

**Supreme Court of the State of New York**  
**For the County of Essex**

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Submitted April 30, 2021

Decided August 3, 2021

Index No.: CV21-00026

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*In the Matter of*

**THOMAS JORLING,**  
*Petitioner-Plaintiff,*

*For a Judgment Pursuant to Article 78 of  
the Civil Practice Law and Rules and For  
Declaratory Judgment.*

*- against -*

**ADIRONDACK PARK AGENCY; NEW  
YORK STATE DEPARTMENT OF  
ENVIRONMENTAL CONSERVATION,  
and LS MARINA, LLC.,**  
*Respondents-Defendants.*

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Decision, Order & Judgment

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*Braymer Law, PLLC* (*Claudia K. Braymer, Esq.*, of counsel), Glens Falls, New York for Petitioner-Plaintiff.

*Letitia James, Esq.*, Attorney General of the State of New York (*Joshua M. Tallent, Esq.* and *Susan L. Taylor, Esq.*, Assistant Attorneys General, of counsel), Albany, New York, for the Respondents-Defendants Adirondack Park Agency and New York State Department of Environmental Conservation.

*Norfolk Law PLLC* (*Matthew D. Norfolk, Esq.*, of counsel), Lake Placid, New York for Respondent-Defendant LS Marina, LLC.

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Combined special proceeding pursuant to CPLR article 78 challenging the issuance of a permit by the Adirondack Park Agency (APA) and the issuance of a temporary revocable permit by the New York State Department of Environmental Conservation (DEC), and a declaratory judgment action for a determination that the waters of Lower Saranac Lake are classified as Wild Forest.

Petitioner, Thomas Jorling (Jorling), is the owner of a parcel of real property on Lower Saranac Lake in the town of Harrietstown, Franklin County, New York. He seeks to annul and vacate APA permit and order No. 2016-0029 dated September 14, 2020, granting a shoreline variance and approving the replacement, rehabilitation and expansion of marina facilities at two separate

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locations on the shore and extending into the lakebed of Lower Saranac Lake (the “project”), as well as a temporary revocable permit issued by DEC for the replacement and expansion of floating docks. One marina location is on the eastern lakeshore near the northern end of the lake in what is known as Ampersand Bay<sup>1</sup> (hereinafter referred to as the “Ampersand Annex” or “Annex”). The Ampersand Annex spans approximately 1335± feet of shoreline amidst wetlands, swamp and emerging marsh<sup>2</sup> and includes a large boat storage building in addition to boat slips. The second location is also on the eastern lakeshore at the southern end of what is commonly known as Crescent Bay (hereinafter referred to as “Crescent Bay”), located almost one mile south of the Ampersand Annex and more than half of a mile south of Jorling’s property. Crescent Bay covers approximately 655 feet of the eastern shoreline adjacent to areas of wetlands<sup>3</sup> and has a number of existing buildings including a maintenance shop, single-family residence, cabins, and storage buildings<sup>4</sup>. Both Jorling’s property and the Annex site are more than 500 feet apart<sup>5</sup> across the northern end of the lake, with Jorling’s property being on the western shore and the Annex being on the eastern shore.

In the combined petition and complaint which was electronically filed on December 31, 2020, Jorling alleges six causes of action seeking to annul and set aside both the APA permit and order and the DEC temporary revocable permit, and to declare that the bed and waters of Lower Saranac Lake are classified as Wild Forest. The first cause of action is premised upon the allegation

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<sup>1</sup> There is a separate marina location known as the Ampersand Bay Resort at the north end of Lower Saranac Lake, which is not owned nor operated by LS Marina, LLC, is not part of the redevelopment project, and which is not a subject of the APA permit and order challenged in this litigation.

<sup>2</sup> Affidavit of John Burth, sworn to March 11, 2021, paragraph 15

<sup>3</sup> Burth affidavit, paragraph 5.

<sup>4</sup> Burth affidavit, paragraph 8.

<sup>5</sup> Respondent APA Administrative Record Volume IV, page R00597.

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that the lands beneath at least part of the marina sites and the waters above those lands are owned by the State of New York as part of the forest preserve and therefore placement of the proposed structures violates the constitutional prohibition against a private person or entity occupying those lands and waters (*see, NY Const. art. XIV, §1; 6 NYCRR §190.8*). At oral argument, held virtually on April 23, 2021, Jorling withdrew his claim that the lands comprising the lakebed under the project sites were state-owned. Documentary evidence submitted to the APA and DEC, and included in the record before this court, established that those lands were privately owned<sup>6</sup>. The first cause of action is dismissed as withdrawn and without merit, and to the extent that the remaining causes of action in the petition and complaint allege that the waters are part of the forest preserve, should be classified as Wild Forest, and that a declaratory judgment should issue so determining, the same have also been withdrawn and the issues raised thereby are moot.

