

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ESSEX

In the Matter of

THOMAS JORLING,

Petitioner-Plaintiff,

**VERIFIED PETITION
AND COMPLAINT**

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

Index No.:

Date Filed:

-against-

ADIRONDACK PARK AGENCY, NEW YORK
STATE DEPARTMENT OF ENVIRONMENTAL
CONSERVATION, and LS MARINA, LLC,

Respondents-Defendants.

Petitioner-Plaintiff Thomas Jorling (“Petitioner”) by and through his attorney, Braymer Law, PLLC, for his verified petition and complaint, herein alleges as follows:

PRELIMINARY STATEMENT

1. This is a combined action and proceeding seeking to annul, vacate and set aside the September 11, 2020 decision by respondent-defendant Adirondack Park Agency (“APA”) which approved a permit application by LS Marina, LLC (“Applicant”) for the construction of a marina project in the Town of Harrietstown, 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 Permit and Order, No. 2016-0029 (“Order”) for the Project.

3. Upon information and belief, the Project is one of the largest marina projects ever reviewed or approved by APA pursuant to the APA Act, since the creation of the APA in 1971.

4. The Project is proposed to be constructed on two sites: the Main Marina site and the Annex site.

5. The Main Marina contains 655 ± feet of shoreline, with areas of wetlands, and the Project would increase the number of boat slips/moorings there from 124 to 178.

6. At the Main Marina 90 of the boat slips would be located in covered structures with no sides.

7. The Main Marina site also has a mechanic shop, boat storage building, a storage building, a single-family dwelling, a cottage, and several small cabins.

8. The Annex site contains 1,335 ± feet of shoreline, with extensive areas of wetlands, shrub swamp, and emergent marsh wetlands, and the Project would increase the number of boat slips/moorings there from 95 to 114.

9. At the Annex site, 84 of the boat slips would be located in covered structures with no sides (60 of the slips would be located in covered structures that have skylights).

10. In addition, there is an existing boat storage building at the Annex site.

11. The Applicant had the burden of proof in the application process and it failed to meet that burden on several key issues.

12. Petitioner seeks judgment annulling the Order because:

- a. APA cannot permit a project that allows private use or commercial use of the Forest Preserve;
- b. APA failed to consider whether the Project would have an undue adverse impact upon the resources of the Adirondack Park;

- c. APA failed to consider all of the mandatory criteria required to issue a variance from the shoreline restrictions of the APA Act;
- d. APA's decision to issue the Order was arbitrary and capricious because it did not obtain the necessary information, and it has not undertaken the study regarding the carrying capacity of Lower Saranac Lake required by the Saranac Lakes Wild Forest Unit Management Plan;
- e. APA's decision to issue the Order was arbitrary and capricious because it failed to properly consider wetlands impacts of the Project in determining whether to grant or deny the Permit; and
- f. APA's decision failed to make the required findings of fact and determinations required by law.

13. For all of the foregoing reasons, the Order should be annulled because it was affected by errors of law, arbitrary and capricious, irrational, and not supported by substantial evidence.

14. Additionally, in the event that any respondent-defendant contests the Wild Forest nature of the waters impacted by the Project, Petitioner seeks a declaration that the bed and waters of Lower Saranac Lake are classified as Wild Forest pursuant to the Adirondack Park State Land Master Plan classification system.

PARTIES

15. Petitioner Thomas Jorling owns property at 4B Pinehurst Road, in the Town of Harrietstown, Franklin County. Petitioner Jorling's property is located in Ampersand Bay of Lower Saranac Lake, directly across the bay from the Annex portion of the Project.

16. Petitioner will be uniquely affected by the Project. The Project creates an increase in the intensity of uses that are currently present on the subject property, and increases the visibility of these uses. As such, the Project will result in changes that will impact Petitioner, such as increased noise, increased light, increased activity, increased stormwater runoff, a reduction in property values, negative aesthetic and visual impacts, and the Project will irreparably alter the character of Ampersand Bay. See Affidavit of Thomas Jorling, submitted simultaneously herewith.

17. Thus, the Project will greatly impact the use and enjoyment of Petitioner's property, such that he is entitled to maintain this combined proceeding and action.

18. Respondent-defendant 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.

19. APA approved the Order that this proceeding seeks to have annulled.

20. Respondent-defendant New York State Department of Environmental Conservation ("DEC") is an agency of the State of New York created pursuant to Environmental Conservation Law ("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.

21. The Project, as approved, would use and impact the lands and waters of Lower Saranac Lake, within the Forest Preserve, for the operation of the marina, in violation of Article 14 of the Constitution.

22. Upon information and belief, respondent-defendant LS Marina, LLC is a New York limited liability corporation with its principal places of business located at 4901 State

Route 3, Saranac Lake, New York, in Franklin County. It was the applicant (the “Applicant”) for the Order that Petitioner seeks to have annulled in this proceeding, and the Order was issued to it. It is the reputed owner of the private lands where much of the Project is to be sited.

