of the Applicant's witness on the capacity of the State Boat Launch, the witness still admitted that its capacity is only about 50 boats per day. Tr. 239.

440. Thus, it is unrefuted, based on the testimony of the Applicant's own witness, that the capacity of the State Boat Launch will be totally usurped by the Project.

441. According to data collected by the Watershed Stewardship Program of the Adirondack Watershed Institute of Paul Smith's College in 2009 and 2010, the current daily public use of the State Boat Launch is in the range of 40 to 50 boats per day on many summer weekends, with the highest use usually occurring on summer weekends with favorable weather. Ex. 125, pp. 62-67; Ex. 126, pp. 73-79.

442. Thus, on those weekends, the State Boat Launch is already at or near its capacity of 48 per day.

443. Adding the Project's usage of up to 47 boats per day, whether via the Valet Boat Launching Service, or otherwise, will completely overwhelm the capacity of the facility.

444. While the Applicant claims that its estimate of 47 boats per day being launched is only "an estimated average to maximum number" (Tr. 197:12-14), the highest usage will no doubt occur on holidays and weekends, when public usage is also at its highest (Tr. 321-322; Ex. 125, pp. 62-67; Ex. 126, pp. 73-79), thereby compounding the problem.

445. Also, even if the Valet Boat Launching Service only launched, say, one-half of its estimated usage of 474 boats on a weekend day, that would overwhelm the State Boat Launch due to the existing public usage of 40 to 50 boats on such days. Tr. 321; Ex. 125, pp. 62-67; Ex. 126, pp. 73-79.⁵¹

⁵¹ Demand of 40 to 50 public boats + 24 ACR customer and resident boats = 64 to 74 boats per day; Boat Launch capacity = 48 per day; making demand 33% to 50% greater than capacity, even if ACR demand is only one-half of the predicted level.

446. The application originally stated that "the provision of two on-site canoe launches will further reduce the demand on the Boat Launch by resort canoers and kayakers." Ex. 21, February 2006, Vol. 1, p. 28.

447. However, in 2007, one of these on-site canoe launches was dropped from the Project. Tr. 31:20-21; Ex. 81, p. 23.

448. The other canoe launch would be at the Marina, but parking and access there are extremely limited. Ex. 82, Attachment 17; Franke PFT #7, p. 7:16.

449. Therefore, ACR residents and customers wanting to use car-top boats such as canoes and kayaks will also use the State Boat Launch, and the overcrowding problem there will be even worse than the Applicant's witness admitted to.

450. The Applicant apparently never asked DEC what the design capacity of the ramps at State Boat Launch is. Nor did it rely upon any form of engineering analysis of the launch's capacity or other professional standards. Instead, it merely assumed that parking was the limiting factor on the use of the State Boat Launch, as DEC had apparently stated. Franke PFT #7, p. 7:1-5.

451. This analysis was completely flawed because the Valet Boat Launching Service would not use any parking spots.

452. The launch ramp itself obviously does not have infinite capacity, yet the Applicant failed to take this into consideration at all. Tr. 197-198.

453. The Applicant and the Town of Tupper Lake argued during the hearing that the overcrowding problem will only occur at full build-out of the Project (Tr. 255, 287). However, in making its decision, the APA must take into account the full life of the project, and not just its early years.

454. The APA Hearing Staff also argued that DEC could expand the Boat Launch to accommodate the Project's overwhelming usage of this public facility. Tr. 252-253. However, there are no plans in the applicable Unit Management Plan⁵² to expand the State Boat Launch (Tr. 252-253)⁵³, and the Applicant has not offered to pay for any such expansion.

455. In the Order (p. 25), APA claimed that the need for additional boat access can be assessed in the future. This is sheer speculation and does not satisfy APA's duty to assess the projected adverse impacts of the Project before issuing a permit.

456. Also, the use of the Valet Boat Launch Service will be slow and inconvenient, with patrons being locked into rigid schedules. Tr. 214-215, 326-328. There is nothing to prevent ACR's customers and residents from launching their boats on their own at this public facility. Tr. 203-206, 252; Parker PFT #7, p. 5:19-20; Order pp. 24-25.

457. Therefore, some guests may just ignore the availability of the Valet Boat Launching Service and launch their

⁵² See APA Act § 816.

⁵³ Bog River Unit Management Plan (2002); www.dec.ny.gov/docs/lands_forests_pdf/bogriver.pdf

own boats, further overwhelming the parking capacity of the State Boat Launch. Tr. 203-206. See also Ex. 21, February 2006, Vol. 1, p. 28. The Applicant provided absolutely no analysis, only guesswork, as to whether or not people will actually use this service. Id.

458. The hearing testimony also showed that, at times, the State Boat Launch already suffers from congestion problems, especially on windy days when using it is more difficult, and on sunny summer days when usage is higher. Tr. 312-318, 321-325. An experienced local boater testified that the addition of 47 boats per day from the Project would create more congestion at the launch site and in the parking lot. Tr. 322-323. This testimony also showed that in the event of a storm on the lake, it would be difficult to get all 47 resort-based boats off the lake. Tr. 326-327.

459. It is incontestable that the Project and its Valet Boat Launching Service will usurp all of the capacity of the State Boat Launch.

The Project Will Overwhelm the
State Boat Launch With or Without
the Valet Boat Launching Service

460. Merely annulling the approval of the Valet Boat Launching Service would not alleviate the Project's usurpation of the State Boat Launch and bring the Project into compliance with the APA Act and other applicable laws.

461. If the Valet Boat Launching Service were not part of the Project, the boat launching demand from the Project of 47 boats per day would still exist and would still overwhelm the facility.

462. As Colleen Parker of the APA Staff testified, the members of the Project can use the Boat Launch just like any other member of the public. Tr. 252. See also Order, pp. 24-25. As the Applicant's witness admitted, there is nothing to stop them from doing so (Tr. 203-206), with or without the launching service. See also Ex. 21, February 2006, Vol., p. 28.

463. If ACR's 47 boating customers per day (Tr. 196) trailer their own boats to the Boat Launch, they would quickly fill all 27 (Parker PFT #7, p. 2:1-2) of the trailer parking spaces available there.

**AS AND FOR A SEVENTEENTH SEPARATE
AND DISTINCT CAUSE OF ACTION**

464. Each and every allegation set forth above is hereby repeated and realleged.

465. As set forth above, the Applicant failed to meet its burden of proof that the Project, and in particular the Valet Boat Launching Service, will comply with the APA Act.