The second cause of action contends that the permit and order should be annulled because the APA failed to consider the project's impact upon the resources of the Adirondack Park, such as water, water quality, wetlands, views, "carrying capacity", and fishing. He asserts in the third cause of action that the APA did not properly consider the mandatory criteria required for a variance to shoreline restrictions and failed to make required findings and determinations justifying a variance, including the existence of practical difficulties. Jorling complains in the fourth cause of action that since a comprehensive study of the "carrying capacity" of Lower Saranac Lake has not been completed in accordance with the Saranac Lakes Wild Forest Unit Management Plan the APA was arbitrary and capricious in approving the project without assessing the potential impacts of the project on such capacity. The fifth cause of action is premised upon the claims that the APA incorrectly

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<sup>6</sup> See affidavit of Carolyn L. Wiggin, sworn to March 10, 2021, and answer of LS Marina with exhibits.

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valued the wetlands and as a result did not properly or adequately consider the impacts of the project thereupon, and therefore issuance of the permit and order was not only affected by an error of law but was also arbitrary and capricious. Lastly, in the sixth cause of action Jorling states that the APA acted arbitrarily, capriciously and in violation of lawful procedure because it failed to make certain determinations required by Executive Law §809(10).

The respondents-defendants filed answers denying the material allegations of the petition and complaint, and asserted objections in point of law and certain defenses including, *inter alia*, that Jorling lacks standing, the causes of action are barred by the applicable statute of limitations and fail to state a cause of action, and the claims of state-owned land under the marina sites are barred by documentary evidence and *res judicata*. The respondents-defendants also filed affidavits and the APA and DEC filed a return consisting of twenty-five volumes of documents spanning four thousand ninety pages plus two audio-video compact discs. This Court has considered all of the papers and records submitted<sup>1</sup> as well as the oral argument of counsel on April 23, 2021.

### I. Facts

LS Marina, LLC (LS) purchased the real property encompassing the project in March 2014<sup>7</sup>. Since then, LS has pursued a permit from the Adirondack Park Agency for a permit to redevelop the marina facilities, a process started in 2013 by its predecessor in title, Crescent Bay Holdings, LLC, which had applied for a jurisdictional determination from the APA. By letters dated September 10, 2013, and October 4, 2013<sup>8</sup>, the APA's executive director rendered a jurisdictional determination that a shoreline variance would be required for the installation of a floating

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<sup>7</sup> Respondent APA Administrative Record Volume I, pages R00020-R00029.

<sup>8</sup> *Id.*, pages R00001-R00005.

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boathouse.

The Crescent Bay marina, as it existed prior to 2014, consisted of five pre-existing boathouses and docks covering 12,347± square feet which were attached to the shoreline of the lake providing 124 boat slips, a fueling station, and moorings for an additional 22 boats<sup>9</sup>. The Annex marina consisted of four pre-existing boathouses and docks covering 14,871± square feet which were attached to the shoreline of the lake providing 82 boat slips, and 12 additional “beached” boat berths plus 1 mooring, which together accommodated a total of 95 boats<sup>10</sup>.

In April 2014, LS filed an application for a variance from the APA’s shoreline restrictions<sup>11</sup>. Among other things, LS asserted that the existing boat slips, many of which were constructed in 1924, were too narrow to accommodate present-day pleasure boats and were in such a state of disrepair as to necessitate replacement because repair was not possible. Not only were the existing boat slips unusable, but the 655 feet of shoreline at Crescent Bay could only accommodate 60 eleven-foot-wide slips, a substantial reduction to the existing facility. Similarly, only 850 feet of the shoreline at the Annex was usable for boat slips and replacement would reduce the number of slips from 95 to 77. Also, the layout of the exiting boathouses “created unorganized and sometimes unsafe boat traffic circulation patters within the marina facilities”<sup>12</sup>. The four other competing marina facilities in the Saranac Lake and Lake Placid area were equipped with covered dock slips and LS needed covered slips as well to be competitive. In its permit application, LS sought to replace the existing boat slip and dock structures at Crescent Bay and the Annex, which pre-existed enactment of the APA Act (*Executive Law article 87*), with modern floating structures. LS

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<sup>9</sup> Burth affidavit, paragraphs 6-7.