VENUE

23. Venue of this proceeding properly lies in Essex County pursuant to CPLR § 506 because respondent-defendant APA has its principal office in said county.

PROJECT BACKGROUND

24. Upon information and belief, the two sites have operated as a marina since the 1920s under different owners.

25. Upon information and belief, Applicant submitted a jurisdictional inquiry to APA when it sought to purchase the property in approximately 2013.

26. At that time, APA determined that the construction of the covered structures for boat slips in the water, as proposed by the Applicant, required a variance from APA, as well as certain permits from APA.

27. Afterwards, the Applicant purchased the property and began removing some of the existing structures that had become dilapidated or unusable.

28. The removal of some of the structures has allowed for natural restoration/revegetation of 16,131 square feet of wetlands.

29. In the Order, APA found that the earlier, non-conforming marina had 219 existing boat berths.

30. However, there is no indication how many boat berths existed at the marina in 1973.

31. If the marina had less than 219 boat berths in 1973, then expansions after that date may or may not have been lawful, depending on the circumstances of the expansions, including whether they were made into wetlands. See 9 NYCRR § 575.5.

32. Accordingly, the Applicant's removal of some of the structures may have been appropriate in order to remove unlawful prior expansions.

33. Upon information and belief, the Applicant first presented the Project to APA in early 2014.

34. In April 2014, the Applicant formally filed its application for the required APA permits and variance.

35. During the summer of 2020, Applicant submitted to APA various additional application materials and modifications to the Project.

36. Eventually, the Applicant succeeded in having the Permit and variance applications declared complete by APA.

37. Public comments were accepted by APA, and a public hearing regarding the variance application was held by APA online on or about August 21, 2020.

38. The Order was granted on or about September 11, 2020.

LEGAL BACKGROUND

39. APA's primary statutory duty is to protect the environment of the Adirondack Park, both the private lands and State lands contained within 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 (New York Executive Article 27) § 801.

40. For jurisdictional private development projects within the Adirondack Park, APA reviews the proposal for compliance with the APA Act and the Adirondack Park Land Use and Development Plan (New York Executive Law § 805).

41. Pursuant to the Adirondack Park Land Use and Development Plan, private lands within the Adirondack Park are classified as one of six land use areas: Resource Management, Rural Use, Low Intensity Use, Moderate Intensity Use, Industrial Use, or Hamlet.

42. Pursuant to the Adirondack Park State Land Master Plan, State lands within the Adirondack Park are classified as one of nine basic categories: Wilderness, Primitive, Canoe, Wild Forest, Intensive Use, Historic, State Administrative, Wild, Scenic and Recreational Rivers, and Travel Corridors.

43. Each of the classifications for private lands and for State lands reflects the existing character of the lands, and the ability of the lands to support the uses permitted by the applicable classification.

44. Private lands classified as Hamlet “serve as the service and growth centers” in the Adirondack Park. APA Act § 805(c)(2).

45. Hamlet areas “are intended to accommodate a large portion of the necessary and natural expansion of the park’s housing, commercial and industrial activities. APA Act § 805(c)(2).

46. Hamlet areas can “range from large, varied communities that contain a sizeable permanent, seasonal and transient populations . . . to smaller, less varied communities with a

lesser degree and diversity of development and generally lower level of public services and facilities”. APA Act § 805(c)(1).

47. State land classified as Wild Forest “is an area where the resources permit a somewhat higher degree of human use than wilderness, primitive or canoe areas, while retaining an essentially wild character.” Adirondack Park State Land Master Plan, p. 34.

48. In Wild Forest areas “no additions or expansions of non-conforming uses will be permitted”. Adirondack Park State Land Master Plan, p. 35.

49. In Wild Forest areas, “[p]ublic use of motor vehicles will not be encouraged” and “[c]are should be taken to minimize conflict of incompatible uses”. Adirondack Park State Land Master Plan, p. 35.

50. In Wild Forest areas, “motorboating [is allowed] on a limited and regulated basis that will not materially increase motorized uses that conformed to the Master Plan at the time of its adopted in 1972 and will not adversely affect the essentially wild character of the land”. Adirondack Park State Land Master Plan, p. 40.

51. Pursuant to APA Act § 809(10), APA “shall not approve any project” without making five separate determinations, which are set forth in APA Act § 809(10)(a) to (e).

52. APA Act Section 809(10) mandates most notably that:

- a. The project must “comply with the shoreline restrictions” of APA Act § 809(10)(d); and
- b. The project must “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” of APA Act § 809(10)(e).