466. Instead, the evidence proved conclusively that the Valet Boat Launching Service would overwhelm the capacity of the State Boat Launch, which is located on the Forest Preserve, thereby unduly adversely impacting the recreational resources of

the Adirondack Park, and preventing the State from providing boat launching services to the general public at that location.

467. Because the Valet Boat Launching Service will usurp the entire capacity of the State Boat Launch, there was not substantial evidence that the Project will not have an undue adverse impact on the recreational resources of the Park, and "... upon the ability of the public to provide supporting facilities and services made necessary by the project..." as required by APA Act § 805(4) and § 809(10) (e), the Order and Permits should be annulled.

**AS AND FOR AN EIGHTEENTH SEPARATE
AND DISTINCT CAUSE OF ACTION**

468. Each and every allegation set forth above is hereby repeated and realleged.

469. The Project would unduly, adversely, impact an adjoining land use, namely the State Boat Launch, by usurping all of its capacity, and excluding the general public from using it, contrary to DC (c) (2) (a) ("Adjoining and nearby land uses"). See also DAP, p. 4A-1.

470. The Site's facilities, namely McDonald's Marina, are not adequate to handle the Project's boat launching requirements, which will lead to the project usurping the State Boat Launch, contrary to DC (c) (2) (b) ("Adequacy of site facilities").

471. The Project would unduly, adversely, impact DEC's ability to provide boat launching facilities and services to the

general public. DC (d) (1) (a) ("Ability of government to provide facilities and services").

472. The proposed use of the Boat Launch is not in conformity with existing state laws and regulations governing the use of the Forest Preserve, contrary to DC (e) (1) (a) ("Conformance with other governmental controls"). See also DAP, p. 32-1.

473. Therefore, the Project and its Valet Boat Launching Service will have an undue adverse impact on the recreational resources of the Park, and "... upon the ability of the public to provide supporting facilities and services made necessary by the project...", such that the approval of the Order and Permits was contrary to APA Act § 805(4) and § 809(10) (e).

474. Therefore, the APA's approval of the Order and Permits was arbitrary and capricious and affected by an error of law and they should be annulled.

The Valet Boat Launching Service Would Be an Illegal
Commercial Business on State Forest Preserve Land

475. The Valet Boat Launching Service would violate the following laws and regulations, such that it would be illegal to operate it at the State Boat Launch:

- Article 14 § 1 of the New York State Constitution (the Forever Wild clause);
- ECL § 9-0301(1) (the Forest Preserve is reserved for the free use of all the People);

- 6 NYCRR § 190.8(a) (the operation of commercial enterprises is prohibited on the Forest Preserve); and
- 6 NYCRR § 190.24(d) (the operation of commercial enterprises is prohibited at DEC boat launches).

476. The Applicant has claimed that the Valet Boat Launching Service would not constitute the operation of a prohibited commercial business at the State Boat Launch.

477. This claim is incorrect, on both the facts and the law.

478. Likewise, the Order found at pages 24-25 that the "project owners and their guests are entitled to use the State boat launch and other public facilities".

479. Be that as it may, it does not entitle the Applicant to usurp the entire capacity of a publicly owned facility.

480. Be that as it may, it does not entitle the Applicant to operate a commercial business on the Forest Preserve.

481. As set forth in the Order (pp. 9, 24) and the Marina Permit (p. 6), the Valet Boat Launching Service will be part of the Applicant's Marina operation.

482. The Marina will clearly be a commercial business, offering a fly-fishing school, retail shops, gas sales and rental boats, which will be open to the public. Order, pp. 8-9.

483. All that it will lack is a boat launch. So, it will use the State's Boat Launch instead.

484. The fact that money will not change hands at the State Boat Launch itself (Franke PFT #7, p. 7:23-24) does not alter the

commercial nature of the Valet Boat Launching Service. In fact, the application concedes that there will be transactions involved in which money will be exchanged, albeit not at the State Boat Launch itself. Ex. 11, April 2005, Vol. 1, pp. xviii-xix, 2-52.

485. Even if no money will change hands at the State Boat Launch (Tr. 207), the Valet Boat Launching Service will still be part of the resort's business. It will be available to both homeowners and hotel guests in the Project. Tr. 199.

486. It will have significant operating costs, that will have to be paid by the resort, from the resort's business revenues or other revenue streams. Tr. 199, 206-212. It will be operated by the resort's staff (Tr. 206-212), who will have to be paid by the resort.⁵⁴

487. Among the several rules governing the use of the State Boat Launch, 6 NYCRR § 190.24(d) prohibits any person from conducting a "business" at a state-owned boat launch.

488. The resort will not offer this service as a public benefit or a charitable endeavor. It will be a "business." Therefore, it is prohibited at the publicly-owned State Boat Launch.

⁵⁴ Each of the 47 launch and pick-up cycles would require three staff people, working for a total of three hours, and two vehicles, at a total cost to the resort of about \$1,500 per day (Tr. 206-212), with a staff of about 15 to 17 people (Tr. 210:21-24), yet the users would not be charged for this service. Tr. 207:13-19.

489. The resort's Marina is apparently not a suitable location for a boat launch for the resort's customers. Ex. 82, Att. 17; Parker PFT #7, pp. 4-5; Franke PFT #7, p. 7.

490. However, the Applicant has estimated that an average of 47 boat-owning resort customers will want to launch them on busy days in the boating season. Tr. 195-196.

491. In order to meet this customer demand of the resort's guests, and lacking a suitable location for its own boat launch, the Applicant has decided to take over the public's boat launch with its private Valet Boat Launching Service.

492. In effect, the Applicant has moved one part of its private commercial marina operation to a public facility.

493. The Valet Boat Launching Service will be an integral part of the Marina facility's services for resort guests. The customers will be chauffeured to the Marina. Tr. 207, 215. There, they will board their boats that the Valet Boat Launching Service staff have trailered for them from a storage facility, launched at the State Boat Launch, and piloted to the Marina. Tr. 203, 207. Upon their return from a day of boating, they will disembark at the Marina. Tr. 203. Their boats will then be taken away by the staff to be removed from the water at the State Boat Launch, and returned to storage. The customers will then be chauffeured back to their homes by that same Valet Boat Launching Service. Tr. 207, 215.

494. In the Order, the Valet Boat Launching Service was determined to be part of the commercial Marina operation, as it

was addressed in that section of the Order (pp. 8-9). Likewise, out of the 14 individual permits for the Project, the Valet Boat Launching Service was addressed in the Marina Permit (p. 6), not in the permit for some other aspect of the Project.

495. All of this will be one integrated commercial marina service, which proposes to heavily use the publicly owned State Boat Launch, in violation of the law.