<sup>10</sup> Burth affidavit, paragraphs 16-17.

<sup>11</sup> Respondent APA Administrative Record Volume I, pages R00006-R-00213.

<sup>12</sup> *Id.*, pages R00039-00050.

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asserted that “[i]n order to operated profitably, . . . 300 slips (286 covered 14 uncovered) are necessary for the project, with 186 slips being proposed at the marina and 114 slips proposed at the annex”<sup>13</sup>.

In September 2014, the New York State Office of Parks, Recreation and Historic Preservation (OPRHP) determined that “due to the loss of material integrity of many of the original structures proposed for demolition, it is the OPRHP opinion that the marina complex does not meet the criteria for inclusion in the State Register of Historic Places \* \* \* [and] [t]he demolitions proposed will not adversely impact historic resources”<sup>14</sup>. The town of Harrietstown Planning Board reviewed the proposed project in 2015 under the town zoning law and as lead agency under the State Environmental Quality Review Act (SEQRA). In the course of its fourteen-month review, the planning board considered the project plans, visual simulations of the project from different locations, a boat traffic assessment, a stormwater pollution prevention plan, and other information<sup>15</sup>. Based upon that review, eight boat slips were eliminated at Crescent Bay and the docks were reconfigured such that the dock length was decreased by sixty feet<sup>16</sup>. On April 3, 2015, the Planning Board made specific findings regarding, among other things, the project’s environmental impacts upon air quality, boat traffic, noise, water quality, natural resources, aesthetics, community and neighborhood character, and issued a negative declaration under SEQRA<sup>17</sup>. The Planning Board also adopted resolutions approving the site plan<sup>18</sup> and granting a special permit for grading, filling and clearing of land within five hundred feet of

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<sup>13</sup> *Id.*, page R00039.

<sup>14</sup> Respondent APA Administrative Record Volume IV, page R00578.

<sup>15</sup> *Id.*, page R00615.

<sup>16</sup> *Id.*, pages R00648-R00649. No known challenge to the Planning Board findings, determinations, and/or resolutions was or has been made.

<sup>17</sup> *Id.*, pages R00612-R00619.

<sup>18</sup> *Id.*, pages R00620-R00625.

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the shoreline at the project sites”<sup>19</sup>. In May, October and December 2015, DEC issued permits for the demolition of existing boathouses at both Crescent Bay and the Annex<sup>20</sup>.

In February 2016, LS filed applications for a major projects permit<sup>21</sup> and to conduct activities in wetlands<sup>22</sup>. Two days after filing the applications, LS filed a lengthy (288-page) response to prior APA requests for additional information<sup>23</sup>. According to the applications and the additional information submitted, LS proposed to install new floating dock systems at both Crescent Bay and the Ampersand Annex. At Crescent Bay, four docks would be installed ranging from 264 feet to 370 feet in length and offering 170 covered boat slips and 8 uncovered slips. Three floating docks would be placed perpendicular to the shoreline at the Ampersand Annex ranging from 160 to 186 feet in length, two of which would be in the man-made lagoon created in the 1950s, and provide 108 covered boat slips and 14 uncovered slips. The dock support posts and roofing of all covered boat slips would be painted dark brown and a flat dark green, respectively, to minimize glare and reflection and coordinate with the surrounding land<sup>24</sup>. Lighting would consist of shielded, dark-sky-compliant fixtures which would not reflect on the lake surface<sup>25</sup>. A July 2014 boat traffic study<sup>26</sup> was also included, the result of which was that the project would not result in significant impacts, a finding which was also made by the town planning board<sup>27</sup>.

LS claimed that its variance application sought the minimum

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<sup>19</sup> *Id.*, pages R00626-R006285

<sup>20</sup> *Id.*, page R00645.

<sup>21</sup> *Id.*, page R00571-R00628.

<sup>22</sup> *Id.*, R00629-R00637.

<sup>23</sup> *Id.*, page R00638-R00926.

<sup>24</sup> *Id.*, page R00647.

<sup>25</sup> *Id.*, pages R00650-R00651, R00801-R00807.

<sup>26</sup> *Id.*, pages R00820-R00844.

<sup>27</sup> *Id.*, pages R00655, R00820-R00843.



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relief necessary based upon the “need of increased revenues driven by a prior owner going bankrupt” and because the number of boat slips sought in its application was less than that of other existing marinas when considering shoreline length and acreage<sup>28</sup>. Five other marinas had an average of 67 boats per acre and 3 feet of shoreline per boat, while the LS project of 292 boat slips equated to 12 boats per acre and 6.82 shoreline feet per boat<sup>29</sup>. Demolition of the original boathouses was necessary for safety reasons and the new docks and boathouses with additional boat slips was commercially necessary “to make marina operations profitable”<sup>30</sup>.