53. As such, when reviewing private development projects, such as this Project:

[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]). Ass’n for Prot. of Adirondacks, Inc. v. Town Bd. of Town of Tupper Lake, 64 A.D.3d 825, 826 (3d Dept. 2009)

54. It must also be noted that 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 [the State Environmental Quality Review Act].” Id.

55. APA’s statutory duty to prioritize environmental protection of the Adirondack Park, both private and State lands, comes from:

the constitutional and legislative history stretching over 80 years 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).

56. Here, APA’s review and approval of this Project violated APA’s statutory duty to place “environmental concerns above all others” because it violated the State Constitution, State law, and applicable State regulations.

57. Therefore, APA’s September 2020 Order must be annulled.

AS AND FOR A FIRST CAUSE OF ACTION

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

59. The Order must be annulled because use of the Forest Preserve as part of the Project violates the State Constitution, State law (APA Act and ECL), and applicable State regulations.

60. The marina would be an illegal commercial business operating on the New York State Forest Preserve in violation of Constitution Article 14, § 1, the APA Act, the ECL, and DEC's regulations for the management of the Forest Preserve.

61. The Project would violate the following laws and regulations, such that it would be illegal to permit the operation of the marina:

- a. Article 14 § 1 of the New York State Constitution (the Forever Wild clause);
- b. APA Act § 809(10)(e) (no undue impact on the Adirondack Park);
- c. ECL § 9-0301(1) (the Forest Preserve is reserved for the free use of all the People); and
- d. 6 NYCRR § 190.8(a) (the operation of commercial enterprises is prohibited on the Forest Preserve).

The Project Cannot Lawfully Be Located on Forest Preserve Lands

62. At the Annex site, the Applicant does not own any of the land below the mean high water mark of Lower Saranac Lake.

63. The land under the water is owned by the State, and as such is Forest Preserve.

64. The support pipes for the structures at the Annex site will be placed on or driven into the land under the water in Lower Saranac Lake.

65. Therefore, the structures for the portion of the Project located at the Annex site will be illegally placed on and above Forest Preserve land.

66. At the Main Marina, although the Applicant purports to own 8 acres of underwater land within Lower Saranac Lake via a quit claim deed dated August 5, 2019, title to that parcel of land is unclear. Applicant appears to have obtained the quit claim deed to the land via a lawsuit that it commenced against Acme of Saranac, LLC in 2017 (Index No. 2017-423).

67. Upon information and belief, the underwater land at the Main Marina is located in what was once known as “Township 24”.

68. Upon information and belief, pursuant to the State’s ownership of portions of land within “Township 24”, the People of the State of New York own the bed of Lower Saranac Lake, including all or a portion of the underwater lands that the Applicant intends to use at the Main Marina for its Project.

69. All of the underwater lands at the Main Marina that are owned by the State are Forest Preserve.

70. The support pipes for the structures at the Main Marina will be placed on or driven into the land under the water.

71. Upon information and belief, the Applicant intends to install some portions of the structures at the Main Marina (e.g., the far ends of structures 2, 3, and 4) over underwater lands of the State.

72. Therefore, upon information and belief, all, or at least some of, the structures for the portion of the Project located at the Main Marina will be illegally placed on and/or above Forest Preserve land.

73. Article 14 § 1 of the New York State Constitution¹ provides that:

the lands of the state, now owned or hereafter acquired, constituting the forest preserve as now fixed by law, **shall be forever kept as wild forest lands. They shall not be leased, sold or exchanged, or be taken by any corporation, public or private**, nor shall the timber thereon be sold, removed or destroyed.

74. As such, the Project's use of the Forest Preserve would violate the Constitution's provision that the Forest Preserve must "be forever kept as wild forest lands". Constitution Article 14 § 1.

75. Having a commercial marina operation, and the structures and activities that go along with it, in the waters of the Forest Preserve is not keeping the Forest Preserve "forever" wild. Constitution Article 14 § 1.

76. Moreover, private persons or corporations cannot deprive the State of possession and control of Forest Preserve lands that are held in trust for the People. See ECL § 9-0105; ECL § 9-0301(1).

77. The Project is not permitted by law because it would constitute an illegal occupancy and possession by a private corporation of State land on the Forest Preserve, which is not permitted by Constitution Article 14 § 1.

78. APA Act § 809(10)(e) also prohibits the Project because it would have an undue adverse impact on the Forest Preserve due to the illegal occupancy and possession of State land by a private corporation, and the Project would not keep the Forest Preserve "forever" wild.

¹ The consent of the Appellate Division pursuant to Constitution Article 14 § 5, is not required to make this claim in this matter 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 Petitioner-Plaintiff could, however, potentially file a separate action under Article 14 § 5, if he first obtains the consent of the Appellate Division.

Constitution Article 14 § 1; see APA Act § 805(4)(e) (requiring APA to consider a project's "conformance with other government controls").