496. There was no competent testimony in the hearing to support the Applicant's claim that the use of the State Boat Launch by the proposed Valet Boat Launching Service would be legal. The Applicant's witness attempted to do so in his prefiled testimony but the Hearing Officer ruled that these statements "require the witness to make a legal conclusion, which he is not qualified to do", and disallowed the testimony.⁵⁵ Tr. 173, 178-179.

497. The Applicant's witness's prefiled testimony also offered some vague double hearsay about alleged conversations on this issue between the Applicant's counsel and DEC, and suppositions that silence by DEC on this issue equated to its support for the Valet Boat Launching Service. Franke PFT #7, pp. 2, 8; Tr. 174-175. However, there is actually no support for this claim in the record.

⁵⁵ Mr. Franke's prefiled testimony, at Franke PFT #7, pp. 1:26-2:2 and pp. 8:15-9:6, was disallowed by the Hearing Officer because Mr. Franke was not qualified to address this issue, but it was not physically stricken from the document. Tr. 173-179. Nevertheless, it must be disregarded. Id.

498. The Applicant's attorney did not make any effort to substantiate this hearsay conversation that he had allegedly had with DEC. Counsel for PROTECT even suggested during his objection to the admission of Mr. Franke's prefiled testimony, that if the Applicant's attorney had actually had such conversations with DEC, he could take the stand and testify to them. Tr. 174:19-175:8. However, the Applicant's attorney failed to do so. Therefore, these alleged conversations are not credible evidence.

499. Despite being a party to the hearing, and despite the fact that the DEC Regional Attorney was present during this testimony (Tr. 6-7), DEC declined to testify or otherwise address this issue. Parker PFT #7, p. 2:13-15.

500. APA Staff testified that "[t]o my knowledge, no formal determination from NYSDEC has yet been provided regarding ACR use of the State boat launch." Parker PFT #7, p. 4:8-10. Ms. Parker also testified for APA Staff that she had discussed this question with the DEC Regional Attorney, but all that she was told was:

that the members of the A.C.R. would be considered members of the public and thus would be able to use the State boat launch. He also explained to me that the Department does not prohibit groups of people from using a State boat launch. Tr. 252.

However, she did not testify that DEC told her that commercial businesses could use State boat launches or that the ACR resort's commercial valet service could use the State Boat Launch. Tr. 275-278. DEC only told her that the ACR members could use it.

501. Therefore, DEC did not endorse the use of the State Boat Launch by the commercial resort itself, or by its private Valet Boat Launching Service. Tr. 252, 276-278.

502. Thus, there is no first-hand, or even hearsay, testimony from an employee of the State of New York that it would be legal for a commercial service such as the Applicant's Valet Boat Launching Service to use the State Boat Launch. Ms. Parker confirmed that she is not aware of any current commercial use of the State Boat Launch. Tr. 277-278.

The Project Will Violate
Constitution Article 14, § 1,
The Forever Wild Clause

503. It is undisputed that the State Boat Launch is part of the Forest Preserve.⁵⁶

504. Article 14 § 1 of the New York State Constitution⁵⁷ provides that:

the lands of the state, now owned or hereafter acquired, constituting the forest preserve as now fixed by law, shall . . . not be leased, sold or exchanged, or be taken by any corporation, public or private.

⁵⁶ See Bog River Unit Management Plan (2002); www.dec.ny.gov/docs/lands_forests_pdf/bogriver.pdf

⁵⁷ The consent of the Appellate Division pursuant to Constitution Article 14, § 5, is not required to make this claim in this proceeding because it is not an action pursuant to Article 14, § 5 that seeks to directly restrain a violation of Constitution Article 14, § 1. The claim herein is part of a proceeding seeking to annul an action that was improperly taken under the APA Act. The Petitioners could, however, potentially file a separate action under Article 14, § 5, if they first obtain the consent of the Appellate Division.

505. DEC is vested with the power to exercise "care, custody and control," of the Forest Preserve, which includes the regulation of possession and occupancy of those lands. ECL § 9-0105.

506. Private persons or corporations cannot deprive the State of possession of facilities on Forest Preserve lands that are held in trust for the People. Further, corporations may not operate state-owned facilities on the Forest Preserve, unless they are acting as agents of the State.

507. The Applicant's proposed Valet Boat Launching Service is not permitted by law because, as set forth above, it would completely take over the State Boat Launch. As set forth above, the service would use essentially all of the capacity of the State Boat Launch, leaving little or no opportunity for the public to use the facility. As such, the Applicant's use of the facility would dispossess the State of the use of the State Boat Launch.

508. With the predicted amount of use of the Valet Boat Launching Service, the service would make the Applicant an operator of the State-owned facility, which it is not permitted to be unless it is an agent of the State, which it is not.

509. Therefore, as proposed, ACR's valet service at the State-owned Boat Launch would constitute an illegal occupancy, possession or operation by a private corporation of a State facility on the Forest Preserve, which is not permitted by Constitution Article 14, § 1.

The Project Will Violate
The Environmental Conservation Law

510. ECL § 9-0301(1) mandates that the Forest Preserve "... shall be forever reserved and maintained for the free use of all the people ...". (emphasis added)

511. Allowing ACR to monopolize this facility for its private business would violate that mandate.

The Project Will Violate DEC Regulations

512. DEC's regulations for the use of State lands, including the Forest Preserve, at 6 NYCRR § 190.8(a) prohibit "...the use of State lands or any structures or improvements thereon for private revenue or commercial purposes...".⁵⁸

513. More specifically, 6 NYCRR § 190.24(d) provides that "[n]o person shall conduct any business ... at a boat launching site."

514. As set forth above, the Valet Boat Launching Service would be a private commercial business operating on State land, which is prohibited by both 6 NYCRR § 190.8(a) and § 190.24(d).

515. Therefore, the Project and its Valet Boat Launching Service are contrary to Article 14, § 1 of the Constitution, ECL § 9-0301(1), 6 NYCRR § 190.8(a), and 6 NYCRR § 190.24(d).

⁵⁸ The rule lists certain exceptions, none of which apply to the Valet Boat Launching Service.

**AS AND FOR A NINETEENTH SEPARATE
AND DISTINCT CAUSE OF ACTION**

516. Each and every allegation set forth above is hereby repeated and realleged.

517. The Applicant failed to meet its burden of proving that the Project and the Valet Boat Launching Service will conform to the DCs of the APA Act as required pursuant to APA Act § 805(4) and § 809(10)(e), in particular, § 805(4)(d)(1)(a) - "Ability of government to provide facilities and services" and § 805(4)(e)(1)(a) - "Conformance with other governmental controls".