Regarding the wetlands work, LS explained that work in the wetland areas was unavoidable for the marina but would be minimized due to water depth, the use of floating boathouses and the boat traffic pattern to be employed<sup>31</sup>. The actual work in the wetlands would consist of installation of floating dock supports covering a total of 3.75 square feet in the deep water marsh at the Annex and 5.6 square feet at Crescent Bay<sup>32</sup>, the installation of navigational and warning buoys to direct boat traffic so as to reduce or eliminate impacts to wetlands, and the dredging of a 7,000± square foot delta area located at the mouth of an existing culvert between two original boathouses to a depth of not more than three feet in order to match the contours of the lakebed on both sides of the mouth of the culvert<sup>33</sup>. The floating docks would “not displace water or otherwise affect wetland hydrology” nor “necessarily result in a decrease in aquatic habitat based upon the published scientific literature regarding aquatic plant density and fish populations”<sup>34</sup>. No compensatory wetland mitigation was proposed

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<sup>28</sup> *Id.*, pages R00646-R00647.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*, pages R00631-R00633.

<sup>31</sup> *Id.*, pages R00630-R00633.

<sup>32</sup> *Id.*, pages R00648 and R00660.

<sup>33</sup> *Id.*, pages R00632-R00633, R00659-R00660.

<sup>34</sup> *Id.*, pages R00660-R00663, R00850-R00854.

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“due to the almost negligible amount of wetland impacts”<sup>35</sup>, but non-compensatory mitigation consisting of navigational and warning buoys in and around the “lagoon” was planned “to protect areas of emergent vegetation”<sup>36</sup> by redirecting boat traffic<sup>37</sup>. Moreover, LS proposed on an on-going basis to remove non-native milfoil, an invasive species, by hand-harvesting from the wetlands<sup>38</sup>.

LS advised that it had considered a quick-launch system similar to one on Lake George but determined that it was not appropriate for its marina operations since such launches “are typically used on small sites with limited lake frontage and room for docks” and would require the construction of “an expansive warehouse building” and a headwall for launching with “impervious surface[s] right at the lake shore” which would cause additional shoreline impacts<sup>39</sup>. Furthermore, LS contended that a quick-launch would require not only the operation of large forklift resulting in significant loud noise and back-up alarms as well as polluting engine emissions, but also deprive early morning and late evening users of the marina of access to their boats when the marina was not in operation<sup>40</sup>. Overall, LS asserted that a quick-launch system would cause greater environmental impacts “both on the land and on the water side”<sup>41</sup>.

On February 19, 2016, the APA issued a notice of incomplete application due to insufficient information relating to LS’ proposed activities in wetlands at Crescent Bay<sup>42</sup>. The LA Group, a consultant for LS, responded to that request on March 4, 2016, and

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<sup>35</sup> *Id.*, page R00633.

<sup>36</sup> *Id.*, pages R00633, R00653-R00654, R00664.

<sup>37</sup> *Id.*, Page R00849.

<sup>38</sup> *Id.*, pages R00665, R00671, R00704.

<sup>39</sup> *Id.*, pages R00631 and R00665.

<sup>40</sup> *Id.*, page R00632.

<sup>41</sup> *Id.*

<sup>42</sup> Respondent APA Administrative Record Volume V, pages R00930-R00934.

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provided additional information about the proposed work in that wetland area<sup>43</sup>. The APA continued to deem the variance and major projects applications to be incomplete and issued a second notice of incompleteness on March 24, 2016 containing thirty additional requests including, among other things, information on whether any of the structures would be placed on state lands, the submission by LS of permit applications to the respondent Department of Environmental Conservation (DEC) and the United States Army Corps of Engineers (USACOE), wastewater treatment, underwater and shoreline watermarks relating to proposed structures, artificial lighting, and visibility of the proposed projects from area mountaintops<sup>44</sup>.

A joint permit application was submitted by LS to both DEC and the USACOE on April 14, 2016<sup>45</sup>. Both agencies deemed the application incomplete and requested additional information<sup>46</sup>. In July 2016, LS responded to the APA's March 2016 request for additional information, including submitting published scientific studies supporting its assertion that the project would not have a negative impact upon fishery<sup>47</sup>. LS responded to the DEC and USACOE requests<sup>48</sup>, which received the material on August 1, 2016<sup>49</sup>. Two weeks later, both DEC and APA notified LS that its applications were incomplete and requested more information. DEC advised that the joint application would be deemed incomplete not only "until such time as APA has a complete application"<sup>50</sup> but also because the town SEQR review had not considered the proposed wetland mitigation area and clarification was needed for

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<sup>43</sup> *Id.*, pages R00948-R00953.