79. Moreover, the Project is not permitted by DEC regulations.

80. 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...". See 6 NYCRR § 190.8 (w) ("no person shall erect, construct, install, maintain . . . any structure . . . on State lands").

81. The Project would be a private commercial business located on State land, which is prohibited by 6 NYCRR § 190.8(a).

82. Therefore, the Project is contrary to Article 14, § 1 of the Constitution, APA Act § 809(10)(e), ECL § 9-0301(1), 6 NYCRR § 190.8(a), and 6 NYCRR § 190.24(d).

The Project Uses Waters of the State that Are Classified Wild Forest

83. Upon information and belief, the Project, at both the Main Marina and the Annex, will use the waters of the State, above lands that are owned by the State and are part of the Forest Preserve, for purposes of navigation of the watercraft that will be stored at or launched from the structures.

84. Upon information and belief, the Project includes buoys and navigation markers and channels in the waters of the State.

85. The use of the waters of the State will be for the commercial operation of the Project.

86. The waters of Lower Saranac Lake are part of the Saranac Lakes Wild Forest, and are classified as Wild Forest, protected as part of the State Forest Preserve.

87. To the extent that any respondent-defendant opposes the classification of Lower Saranac Lake as Wild Forest, Petitioner seeks a declaratory judgment from the Court that Lower Saranac Lake is classified as Wild Forest pursuant to the APA Act.

88. Article 14 § 1 of the New York State Constitution² 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.

89. The Constitution protects the waters that are above lands owned by the State. See In re Adirondack Mountain Club, Inc., 33 Misc. 3d 383, 390 (Sup. Ct. Albany Co. 2011).

90. Private persons or corporations cannot deprive the State of possession and control of Forest Preserve lands and waters that are held in trust for the People. See ECL § 9-0105; ECL § 9-0301(1).

91. The Project is not permitted by law because it would constitute an illegal occupancy and possession by a private corporation of State waters of the Forest Preserve, which is not permitted by Constitution Article 14 § 1.

92. APA Act § 809(10)(e) also prohibits the Project because it would have an undue adverse impact on the Forest Preserve due to the illegal occupancy and possession of State waters by a private corporation.

93. The Project is also not permitted by DEC regulations.

94. 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...". See 6 NYCRR § 190.8 (w) ("no person shall erect, construct, install, maintain . . . any structure . . . on State lands").

² See footnote 1.

95. The Project would be a private commercial business using State waters, which is prohibited by 6 NYCRR § 190.8(a).

96. Therefore, the Project is contrary to Article 14, § 1 of the Constitution, APA Act § 809(10)(e), ECL § 9-0301(1), 6 NYCRR § 190.8(a), and 6 NYCRR § 190.24(d).

The Order Approving the Project Must be Annulled

97. In conclusion, APA’s Order is contrary to Article 14, § 1 of the Constitution, APA Act § 809(10)(e), ECL § 9-0301(1), 6 NYCRR § 190.8(a), and 6 NYCRR § 190.24(d), and is therefore arbitrary and capricious, irrational, and contrary to law. APA cannot grant an approval that is not in “conformance with other governmental controls”. APA Act § 805(4)(e).

98. Accordingly, Petitioner respectfully requests that this Court issue an order and judgment vacating and annulling APA’s September 2020 Order.

99. Upon information and belief, DEC has granted a “temporary revocable permit” to allow use of the Forest Preserve for portions of the Project. see also Affirmation of Claudia K. Braymer, submitted simultaneously herewith, Exhibit A.

100. The Court should issue an order and judgment annulling the “temporary revocable permit” issued by DEC.

AS AND FOR A SECOND CAUSE OF ACTION

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

102. Here, the Project requires a Class A Regional Project permit (“Class A permit”) from APA pursuant to APA Act § 809(10).

103. APA Act § 809(10)(e) prohibits the Project because it would have an undue adverse impact on the Adirondack Park.

104. APA may not approve a Class A permit for a project unless it finds that the project will:

not have an undue adverse impact upon the natural, scenic, aesthetic, ecological, wildlife, historic, recreational or open space resources of the park . . . 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. APA Act § 809(10)(e).

105. Aside from the direct use of the Forest Preserve in violation of the Constitution, State law and regulations, as set forth in the First Cause of Action, and in addition to the wetlands impacts that required a wetlands permit, the Project has adverse impacts that APA failed and refused to consider.

106. Pursuant to APA Act § 809(10)(e), in making the determination “as to the impact of the project upon 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”.

107. The development considerations are set forth in APA Act § 805(4), and require that APA consider the Project’s “potential for adverse impacts” upon the “water”, “existing water quality”, and upon “adjoining and nearby land uses”, among many other considerations, including “conformance with other governmental controls”.

108. While APA reviewed some of the impacts related to the request for a variance for the covered nature of the boat slips of the size proposed, APA failed to consider the adverse impacts of the Project in granting a Class A permit for the Project.