518. The Applicant failed to meet its burden of proving that the Valet Boat Launching Service would be a legal use of the State Boat Launch, as required by APA Act § 805(4), § 805(4)(e)(1)(a), and § 809(10)(e).

519. Therefore, APA's decision to approve the Project is not supported by substantial evidence, and the Order and Permits should be annulled.

**AS AND FOR A TWENTIETH SEPARATE
AND DISTINCT CAUSE OF ACTION**

520. Each and every allegation set forth above is hereby repeated and realleged.

521. As set forth above, the Project and its Valet Boat Launching Service violate are contrary to APA Act § 805(4), § 805(4)(e)(1)(a), and § 809(10)(e), which require that a project must be in "[c]onformance with other governmental controls".

522. Therefore, the approval of the Order and Permits by APA was arbitrary and capricious and affected by an error of law, and they should be annulled.

**CAUSES OF ACTION REGARDING THE
PROJECT'S PUBLIC AND FISCAL IMPACTS**

523. APA may only approve a project if it determines that it will not have an undue adverse impact "... upon the ability of the public to provide supporting facilities and services made necessary by the project...". APA Act § 809(10)(e). In addition, APA Act § 805(4) and § 809(10)(e) require that the Act's DCs must be taken into account when making that determination.

524. The DCs relevant to this analysis include:

- § 805(4)(c)(2)(b) - "Adequacy of site facilities"
- § 805(4)(d)(1)(a) - "Ability of government to provide facilities and services"
- § 805(4)(d)(1)(b) - "Municipal, school or special district taxes or special district user charges"
- § 805(4)(e)(1)(a) - "Conformance with other governmental controls"

525. The findings and determinations of the APA on this issue were not supported by substantial evidence. Indeed, they were generally based on inadmissible evidence and outdated, incorrect information.

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

application materials. See PROTECT Brief, pp. 12-19; PROTECT Reply Brief, pp. 13-18.⁵⁹

527. The evidence overwhelmingly proved that the resort real estate market will not support sales of the levels projected for the Project. Instead, due to the ski area's small size, the resort's remote location, and the lack of a well-established ski area, the real estate sales are only likely to be about one-eighth of the claimed levels. See PROTECT Brief, pp. 19-26; PROTECT Reply Brief, pp. 13-18.

528. The documentary record established that the proposed payment-in-lieu-of-taxes ("PILOT") and sub-PILOT structure for payment of the Industrial Development Agency ("IDA") bonds, that are essential to the funding of the construction of the Project's infrastructure, is not approvable by the County of Fulton Industrial Development Agency ("CFIDA"). The record also shows that the proposed loan structure is unprecedented, and that the CFIDA and its bond counsel have, to put it mildly, significant doubts about its legality. See PROTECT Brief, pp. 26-34.

529. The evidence shows that it is not likely to be feasible for the Ski Area to be maintained as a community resource. Instead, the skier use levels, and the financial subsidies from the ACR resort, that are necessary to reopen the

⁵⁹ Post-Hearing Brief and Closing Statement of Protect the Adirondacks! Inc., September 23, 2011; Reply Brief and Closing Statement of Protect the Adirondacks! Inc., October 24, 2011.

Big Tupper Ski Area, and to keep it open, will not be achieved. See PROTECT Brief, pp. 34-39.

530. The Project will not actually create jobs at the levels claimed in the application materials. The construction jobs will mostly go to non-local and out-of-state contractors, and there is absolutely no support in the record for the claimed levels of on-site resort employment. See PROTECT Brief, pp. 39-42.

531. There will be unfunded fiscal and municipal services burdens imposed on the local governments. Because of the lack of tax revenue and the inability of the Applicant to fund the infrastructure without the IDA bond funding, the financial burdens will all fall on the local governments. See PROTECT Brief, pp. 42-46; PROTECT Reply Brief, pp. 18-24.

Causes of Action Regarding The Fictional
Predicted Financial Benefits of the Project

532. Ordinarily, it is not the role of the APA to ensure the financial viability of the projects that come before it. Thus, for example, the potential market prices of the lots in a subdivision, or the potential rate of sales of the lots, is not usually of concern in the permitting process. However, the APA does, and should, assess the "financial capacity" of the project sponsor. 9 NYCRR § 572.4(c)(5).

533. In this case, because of its sheer size, the potential downside of the ACR Project for the Town and Village of Tupper

Lake and other affected municipalities is enormous. As set forth in Hearing Issues #5 and #6, and in DCs (c) (2) (b), (d) (1) (a), (d) (1) (b), and (e) (1) (a), APA was required to assess the potential fiscal impacts of this Project.

534. The potential costs of the Project for infrastructure and services have been estimated by the Applicant to be tens of millions of dollars. Ex. 36, Att. 1, p. 35 (2006); Ex. 85, pp. 51-56 (2010).

535. The Order (p. 28) relies upon the Applicant's 2010 Fiscal and Economic Impact Analysis Update (Ex. 85) to support its findings regarding the potential benefits of the Project.

536. The projected municipal tax revenues are highly dependent upon the ACR resort achieving the projected levels of real estate sales and skier visits.

537. However, as set forth above, the testimony and exhibits in the adjudicatory hearing demonstrated that this document, and the purported revenues of the Project, are based on fictional claims by the Applicant regarding the potential prices and rates of sale of the housing in the Project, the number of skier visits that the Ski Area will attract, and the alleged job creation and secondary spending benefits.

538. There was no competent proof provided by the Applicant in the hearing record to support these allegations of Ex. 85 of the application materials.

539. Thus, the tax revenues which will allegedly offset the costs of building and operating the Project's infrastructure, and

allegedly yield a net benefit for the municipalities, are as fictitious as the alleged benefits of the Project. At the least, the Applicant has failed to meet its burden of proof of showing that those revenues will materialize. The record actually shows that there is no basis in reality for these claims.

540. During the APA's deliberations, the "Senior Staff" presented an analysis of the Project's costs and revenues that purported to show that even if real estate sales were 70% lower than the Applicant had projected, there would be no risk to the municipalities. The Order (p. 30) then made a finding based on this presentation.

541. However, this analysis was not in the hearing record (9 NYCRR § 580.14(g)), it was not given in sworn testimony (9 NYCRR § 580.15(d)), and it was not subject to discovery (9 NYCRR § 580.15(a)(vii)) or cross-examination (9 NYCRR § 580.14(b)(7)), all in contravention of the applicable regulations.