<sup>44</sup> *Id.*, pages R01023-R01030.

<sup>45</sup> *Id.*, pages R01033-R01063.

<sup>46</sup> *Id.*, pages R01064-R01074.

<sup>47</sup> Respondent APA Administrative Record Volume VI, page R01091, to Volume VII, page R01410.

<sup>48</sup> Respondent APA Administrative Record, Volume VIII, pages R011578-R01606.

<sup>49</sup> *Id.*, page R0167.

<sup>50</sup> *Id.*

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possible impacts to submerged aquatic vegetation (SAV)<sup>51</sup>. The same day, APA issued a third notice of incomplete application and request for additional information<sup>52</sup>. LS appealed from this request<sup>53</sup> and sought further declaratory rulings reversing prior declaratory rulings in 2013 and 2014 by which the APA asserted that variances from the APA shoreline restrictions were required for the project<sup>54</sup>. When the APA executive director essentially refused to consider the petitions and reaffirmed the prior declaratory rulings<sup>55</sup>, LS unsuccessfully challenged that decision in a special proceeding under CPLR article 78<sup>56</sup>.

In late March 2017, LS supplied APA with responses to the third information request<sup>57</sup>, including an updated stormwater pollution prevention plan<sup>58</sup>. LS also revealed that title to certain underwater lands at Crescent Bay was unsettled and that a proceeding to determine ownership was in the process of being filed in Franklin County Supreme Court<sup>59</sup>. By letter dated April 12, 2017, the informed LS that while it had no further requests for information at that time further action on the applications would not occur until LS resolved the issue of title to the underwater land<sup>60</sup>. Litigation over ownership of those lands was resolved in August 2019 with a quitclaim deed to LS<sup>61</sup>.

By letter dated March 10, 2020, counsel for LS advised the APA that it would be submitting a new site plan showing the areas

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<sup>51</sup> *Id.*

<sup>52</sup> *Id.*, pages R01609-R01617.

<sup>53</sup> *Id.*, pages R01619-R01725.

<sup>54</sup> *Id.*, pages R01740-R

<sup>55</sup> *Id.* page R01804.

<sup>56</sup> Respondent APA Administrative Record Volume IX, pages R02028-R02033.

<sup>57</sup> *Id.*, pages R01805-R02023.

<sup>58</sup> *Id.*, pages R01856-R02023.

<sup>59</sup> *Id.*, page R01808.

<sup>60</sup> *Id.*, pages R02024-R02025.

<sup>61</sup> *Id.*, pages R02066-R02086.

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that would require a variance because prior submissions had incorrectly included approximately 10,000 square feet of dock roofing in calculating the square footage for which the variance was sought<sup>62</sup>. In May, LS responded to a question posed by APA staff in November 2019 regarding whether the floating covered docks with skylights would adversely impact SAV at a depth of two meters or less, particularly due to the inability of UV rays to reach the vegetation<sup>63</sup>. A sun study, with references to published scientific studies, and updated project plans were submitted<sup>64</sup>, with LS' engineer concluding that there would be "little to no impact on the sustainability and viability of SAV . . . [and] UV rays actually harm vegetation and photosynthetic processes"<sup>65</sup>. LS submitted revised drawings and an updated sun study during June, July and early August<sup>66</sup>.

The APA issued a notice on August 5, 2020, that the major project and variance applications were complete and set a date of August 27, 2020, for the public to submit written comments<sup>67</sup>. According to the applications, the project work at the Annex would include an increase in the number of boat dock and slip structures by 20%, from 95 to 114, with 60 having a roof with skylights and 24 having only a roof. An existing boat storage building would remain. The Crescent Bay marina project work included increasing the number of shoreline boat dock and slip structures from 124 to 178, a 43.5%± increase, of which 90 were to be covered by a roof without skylights, and increasing the number of moorings in the waters of Crescent Bay proper. All boat structures at both locations would be floating and replace pre-existing fixed structures on the shoreline.

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<sup>62</sup> Respondent APA Administrative Record Volume X, pages R02107-R02108

<sup>63</sup> *Id.*, pages R02110-R02

<sup>64</sup> *Id.*, pages R02128-R02436.