109. In issuing the Order granting a Class A permit for the Project, APA failed to take into consideration the Project's impacts on the waters, water quality, use of the adjoining waters of Lower Saranac Lake, or the Project's impacts on adjoining and nearby land uses.

110. First, the Project will have an undue adverse impact on the water, water quality, and wetlands on the shore of Lower Saranac Lake. See Fifth Cause of Action, infra.

111. These impacts were not assessed in the context of APA Act § 809(10)(e) in APA's Order.

112. Second, the waters of Lower Saranac Lake are part of the Saranac Lakes Wild Forest, and are classified as Wild Forest, protected as part of the State Forest Preserve.

113. To the extent that any respondent-defendant opposes the classification of Lower Saranac Lake as Wild Forest, Petitioner seeks a declaratory judgment from the Court that the Lower Saranac Lake is classified Wild Forest.

114. APA identified in the Order that the Saranac Lakes Wild Forest adjoins the Main Marina site.

115. APA also identified in the Order that the DEC Saranac Lake Islands campground is within the Saranac Lakes Wild Forest.

116. APA's Order fails to identify that the Saranac Lakes Wild Forest is adjacent to and within the Annex site, and it fails to state that the waters at the Annex site are owned by the State.

117. As Wild Forest waters, "[p]ublic use of motor vehicles will not be encouraged" on Lower Saranac Lake and "[c]are should be taken to minimize conflict of incompatible uses". Adirondack Park State Land Master Plan, p. 35.

118. Additionally, “motorboating” on Lower Saranac Lake is not permitted to “materially increase” beyond the “motorized uses that conformed to the Master Plan at the time of its adopted in 1972” and it may “not adversely affect the essentially wild character of the land”. Adirondack Park State Land Master Plan, p. 40.

119. APA failed to evaluate the adverse impacts of the Project’s increase in the number of motorboats that would be berthed and used on Lower Saranac Lake.

120. In fact, APA implied that it does not need to consider the Project’s impacts on “use and boat capacity of the Saranac Chain of Lakes” because there are numerous other public and private areas to access the water.

121. That flippant statement is a violation of APA’s duty to evaluate the Project’s impacts and to protect the wild character of the Saranac Lakes Wild Forest.

122. Moreover, APA’s Order approving the Project violated the provisions of the “other governmental controls” set forth in the Adirondack Park State Land Master Plan by both encouraging and increasing the use of motorized watercraft on Lower Saranac Lake, in a way that does not “minimize conflict of incompatible uses”. APA Act § 805(4)(e) (requiring APA to consider a project’s “conformance with other government controls”).

123. Notably, APA identifies in the Order that the DEC “Ampersand Bay Boat Launch, which provides public canoe and kayak access to Lower Saranac Lake . . . is located to the northwest of the project site”, and that the DEC Saranac Lake Islands campground is nearby.

124. However, APA failed to evaluate the Project’s adverse impacts on the public Ampersand Bay Boat Launch, and the use of that public launch for non-motorized (canoe and kayak) access to, and use of, Lower Saranac Lake.

125. APA also failed to evaluate the Project's adverse impacts on the public's use of the Saranac Lake Islands campground, and on the public's use of the swimming area on the northwestern portion of the Main Marina site.

126. Finally, APA failed to evaluate the Project's adverse impacts upon the natural, scenic, and aesthetic resources of the Park and upon the "adjoining and nearby land uses".

127. APA admitted, in its review of the variance, pursuant to a different set of applicable criteria, that "views along the shoreline of Crescent Bay and Ampersand Bay on Lower Saranac Lake will be impacted by the installation of the open-sided structures". Despite this, APA did not review such impacts on the nearby Saranac Lakes Wild Forest.

128. APA also admitted, in its review of the variance, pursuant to a different set of applicable criteria, that the "creation of up to 73 additional boat slips available at the marina may create impacts to adjoining and nearby landowners on Lower Saranac Lake".

129. There was no analysis by APA of those impacts (to views and impacts to adjoining and nearby landowners), which it had already admitted will occur, and whether those impacts would create an "undue adverse impact", as APA was required to do by APA Act § 809(10)(e) in evaluating whether to grant or deny the Class A permit for the Project.

130. As such, given the potential impacts on Lower Saranac Lake, the increase in the use of motorized watercraft on Lower Saranac Lake, the public's nearby use of a swimming area and the public launch for nonmotorized boat access, and the other impacts to adjoining and nearby landowners and the public, APA failed in its duty to consider these impacts, and its Order was arbitrary and capricious and affected by an error of law.

131. Therefore, the Order must be annulled.

AS AND FOR A THIRD CAUSE OF ACTION

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

133. APA failed to undertake the proper review required by the APA Act for the consideration of a variance from the shoreline restrictions.