542. There are many obvious defects in this analysis, such as the fact that the APA staff person making it did not know the costs of constructing the units, so he could not know if they could be built and sold at a 70% discount. However, no party was able to question this unsworn witness, because his testimony was given after the hearing record was closed. 9 NYCRR § 580.14(b)(11), § 580.14(g).

543. Moreover, the record proved that sales will only be about one-eighth, or 87.5% lower, than the Applicant had

projected. See PROTECT Brief, pp. 19-26; PROTECT Reply Brief, pp. 13-18.

544. Therefore, even the Senior Staff's 70% analysis is based on revenues 300% higher than the record shows will occur.

545. Because this analysis by the Senior Staff was completely outside the record, and lacking in credibility, it may not form the basis for any determination by the APA.

**AS AND FOR A TWENTY-FIRST SEPARATE
AND DISTINCT CAUSE OF ACTION**

546. Each and every allegation set forth above is hereby repeated and realleged.

547. There is no testimony or other competent evidence that supports any finding or determination that the Project could succeed, and that its real estate sales and other tax-generating activities could be successful, so as to avoid undue adverse impacts to the public and local governments, as required by APA Act § 805(4) and § 809(10)(e) and DCs (c)(2)(b), (d)(1)(a), (d)(1)(b), and (e)(1)(a).

548. The Applicant failed to meet its burden of proof to show that the Project could succeed, and that its real estate sales and other tax-generating activities could be successful, so as to avoid undue adverse impacts to the public and local governments.

549. Therefore, APA's decision to approve the Project is not supported by substantial evidence, and the Order and Permits should be annulled.

**AS AND FOR A TWENTY-SECOND SEPARATE
AND DISTINCT CAUSE OF ACTION**

550. Each and every allegation set forth above is hereby repeated and realleged.

551. Without the tax revenues that the Applicant has projected, the Project will have an undue adverse impact on the public and local governments, such that the approval of the Order and Permits was contrary to APA Act § 805(4) and § 809(10)(e), and DCs (c)(2)(b), (d)(1)(a), (d)(1)(b), and (e)(1)(a).

552. Therefore, the APA's approval of the Order and Permits was arbitrary and capricious and affected by an error of law and they should be annulled.

Causes of Action Regarding the CFIDA Bonding

553. The record shows that the CFIDA has not approved the bond funding for the Project, and that is highly unlikely to do so. In a letter to the Applicant's attorney dated February 1, 2011 (Ex. 227; Tr. 3474-3475), the Executive Director of the CFIDA stated, in part:

It has been four years since AC&R's application to the IDA in February, 2007, and nearly that long since an Inducement Resolution was passed in April, 2007. The board that approved the project has since turned over four times and the project has changed. Without a current application and current board approval, it does

not seem appropriate to provide testimony.

There is also the matter of AC&R's proposed PILOT. Not only has the proposed PILOT not been accepted at this time, we have not determined the legal basis, precedent or workability of it. For this reason and for those noted in the paragraph above, I believe it is premature for the IDA to provide testimony or opinion in the case of AC&R. Ex. 227 (emphasis added)

554. This letter proves that the Applicant did not meet its burden of proof as to a key element of its financing scheme.

555. The record also shows that, in an e-mail dated July 20, 2009, the CFIDA's bond counsel made it clear to its Executive Director that the proposed tax and ownership structure of the Project would not work because, among other things, IDA bonding and a PILOT agreement do not continue to freeze the real property taxes after a parcel is sold, as was being proposed by the Applicant. Ex. 201; Tr. 3085-3114, 3118.

556. In an e-mail dated March 18, 2010, the CFIDA's bond counsel stated to its Executive Director that the counsel's 2006 opinion letter (Ex. 199) regarding the project had not been updated to reflect the changes in the applicable law and regulations in the intervening four years, and recommended that this be done. Ex. 202; Tr. 3115, 3118. There is nothing in the record to show that the bond counsel has updated or reaffirmed its now 5 year old opinion. Therefore, there is no proof in the record that the proposal meets the requirements of the Internal Revenue Code and other applicable laws.

557. At the CFIDA's October 13, 2010 board meeting, the following discussion was held:

A discussion ensued about the Adirondack Club and Resort (ACR), prompted by Director Gillis, with a focus on PILOT and specifically sub-PILOTs as proposed by ACR. It is not clear how this will work, and has generated controversy in the Tupper Lake community about whether it is right to enter into a sub-PILOT when a parcel is sold. In addition, Fulbright & Jaworski has previously advised the IDA that a parcel, when sold, would be taxed at the then current tax rates.

John related that a conference call with Fulbright & Jaworski and ACR's Bob Sweeney will be held soon to discuss the matter, and he will keep the board advised. Ex. 205; Tr. 3116, 3118.

558. In an e-mail exchange in mid-October 2010, the CFIDA's bond counsel advised its Executive Director that:

I completely understand the members' concerns - the IDA would approve a project with ACR, but it has no knowledge of who the ultimate buyers are and likely will have no interaction with those buyers.

Frankly I'm not sure this has been done. A good starting point would be to ask ACR if they know of any other projects in the State of New York where this approach has been used and talk to the IDA. (emphasis added)

Ex. 206; Tr. 3116, 3118. At that time, the IDA board was considering rejecting the entire concept of "sub-PILOTs". Id.

559. As of the CFIDA's November 10, 2010 board meeting, its bond counsel was still trying to figure out whether the Applicant's "sub-PILOT" idea was legal or feasible. Ex. 207; Tr. 3116, 3118.

560. As of the time of the hearing, the Applicant's expert witness on IDA bonding testified, with regard to the CFIDA, that "...they don't have all the information...". Tr. 2997:20-21.

561. Despite this record, the Order (pp. 28-29) made findings concluding that the CFIDA had agreed to issue the bonds

and that this would insulate municipal governments from financial responsibility for infrastructure costs:

The Project Sponsor proposes a payment in lieu of taxes ("PILOT") financing and bond agreement with the Franklin County Industrial Development Authority ("FCIDA") to cover the costs of public infrastructure to the project. The FCIDA adopted a resolution, dated April 11, 2007, taking official action toward the issuance of PILOT bonds on behalf of the Project Sponsor finding that the project constitutes an appropriate project within the New York State Industrial Development Agency Act. The FCIDA subsequently drafted a Proposed Payment-in-Lieu-of-Tax Agreement for discussion purposes but no terms have yet been finalized. ...

As proposed, no municipal bonds will be issued. The Project Sponsor intends to construct all of the public infrastructure necessary for the project with financing through a mix of conventional bank financing, internal investors, and bonds issued by the FCIDA. ...