<sup>65</sup> *Id.*, pages R02110-R02112.

<sup>66</sup> Respondent APA Administrative Record Volume XI, page R02503 to Volume XIII, page-R02694.

<sup>67</sup> Respondent APA Administrative Record Volume XII, pages R02649-R02650.

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The existing boat launch was to be improved and expanded, and a boat-wash station would be installed. Both sites were to have landscaping performed and vegetation planted for erosion control and stormwater management, and the wastewater treatment facilities would be brought to current standards. Buoys and warning signs were to be placed in the water to limit boat speed and direct boat traffic so as to minimize adverse impacts upon the wetlands and wetland vegetation. An invasive species management plan utilizing hand-harvesting was to be implemented to address milfoil.

A public hearing by videoconference was scheduled for August 21, 2020, at 1:30 p.m.<sup>68</sup>. The hearing was conducted over the course of almost two hours<sup>69</sup> with sixty-nine members of the public participating in addition to APA staff and representatives of LS. In addition, the APA received two hundred eighty-four written comments, some in favor and some in opposition to the project<sup>70</sup>.

The APA Regulatory Committee considered the applications at its meeting on September 10, 2020, and approved the same with certain staff-recommended conditions<sup>71</sup> for consideration by the full agency board at its meeting the next day<sup>72</sup>. The applications by LS were approved by the full agency the next day, and the order and permit was issued on September 14, 2020<sup>73</sup>. On November 6, 2020, DEC issued a temporary revocable permit for the project<sup>74</sup>.

## II. Standing

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<sup>68</sup> Respondent APA Administrative Record Volume XIII, page R02695.

<sup>69</sup> Respondent APA Administrative Record Volume XIV DVD Video IMG\_0134.

<sup>70</sup> Respondent APA Administrative Record Volume XVI, page R03062 to Volume XVII, page R03558.

<sup>71</sup> Respondent APA Administrative Record Volume XV, page R03007.

<sup>72</sup> Respondent APA Administrative Record DVD Video filed April 27, 2021.

<sup>73</sup> Respondent APA Administrative Record Volume XV, pages R03042-R03061.

<sup>74</sup> Respondent APA Administrative Record Volume XXV, pages R04069-R04090.

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"Standing is, of course, a threshold requirement for a plaintiff seeking to challenge governmental action. The two-part test for determining standing is a familiar one. First, a plaintiff must show 'injury in fact,' meaning that plaintiff will actually be harmed by the challenged administrative action. As the term itself implies, the injury must be more than conjectural. Second, the injury a plaintiff asserts must fall within the zone of interests or concerns sought to be promoted or protected by the statutory provision under which the agency has acted (*see Society of Plastics Indus. v. County of Suffolk*, 77 N.Y.2d 761, 773, 570 N.Y.S.2d 778, 573 N.E.2d 1034 [1991]; *Matter of Colella v. Board of Assessors*, 95 N.Y.2d 401, 409-410, 718 N.Y.S.2d 268, 741 N.E.2d 113 [2000] )." [internal quotation marks omitted] (*New York State Ass'n of Nurse Anesthetists v. Novello*, 2 N.Y.3d 207, 211, 778 N.Y.S.2d 123, 125, 810 N.E.2d 405, 407 [2004]).

Jorling alleges in the petition and complaint<sup>75</sup>, and in his affidavit submitted therewith<sup>76</sup>, that he "will be uniquely affected"<sup>77</sup> by the project because his residential real property is located across Ampersand Bay, "a quiet, serene area"<sup>78</sup>, from the Annex site. Though more than five hundred feet away from the Annex<sup>79</sup>, Jorling avers that his property, and his enjoyment of "boating, swimming and relaxing on the shore of Ampersand Bay"<sup>80</sup>, will be adversely impacted "due to the increased noise, increased light, increased activity, increased stormwater runoff, a reduction to my property

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<sup>75</sup> See paragraph 16 of petition and complaint.

<sup>76</sup> See paragraphs 2-7 of Jorling affidavit sworn to December 30, 2020.

<sup>77</sup> See petition and complaint, paragraph 16.

<sup>78</sup> Jorling affidavit, paragraph 3.

<sup>79</sup> Respondent APA Administrative Record Volume IV, page R00597.

<sup>80</sup> Jorling affidavit, paragraphs 6-7.

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value, negative aesthetic and visual impacts, and . . . irreparabl[e] alter[ation of] the character of Ampersand Bay”<sup>81</sup>.