134. “In order to provide adequate protection of the quality of the lakes, ponds, rivers and streams of the park and the qualities of their shorelines, no person shall undertake any new land use or development or subdivision of land that involves any shoreline within the park, except in compliance, at a minimum, with the [shoreline] restrictions”. APA Act § 806(1).

135. “In the case of the shorelines of all lakes”, the “minimum setback of all principal buildings and accessory structures in excess of one hundred square feet, other than docks or boathouses, from the mean high-water shall be fifty feet in hamlet areas”. APA Act § 806(1)(a)(2).

136. Here, the proposed structures are in excess of one hundred square feet and do not meet the definitions provided for docks or boathouses.

137. Therefore, APA determined that the proposed structures require a variance from the shoreline restrictions.

138. “[W]here there are **practical difficulties** or **unnecessary hardships** in the way of carrying out the strict letter of the restrictions”, APA may “vary or modify the application of such restrictions relating to the use, construction or alterations of buildings or structures, or the use of land, so that the spirit of such restrictions shall be observed, public safety and welfare secured and substantial justice done”. APA Act § 806(3)(a).

139. APA cannot grant a variance without making the findings required by the APA Act and by APA's regulations.

140. In granting the variance for this Project, APA failed to make the initial finding required by the APA Act and by APA's regulations.

141. APA ignored the requirement that a variance may only be granted "where there are **practical difficulties** in carrying out the strict letter of the provisions of the plan or the shoreline restrictions". 9 NYCRR § 576.1(a); see APA Act § 806(3)(a); see also Affidavit of Barbara Rottier, submitted simultaneously herewith.

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

143. Here, there is no practical difficulty related to the site that would necessitate a variance from the limitations of the shoreline restrictions.

144. While APA's Order purports to address the criteria set forth in 9 NYCRR § 576.1(b) and (c), APA's Order states nothing about 9 NYCRR § 576.1(a), presumably because APA could not affirm that "practical difficulties" were present.

145. Instead, APA, without creating rules or specific limitations, has applied a new standard via the variance procedures rather than through regulatory rulemaking that allows a marina to have covered structures of any size within waters of the Adirondack Park, any distance out from the shoreline.

146. Therefore, APA's Order was arbitrary and capricious and affected by an error of law.

147. Therefore, the Order must be annulled.

AS AND FOR A FOURTH CAUSE OF ACTION

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

149. APA failed to take into consideration the impacts of the Project on the carrying capacity of Lower Saranac Lake.

150. Despite knowing that it lacked adequate information on the Project's potential adverse impacts on the carrying capacity of Lower Saranac Lake, APA failed and refused to require the necessary studies of these impacts before voting to approve the Project.

151. The Adirondack Park State Land Master Plan (pp. 10-11) requires each management plan for a particular unit of Forest Preserve land (known as a "unit management plan" to contain "an inventory of all existing facilities", "an inventory of the types and extent of actual and projected public use of the area", "an assessment of the impact of actual and project public use on the resources, ecosystems and public enjoyment of the area with particular attention to portions of the area threatened by overuse", and "an assessment of the physical, biological and social carrying capacity of the area with particular attention to portions of the area threatened by overuse".

152. In addition, each unit management plan will "set forth a statement of the management objectives for the projection and rehabilitation of the area's resources and ecosystems and for public use of the area consistent with its carrying capacity". Adirondack Park State Land Master Plan, p. 11.

153. The unit management plan should address "the regulation or limitation of public use such that the carrying capacity of the area is not exceeded and the types of measures necessary to achieve that objective". Adirondack Park State Land Master Plan, p. 11.

154. Numerous physical characteristics of a land area “all affect the carrying capacity of the land or water both from the standpoint of the construction of facilities and the amount of human use the land or water itself can absorb.” Adirondack Park State Land Master Plan, p. 14.

155. In Wild Forest land areas, access to waterbodies may be provided so long as the “physical, biological and social carrying capacity of the water body or other water bodies accessible from the site will not be exceeded”. Adirondack Park State Land Master Plan, p. 40. There may be a “prohibition of motorized use as appropriate to the carrying capacity of the water body”. Adirondack Park State Land Master Plan, p. 40.

156. The unit management plan for the Saranac Lakes Wild Forest recognized that the Saranac Lakes Wild Forest, “like any other natural area in our Forest Preserve, cannot withstand ever-increasing and unlimited visitor use without suffering the eventual loss of its essential natural and wild character”. Saranac Lakes Wild Forest Unit Management Plan, p. 67.

157. “Waterbodies in the [Saranac Lakes Wild Forest] are impacted by recreational use”, particularly motorboats that “have the potential to cause a greater variety and more significant impacts than non-motorized watercraft”. Saranac Lakes Wild Forest Unit Management Plan, p. 75.