As industrial development agency (IDA) bonds are the obligations of IDAs themselves, no municipal, county, or state money would be liable in such an event and the bondholders would be solely obligated to any losses. (emphasis added)

562. Thus, the APA relied solely on a the 2007 resolution, which the CFIDA's Executive Director had since disowned.

563. The Applicant's witness on IDAs was Adore Flynn Kurtz, the Executive Director of the County of Clinton IDA. She testified regarding the 2007 inducement resolution adopted by the CFIDA (Ex. 200), which forms the sole basis for the APA's findings quoted above.

564. Ms. Kurtz testified that this resolution was out of date, and predated the advent of the Applicant's novel sub-PILOT idea. She also stated that even when it was new, it was not a binding commitment by the CFIDA, and was only a general finding

of support. Ms. Kurtz repeatedly labeled it a "preliminary resolution" (Tr. 2998:15-22, 2999:7-16, 3024:20-21) and testified that there may be 8 or 9 resolutions necessary before the final bond approval resolution is adopted. Tr. 2999:11-16.

565. Indeed, the 2007 inducement resolution itself twice stated that it was contingent upon "the PILOT Agreement to be negotiated" (Ex. 200, pp. 4, 5), which has yet to occur. As shown by Exhibits 202, 203, 205, 206 and 207, as described above, the likelihood of that happening is now highly questionable, at best.

566. The implication in the Order (pp. 28-29) that the CFIDA has somehow approved the proposed bonding is blatantly false. As shown above, the exact opposite is true.

567. Therefore, the additional implication of the Order (pp. 28-29), that the structure of the IDA bonding will insulate the municipal governments from liability for the costs of constructing the Project's infrastructure is equally false.

**AS AND FOR A TWENTY-THIRD SEPARATE
AND DISTINCT CAUSE OF ACTION**

568. Each and every allegation set forth above is hereby repeated and realleged.

569. There is no testimony or other competent evidence that supports any finding or determination that the CFIDA would approve the IDA bonds necessary to fund the construction of all of the Project's infrastructure, so as to avoid undue adverse

impacts to the public and local governments, as required by APA Act § 805(4) and § 809(10)(e) and DCs (c)(2)(b), (d)(1)(a), (d)(1)(b), and (e)(1)(a).

570. The Applicant failed to meet its burden of proof to show that the CFIDA would approve the IDA bonds necessary to fund the construction of all of the Project's infrastructure, so as to avoid undue adverse impacts to the public and local governments.

571. Therefore, APA's decision to approve the Project is not supported by substantial evidence, and the Order and Permits should be annulled.

**AS AND FOR A TWENTY-FOURTH SEPARATE
AND DISTINCT CAUSE OF ACTION**

572. Each and every allegation set forth above is hereby repeated and realleged.

573. Without the CFIDA bonding, the Project will have an undue adverse impact on the public and local governments, such that the approval of the Order and Permits was contrary to APA Act § 805(4) and § 809(10)(e), and DCs (c)(2)(b), (d)(1)(a), (d)(1)(b), and (e)(1)(a).

574. Therefore, the APA's approval of the Order and Permits was arbitrary and capricious and affected by an error of law and they should be annulled.

Cause of Action Regarding APA's Improper
Weighing and Balancing of Alleged Economic
Benefits Against Adverse Environmental Impacts

575. As set forth above at pages 19 to 23, the alleged financial benefits of the Project may only be taken into account when assessing the ability of the public to provide facilities and services, and can not be used for any kind of weighing and balancing against the Project's adverse environmental impacts. See Association v. Town of Tupper Lake, supra, at 830.

576. However, in their deliberations on the application, conducted from November 2011 to January 2012, the APA Members discussed these alleged benefits at great length and clearly weighed and balanced them against the adverse environmental impacts of the Project, as a purported justification for approving it.

577. The Order (pp. 30-31) contained a lengthy discussion of the Project's alleged benefits.

578. APA's January 20, 2012 News Release trumpeting its approval of the Project stressed its economic benefits and expressly contrasted them to its environmental impacts.⁶⁰

579. As set forth above, it is also true that the record shows that the Project's potential benefits were grossly exaggerated by the Applicant. Any claims of economic benefit from the Project were not proven by the Applicant and are not

⁶⁰ This News Release may be found at <http://www.apa.ny.gov/Press/pressrelease.cfm?PressReleaseID=461> .

supported by substantial evidence. Moreover, those claims are legally irrelevant, since APA may not weigh them against the Project's adverse environmental impacts.

**AS AND FOR A TWENTY-SIXTH SEPARATE
AND DISTINCT CAUSE OF ACTION**

580. Each and every allegation set forth above is hereby repeated and realleged.

581. In making their decision to approve the Project, the APA Members improperly weighed and balanced the Project's alleged economic benefits against its adverse environmental impacts, in violation of APA Act § 801, § 805, and § 809(10).

582. Therefore, the APA's approval of the Order and Permits was arbitrary and capricious and affected by an error of law and they should be annulled.

**APA'S APPROVAL OF THE PROJECT WAS
MADE IN VIOLATION OF LAWFUL PROCEDURE**

**AS AND FOR A TWENTY-SEVENTH SEPARATE
AND DISTINCT CAUSE OF ACTION**

583. Each and every allegation set forth above is hereby repeated and realleged.

584. The Order and Permits must be annulled because APA failed and refused to make the findings and determinations required by law to support its decision.

585. When making a decision such as the one at issue herein, any agency, including APA, must make detailed findings of fact, supported by specific references to the record.

586. In addition, the decision rendered by any such agency must provide a clear discussion of why the action complies with the statutory determinations that must be made in order to approve the action in question.

587. Conclusory statements that do not provide any explanation for the decision or do not provide a clear basis for judicial review are not sufficient to satisfy this duty.

588. In keeping with these legal requirements, APA's regulations allow the parties to a hearing to make "proposed findings of fact ... and proposed conclusions of law relative to the required statutory and regulatory determinations." 9 NYCRR § 580.14(b)(9)(iii). APA's final decision "shall include findings of fact and conclusions of law or reasons for the decision, determination or order." 9 NYCRR § 580.18(c). In

doing so, it must make "a ruling upon each finding proposed by the parties." Id.