None of the allegations establish an actual injury from the Crescent Bay portion of the project located more than half of a mile from Jorling’s property. “The existence of an injury in fact — an actual legal stake in the matter being adjudicated — ensures that the party seeking review has some concrete interest in prosecuting the action which casts the dispute ‘in a form traditionally capable of judicial resolution.’ (*Schlesinger v. Reservists to Stop the War*, 418 U.S. 208, 220–221, 94 S.Ct. 2925, 2932, 41 L.Ed.2d 706.) The requirement of injury in fact for standing purposes is closely aligned with our policy not to render advisory opinions (*see, Cuomo v. Long Is. Light. Co.*, 71 N.Y.2d 349, 354, 525 N.Y.S.2d 828, 520 N.E.2d 546).” (*Soc’y. of Plastics Indus., Inc. v. County of Suffolk*, 77 N.Y.2d 761, 772–773, 573 N.E.2d 1034, 1040, 570 N.Y.S.2d 778, 784 1991)). To the extent that Jorling’s allegations of injury relate to the Crescent Bay portion of the project, the same are at best speculative and “are merely generalized claims of harm no different in kind or degree from the public at large, which are insufficient for standing purposes (*see, Matter of Otsego 2000 v. Planning Bd. of Town of Otsego*, 171 A.D.2d 258, 260, 575 N.Y.S.2d 584, *lv. denied* 79 N.Y.2d 753, 581 N.Y.S.2d 281, 589 N.E.2d 1263).” (*Matter of Schulz v. Warren County Bd. of Sup’rs*, 206 A.D.2d 672, 674, 614 N.Y.S.2d 809, 811 [3d Dept., 1994], *lv. denied* 85 N.Y.2d 805, 626 N.Y.S.2d 756, 650 N.E.2d 415 [1995]). Jorling thus lacks standing to challenge the project at that location.

Even with regard to the Annex site, many of Jorling’s claims of injury are speculative and unsupported by the record. There is nothing to suggest that Jorling’s property will decrease in value. There is no stormwater runoff or erosion controls now at the Annex and the project will install such controls, and no explanation has

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<sup>81</sup> Jorling affidavit, paragraph 5.



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been provided by Jorling as to how his property will thus be adversely affected thereby. His claims of aesthetic and visual injury are also speculative and subjective, particularly in light of the record evidence establishing that the Annex project replaces 26,973± square feet of dilapidated wooden covered boatslips with new brown and green floating structures<sup>82</sup> which blend into the natural features on land<sup>83</sup>, and allows for 16,131± square feet of natural wetland revegetation<sup>84</sup>. Similarly abstract is Jorling's assertion of injury from increased lighting as the project requires the installation of "low wattage, ceiling mounted lights that will also minimize light migration"<sup>85</sup>, low-wattage "'dock dot' marker lights . . . of relatively low-output and not visually intrusive or detrimental"<sup>86</sup> spaced along the perimeter of the docks for safety purposes, and there will be "no site light fixtures at the Annex"<sup>87</sup>.

The only allegations of possible actual injury involve potential increased noise and activity in the waters of Ampersand Bay between the Annex and Jorling's property. The number of boat slips at the Annex would be increased by 19 slips from 95 to 114. The 2014 boat traffic study, and the members of the APA Regulatory Committee, recognized that not all boats at either project site would be in use at the same time<sup>88</sup> and that there were other public, state boat launch access points at Second Pond and Ampersand Bay by which boat traffic on Lower Saranac Lake could be increased by up to approximately 110 boats<sup>89</sup>. No data was provided by LS to the APA, and none has been furnished by Jorling,

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<sup>82</sup> See Respondent APA Administrative Record Volume XV, page R02951.

<sup>83</sup> *Id.*, pages R02981-R02986.

<sup>84</sup> Respondent APA Administrative Record Volume IV, page R00783 where the town planning board determined that "[r]emoval of dilapidated buildings will improve the appearance of the property."

<sup>85</sup> *Id.*, pages R00651, R00783 and R00801.

<sup>86</sup> *Id.*, and pages R00802- R00807.

<sup>87</sup> *Id.*, pages R00650-R00651.

<sup>88</sup> *Id.*, page R00823.

<sup>89</sup> *Id.*, pages R00821-00823.

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quantifying the amount, if any, by which the noise level on the lake adjacent to Jorling's property would increase by reason of the use of Ampersand Bay by boats berthed at the Annex. Jorling's contentions of injury-in-fact from increased noise and activity resulting from the Annex portion of the project are tenuous at best, but since those assertions fall within the zone of interests sought to be protected by the APA Act, the same are minimally sufficient to confer standing.