158. “Crowding and conflict impact one’s experience on a waterbody”. Saranac Lakes Wild Forest Unit Management Plan, p. 111.

159. A variety of indicators such as “ecological impacts (e.g., non-native aquatic plants, fecal coliform, chloride, dissolved oxygen, and water temperature), social impacts (e.g., trip satisfaction, visitor conflict), recreation use (e.g., people at one time, visitor overnight use), and adjacent development (e.g., number of campsites)” need to be examined in order “to

determine the capacity of waterbodies”. Saranac Lakes Wild Forest Unit Management Plan, p. 111.

160. The Saranac Lakes Wild Forest Unit Management Plan (p. 112) stated that “a comprehensive study” of Lower Saranac Lake and the other lakes in the unit needs to be completed to determine each lake’s carrying capacity.

161. The “comprehensive study” has not been completed, and APA lacked information about the carrying capacity of Lower Saranac Lake that it needed to assess the Project’s impacts on Lower Saranac Lake. Saranac Lakes Wild Forest Unit Management Plan, p. 112.

162. APA Board Member Chad Dawson, in voting against approval of the Project, noted that a carrying capacity study had been completed, and he was expressed his concern that the marina would cause overuse of the water, causing negative impacts to Lower Saranac Lake.

163. APA cannot ignore the need for a carrying capacity analysis by simply and irrationally implying that it does not have the authority to regulate private businesses, such as the Project.

164. APA has the authority and the duty to regulate private projects to ensure that there are no undue adverse impacts on the Adirondack Park. See APA Act § 805(1),(4) (requiring that APA consider adverse impacts upon the Adirondack Park before any new land use or development takes place on private land).

165. Approving the Project, without the information needed to adequately assess the impacts of the Project on the carrying capacity of Lower Saranac Lake, and without fulfilling its duty to regulate the uses and impacts of the Project, was arbitrary and capricious.

166. Therefore, APA’s Order must be annulled because it was arbitrary and capricious, irrational and lacks substantial evidence in the record.

AS AND FOR A FIFTH CAUSE OF ACTION

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

168. APA failed to properly consider the impacts of the Project on the wetlands of Lower Saranac Lake as part of its review of whether to grant or deny a wetlands permit for the Project.

169. In total, the Applicant's Project involves the construction of over 64,000 square feet of new shoreline structures.

170. At the Main Marina, the Project involves the construction of 20,773 square feet of covered structures below the mean high water mark.

171. At the Annex site, the Project involves the construction of 15,018 square feet of covered structures below the mean high water mark.

172. The Project will directly impact 11,597 ± square feet of wetlands.

173. The impacts include destruction of wetlands vegetation from boat propellers, shading of the water/wetlands from the docks and covered structures, suspension of sediments from physical disturbance of the bed of the lake, and displacement of fish habitat by physical disturbance, among other impacts.

174. The Project will result in the reduction of wetland functions and values including loss of habitat, reduced water quality and protection of water resources, and loss of open space, among other impacts.

175. There is a discussion in the Order regarding the wetlands impacts insofar as the APA's review of the request for a variance from the shoreline restrictions.

176. However, APA did not undertake a proper review of the wetland impacts from the Project in its review of whether to issue a wetlands permit pursuant to 9 NYCRR Part 578.

177. APA regulations state that a permit shall not be issued for activities in wetlands “unless the findings” required by the regulations are made. 9 NYCRR § 578.10(a).

178. The Order contains no findings that support APA’s bald conclusory statement that the Project would “result in minimal degradation or destruction of the wetland or its associated values, and is the only alternative which reasonably can accomplish the applicant’s objectives”.

179. The Order states that there are deepwater marsh wetlands at the Main Marina, and at the Annex site there are extensive deepwater marsh, shrub swamp, and emergent marsh wetlands.

180. “Deep water marsh may be an important food source for waterfowl and is frequently a valuable area for fish spawning and nurseries”. 9 NYCRR § 578.5(e).

181. “Shrub swamps generally have variable values for fish and wildlife”, and “they often supply significant nesting and other wildlife habitat”, among other values and benefits. 9 NYCRR § 578.5(f).

182. “Emergent marsh is the most valuable individual coverytype and one of the highest in productivity of all temperate ecosystems. The emergent vegetation provides nesting habitat, food and cover for many waterfowl and other wildlife, provides large annual increases in biomass, and cycles large quantities of nutrients into foodchains.” 9 NYCRR § 578.5(c).

183. Due to the significant presence of wetlands and the wetland values provided by the wetlands on and adjacent to the Project, the Project site has at least three wetlands categories with a value rating of “2”. See 9 NYCRR § 578.4.

184. Therefore, APA regulations demand that the wetlands value rating be raised to the highest rating of “1”. See 9 NYCRR § 578.6.