589. PROTECT's Brief and Reply Brief made numerous such proposals, on each Hearing Issue.

590. The brief and reply brief filed by petitioner Phyllis Thompson also made many such proposals.

591. Pursuant to APA Act § 809(10), APA "shall not approve any project" without making 5 separate determinations, which are set forth in § 809(10) (a) to (e), as follows:

(a) that the project "would be consistent with the land use and development plan;"

(b) that the project "would be compatible with the character . . . of the land use area;"

(c) that the project "would be consistent with the overall intensity guideline for the land use area involved;"

(d) that the project "would comply with the shoreline restrictions;" and

(e) 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." APA Act § 809(10).⁶¹

592. However, in approving the Project, APA did not make the findings and determinations required of it by APA Act § 809(10) (a) to (e).

593. Instead, the Order summarily concluded that:

The Agency, having considered the findings set forth above, and the statutory and regulatory criteria as set

⁶¹ These requirements are more fully set forth at pages 20 to 21 above.

forth in Executive Law § 809(10) and 9 NYCRR Part 574, Environmental Conservation Law § 24-0801(2) and 9 NYCRR § 578.10, and Environmental Conservation Law § 15-2709 and 9 NYCRR § 577.8, finds that Adirondack Park Agency Project 2005-100, if undertaken in compliance with the following and with all terms and conditions in the permits issued pursuant to this Order, complies with the applicable approval criteria. Order, p. 36.

594. APA did not make specific findings and conclusions on the issues, and the statutory determinations that it was mandated to make.

595. For example, APA did not determine whether or not the Valet Boat Launching Service was a legal use of the State Boat Launch.

596. Instead, it made only the one generic conclusion that the Project complied with the law.

597. In doing so APA violated both generally applicable principles of administrative law, and its own statute and regulations.

598. APA's Order does not enable the parties and the Court to intelligently determine whether the decision follows as a matter of law from the facts stated as its basis and whether the findings of fact have any substantial support in the evidence, as required by law.

599. Even though the APA's Order makes numerous statements in its "findings of fact," the basis for its final determination has not been set forth with such clarity as to be understandable, as required by law.

600. APA's Order does not cite to the parts of the record that supposedly support its conclusory findings and conclusions, as required by law.

601. APA's Order does not provide a clear discussion supporting its conclusions or tying its conclusions to the record and the relevant facts.

602. APA's Order did not rule upon the findings and conclusions relative to each issue, as proposed by PROTECT, Phyllis Thompson, and other hearing parties, as required by 9 NYCRR § 580.18(c).

603. Therefore, the Order and Permits were adopted in violation of lawful procedure, their approval was arbitrary and capricious and affected by an error of law, and they must be annulled.

**AS AND FOR A TWENTY-EIGHTH SEPARATE
AND DISTINCT CAUSE OF ACTION**

604. Each and every allegation set forth above is hereby repeated and realleged.

605. APA's approval of the Project should be annulled due to improper *ex parte* contacts between the Applicant and the APA's Senior Staff.

606. State Administrative Procedure Act ("SAPA") § 307(2) provides that:

Unless required for the disposition of *ex parte* matters authorized by law, members or employees of an agency assigned to render a decision or to make findings of

fact and conclusions of law in an adjudicatory proceeding shall not communicate, directly or indirectly, in connection with any issue of fact, with any person or party, nor, in connection with any issue of law, with any party or his representative, except upon notice and opportunity for all parties to participate. Any such agency member (a) may communicate with other members of the agency, and (b) may have the aid and advice of agency staff other than staff which has been or is engaged in the investigative or prosecuting functions in connection with the case under consideration or factually related case. (emphasis added)

607. The APA's regulations at 9 NYCRR § 587.4 provide in pertinent part that:

§ 587.4 Ex parte communications prohibited.

(a) An ex parte communication is any communication regarding issues of fact or conclusions of law with any party or its representative or hearing officer by one party to an adjudicatory proceeding out of the presence of other parties to the same proceeding without simultaneous communication with other parties.

(b) The following prohibition shall apply to adjudicatory proceedings, including public hearings pursuant to subparts 580, 581-3 and 581-4, or variance hearings pursuant to subpart 576.

(c) Prohibition.

(1) No party or representative of a party shall communicate in any form with the agency or any member regarding any matter subject to an adjudicatory proceeding before the agency without serving copies of the communication on all other parties to the proceeding.

(2) Prior to or during an adjudicatory proceeding, no agency member or employee responsible for rendering a decision or making findings of fact and conclusions of law shall communicate in connection with any issue of fact, or issue of law, with any person, party or his representative, except upon notice and opportunity for all parties to participate; provided, however, that any agency member or employee:

(i) may communicate with other members of the agency;
and

(ii) may have the aid and advice of agency staff which have not been engaged in the investigation or prosecuting functions in connection with the matter or proceeding or factually related matter or proceeding.

...

608. After deliberating at its monthly meetings in November and December 2011, APA was scheduled to meet again on January 18 to 20, 2012 and to take its vote on the Project on January 20th.

609. On January 17, 2012, a story broadcast on radio station North Country Public Radio ("NCPR") was devoted to the impending APA vote.⁶² That story included an interview with Paul Maroun, the Mayor of the Village of Tupper Lake ("the Mayor").

610. In that interview, in the context of discussing the APA's upcoming vote, the Mayor stated:

There have been ongoing talks between the developer and the staff, the senior staff, and I think that it's going to work out favorably for both the developer and the environmental interests.

611. The Mayor is a strong supporter of the Project. Tr. 62-68.

612. Upon information and belief, the Mayor is well-acquainted with the Applicant and its representatives.

⁶² Said broadcast may be found at:
<http://www.northcountrypublicradio.org/news/story/19137/20120117/big-tupper-vote-looming-all-eyes-on-adirondack-park-agency>. Upon request, the Petitioner can make a CD recording of this broadcast available to the Court.

613. The Mayor is also a member of the Franklin County Legislature and had participated in the entire hearing process as the representative of the County.

614. During the course of their deliberations, pursuant to 9 NYCRR § 587.4(c)(2)(ii), the APA Members extensively utilized the "aid and advice" of the "Senior Staff" of the APA and other staff members who "have not been engaged in the investigation or prosecuting functions in connection with the matter or proceeding or factually related matter or proceeding".

615. These Senior Staff members included, but were not limited to, APA's General Counsel John Banta, Executive Director Terry Martino, Associate Counsel Sarah Reynolds, Deputy Director for Regulatory Programs Richard Weber, Daniel Kelleher, and Edward Snizek.

616. General Counsel Banta and Executive Director Martino would be among the "Senior Staff", by any definition of that term.

617. These Senior Staff members summarized the record for the APA Members, prepared and showed PowerPoint presentations describing the Project and summarizing the record during the deliberations, advised the APA Members during their meetings, prepared and revised proposed "findings of fact and conclusions of law" (9 NYCRR § 587.4(c)(2)), drafted the Order and Permits, and performed various other functions for the APA Members.

618. This role gave these Senior Staff persons significant influence over the outcome of the APA's decision.

619. These Senior Staff persons were directly involved in the APA's decision-making process.

620. These Senior Staff persons acted as representatives of the APA Members in their decision-making capacity.

621. Pursuant to 9 NYCRR § 587.4, the hearing parties, including the Applicant, were prohibited from communicating with the APA Members.

622. Likewise, 9 NYCRR § 587.4 prohibited the hearing parties, including the Applicant, from communicating with the APA's Senior Staff and the other staff persons who were providing "aid and advice" to the APA Members pursuant to § 587.4(c)(2)(ii).

623. Section 587.4(c)(2) applies equally to APA Members and their staff who are "responsible for rendering a decision or making findings of fact and conclusions of law ...".

624. Any communication by the Applicant with the "Senior Staff" or other APA Staff persons who were providing "aid and advice" to the APA Members, was, in effect, communication by the Applicant with the APA Members.

625. Such communications impermissibly allowed the Applicant to have input into the APA's deliberations and the preparation and adoption of its "findings of fact and conclusions of law" (§ 587.4(c)(2)) that no other party was allowed to have.

626. It appears from the content of the Mayor's statement, that "I think that it's going to work out favorably for both the developer and the environmental interests", that, via

communications from the Applicant, a/k/a "the developer", the Mayor knew in advance the probable outcome of the APA's planned vote, which is knowledge that could have only come from the APA's "Senior Staff" or another source with access to the APA's internal decision-making process.

627. No notice of these communications was provided to the other parties, as required by § 587.4(a), § 587.4(c)(1) and § 587.4(c)(2).

628. For all of these reasons, the "ongoing talks between the developer and the staff, the senior staff...", as described by the Mayor, were a violation of the prohibition on *ex parte* contacts between the hearing parties and the APA Members.

629. Therefore, the APA's decision to approve the Order and Permits was made in violation of lawful procedure, affected by error of law, and arbitrary and capricious, and should be annulled.

**AS AND FOR A TWENTY-NINTH SEPARATE
AND DISTINCT CAUSE OF ACTION**

630. Each and every allegation set forth above is hereby repeated and realleged.

631. The Order and Permits should be annulled because the parties were not provided with an opportunity to make written comments on the summaries of the record which were prepared for the APA Members by the "Senior Staff" during their deliberations, as required by the APA's regulations.

632. 9 NYCRR § 580.18(a) provides that:

§ 580.18 Agency determination and order.

(a) The agency staff may summarize the record of any hearing for the aid of the agency. The parties participating in the hearing shall be provided an opportunity to make written comment with respect to the completeness of the summary. Comments shall be directed to the record and shall not consist of argument or reference to matters outside the record. (emphasis added)

633. During the course of the adjudicatory hearing, the APA Hearing Staff prepared a lengthy document (Ex. 95) which "summarize[d] the record ... for the aid of the agency." APA Act § 580.18(a).

634. The hearing parties were duly permitted to comment on the completeness of this document.

635. However, during the APA Members' deliberations in November and December 2011, and January 2012, the APA Senior Staff that was providing "aid and advice" (9 NYCRR § 587.4(c)(2)(ii)) to the APA Members during their deliberations prepared multiple other summaries of the record, including, but not limited to, PowerPoint presentations that were shown to the APA Members during their meetings.

636. These summaries were grossly one-sided, heavily favoring the positions and testimony of the APA Hearing Staff and the Applicant, and giving short shrift to the testimony, exhibits and positions of the other hearing parties.

637. In addition to being incomplete, these summaries contained numerous factual errors.

638. However, none of the "parties participating in the hearing [were] provided an opportunity to make written comment with respect to the completeness of the summary" as mandated by 9 NYCRR § 580.18(a).⁶³

639. This failure to conform to the regulations was highly prejudicial to the Petitioners because it presented a very incomplete picture of the record to the APA Members.

640. In addition, as described above at pages 124 to 125, during the APA's deliberations, the "Senior Staff" presented an analysis of the Project's costs and revenues that purported to show that even if real estate sales were 70% lower than the Applicant had projected, there would be no risk to the municipalities. The Order (p. 30) then made a finding based on this presentation.

641. However, this analysis was not in the hearing record as required by 9 NYCRR § 580.14(g)), it was not given in sworn testimony as required by 9 NYCRR § 580.15(d), it was not subject to discovery as required by 9 NYCRR § 580.14(a)(vii), or to cross-examination as required by 9 NYCRR § 580.14(b)(7), or to rebuttal subject to NYCRR § 580.14(b)(8), and it was given after the closing of the hearing record, contrary to 9 NYCRR § 580.14(b)(11) and § 580.14(g).

⁶³ With the possible exception of the Applicant, through its "ongoing talks between the developer and the staff, the senior staff", as described above.

642. Therefore, the APA's decision to approve the Order and Permits was made in violation of lawful procedure, affected by error of law, and arbitrary and capricious, and should be annulled.

WHEREFORE, it is requested that judgment be granted:

(A) Annuling the Project Findings and Order, No. 2005-100, and the 14 individual permits for the Project.

(B) Awarding Petitioners the costs and disbursements of this proceeding;

(C) Against respondents APA and DEC only, awarding Petitioners their legal fees and other expenses pursuant to the New York State Equal Access to Justice Act, CPLR Article 86; and

(D) Granting such other and further relief as may be deemed just and proper by the Court.

/S/ John W. Caffry

Dated: March 20, 2012

CAFFRY & FLOWER
Attorneys for Petitioners
John W. Caffry, of Counsel
Claudia K. Braymer, of Counsel
100 Bay Street
Glens Falls, New York 12801
518-792-1582

Robert C. Glennon, Esq.
Ray Brook, New York

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

John W. Caffry, being duly sworn, deposes and says that deponent is the attorney for the Petitioners herein; that deponent has read the foregoing petition and knows the contents thereof; that the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters deponent believes them to be true; and that this verification is made by the deponent because all of the Petitioners reside outside the county in which I maintain my office for the practice of law, because the material allegations thereof are within my personal knowledge, and because I am a Director of petitioner Protect the Adirondacks! Inc.

/S/ John W. Caffry

John W. Caffry

Sworn to before me this

 20th day of March, 2012.

/S/

NOTARY PUBLIC

R:\Client.Files\Protect-ACR.APA.2186\Art.78\Pleadings\Petition.C.wpd