185. As a result, the Project’s impacts must be evaluated pursuant criteria for wetlands rated “1”.

186. APA incorrectly evaluated the Project pursuant to the criteria for wetlands rated “2”, rather than for wetlands rated “1”.

187. Accordingly, APA’s Order was arbitrary and capricious and affected by an error of law.

188. Even if the criteria for wetlands rated “2” is applied, the Order is arbitrary and capricious due to the fact that the Project will directly impact 11,597 ± square feet of wetlands, and will result in numerous impacts to wetlands and their functions; the Project would not result in “minimal degradation or destruction of the wetland or its associated values”; and is not “**the only** alternative”. See 9 NYCRR § 578.10(a)(2) (quoting the criteria for wetlands rated “2”).

189. There are alternatives that the Applicant could have used to reduce wetlands impacts, such as uncovered dock structures, smaller docks for small boats, reducing the length of the structures, reducing the width of the structures, reducing the footprint of the structures in the wetlands, or employing a quick launch system that stores boats on land rather than in the water.

190. Certainly, applying the criteria for wetlands rated “1”, the Project would “result in degradation or loss of any part of the wetland or its associated values”, and the wetlands permit should have been denied. See 9 NYCRR § 578.10(a)(2) (quoting the criteria for wetlands rated “1”).

191. Therefore, APA’s Order approving the wetlands permit for the Project was arbitrary and capricious, and affected by an error of law.

192. Accordingly, the Order must be annulled.

AS AND FOR A SIXTH CAUSE OF ACTION

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

194. APA failed and refused to make the findings and determinations required as part of its review of whether to grant or deny the permits for the Project.

195. When making a decision such as the Order at issue herein, any agency, including APA, must make detailed findings of fact, supported by the record.

196. 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 proposed project in question.

197. Conclusory statements that do not provide any explanation for the decision or that do not provide a clear basis for judicial review are not sufficient to satisfy this duty.

198. Here, APA's regulations specifically require that the final decision on the wetlands permit application must include certain "findings". 9 NYCRR § 578.10(a).

199. In addition, pursuant to APA Act § 809(10), APA "shall not approve any project" without making five 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.”

200. However, in approving the Project, APA did not make the findings and determinations required of it by its own regulations and by APA Act § 809(10)(a) to (e).

201. Instead, the Order summarily concluded that the Project met “all statutory and regulatory criteria for approval” and simply recited the statutory phrases.

202. APA did not make specific findings of fact on the issues and the statutory determinations that it was required to in order to issue a permit for a Class A project such as this.

203. In doing so, APA violated both generally applicable principles of administrative law, and its own statute and regulations.

204. APA’s Order does not enable the public, the parties and the Court to intelligently determine whether the decision follows as a matter of law from the facts in this matter, and whether the agency had sufficient support in the record to make a rational decision.

205. If, in responding to this litigation, APA attempts to offer after-the-fact affidavits or other information to explain the basis for its decisions, this outside-the-record evidence should be rejected because the Court may not consider impermissible post-hoc rationalizations of the agency’s decision-making.

206. Even though APA’s Order discussed the Project site, the Applicant’s request, the applicable laws, the conditions for the approval, and some of the variance criteria (pursuant to APA Act § 806(3)(a) and 9 NYCRR § 576.1)), APA’s Order makes no findings of fact regarding the Class A and wetlands permits (pursuant to APA Act § 809(2)(a) and 9 NYCRR Part 578), and the basis for its final determinations on these permits has not been set forth with any clarity that is discernible and understandable, as required by law.

207. Therefore, the Order was adopted in violation of lawful procedure, was arbitrary and capricious and affected by an error of law.

208. Accordingly, the Court must annul the Order.

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

1. Annuling, vacating and setting aside APA's September 2020 Order;
2. Annuling, vacating and settings aside DEC's temporary revocable permit;
3. Declaring that the bed and waters of Lower Saranac Lake are classified as Wild Forest;
4. Awarding Petitioner the costs, disbursements, and attorneys' fees incurred in connection with this proceeding; and
5. Awarding Petitioner such other and further relief as this Court shall deem just, proper, or equitable.

Dated: December 30, 2020
Glens Falls, New York

BRAYMER LAW, PLLC

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VERIFICATION

STATE OF ~~NEW YORK~~ ^{Massachusetts})
COUNTY OF ~~_____~~ ^{Berkshire}) ss.:

Thomas Jorling, being duly sworn, deposes and says:

1. I am a Petitioner-Plaintiff in the above action and proceeding.
2. I have read the foregoing Verified Petition and Complaint and affirm that the allegations set forth therein are true to my own knowledge, except as to those matters stated to be upon information and belief, and as to those matters, I believe them to be true.



Thomas Jorling

Sworn to me this DEC. 30. 2020
day of December, 2020

K. A. [Signature]
Notary Public