### III. Statute of Limitations

Judicial review of APA permits and orders is governed by a sixty (60) day statute of limitations (*Executive Law §818(1)*). Although this action was commenced more than sixty days after the APA permit and order was issued on September 14, 2020, that period was tolled by reason of various executive orders issued by the Governor due to the COVID-19 state of emergency. Executive Order No. 202.8, issued on March 20, 2020, provided that "any specific time limit for the commencement, filing, or service of any legal action, notice, motion, or other process or proceeding, as prescribed by the procedural laws of the state, including but not limited to . . . the civil practice law and rules . . . is hereby tolled from the date of this executive order until April 19, 2020." Successive executive orders continued "the suspensions and modifications of law, and any directives, not superseded by a subsequent directive" through and including November 3, 2020 (*Executive Order Nos. 202.67, 202.72*). The commencement of this proceeding by electronic filing on December 31, 2020, was timely as to the APA permit and order.

The temporary revocable permit was issued by DEC on November 6, 2020, well within the four-month statute of limitations in CPLR §217.

### IV. Challenges to APA & DEC Administrative Determinations

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Judicial review of a determination by an administrative agency under CPLR Article 78 is limited to whether the challenged decision “was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion” (*CPLR §7803(3)*).

"This review is deferential for it is not the role of the courts to weigh the desirability of any action or choose among alternatives' (*Matter of Friends of P.S. 163, Inc. v. Jewish Home Lifecare, Manhattan*, 30 N.Y.3d 416, 430, 68 N.Y.S.3d 382, 90 N.E.3d 1253 [2017] [internal quotation marks and citation omitted]; *see Matter of Beck-Nichols v. Bianco*, 20 N.Y.3d 540, 559, 964 N.Y.S.2d 456, 987 N.E.2d 233 [2013] [the 'standard is, of course, an extremely deferential one']). '[T]he courts cannot interfere unless there is no rational basis for the exercise of discretion' or 'the action is without sound basis in reason . . . and taken without regard to the facts' (*Matter of Pell v. Board of Educ. Of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County* 34 N.Y.2d 222, 231, 356 N.Y.S.2d 833, 313 N.E.2d 321 [1974]; *see Matter of Society for Ethical Culture in City of N.Y. v. Spatt*, 68 A.D.2d 112, 116, 416 N.Y.S.2d 246 [1st Dept. 1979] ['our inquiry is directed to a determination of whether the commission's (decision) had a rational basis or, if, ... it was arbitrary and capricious']). It follows that '[i]f the court finds that the determination is supported by a rational basis, it must sustain the determination even if the court concludes that it would have reached a different result than the one reached by the agency' (*Matter of Peckham v. Calogero*, 12 N.Y.3d 424, 431, 883 N.Y.S.2d 751, 911 N.E.2d 813 [2009])." (*Save Am.'s Clocks, Inc. v. City of New York*, 33 N.Y.3d 198, 207,

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100 N.Y.S.3d 639, 646, 124 N.E.3d 189, 196 [2019],  
*rearg denied*, 33 N.Y.3d 1054, 103 N.Y.S.3d 26, 126  
 N.E.3d 1066 [2019]).

Jorling asserts that the APA violated lawful procedure, and acted arbitrarily and capriciously, by failing to make certain determinations required by Executive Law §809(10) before granting the major project and wetlands permits, consider criteria for granting a variance from APA shoreline restrictions (9 NYCRR §576.1(c), complete a comprehensive study of the “carrying capacity” of Lower Saranac Lake as suggested in the Saranac Lakes Wild Forest Unit Management Plan in order to assess the impact of the project on that capacity, and properly value the wetlands at both project sites and evaluate the project’s impact thereon.

## A.

The second and sixth causes of action are premised upon the allegation that the APA failed to make determinations on five criteria required by Executive Law §809.10(e). The permit and order here, though lacking specific, numbered findings of fact, contains substantial factual findings and determinations which collectively constitute rulings on each of those criteria as they apply to the major project and wetlands permit applications. As the Third Department noted in Matter of Protect the Adirondacks! Inc. v. Adirondack Park Agency, 121 A.D.3d 63, 77, 990 N.Y.S.2d 643, 654 (3d Dept., 2014):

"Also without merit is petitioners' argument that the APA failed to make detailed findings of fact, supported by specific references to the record, as to how the project complied with the statutory criteria. The order approving the project contains over 100 findings of fact, followed by the APA's conclusions of law. Within these findings is support for each of the enumerated criteria

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of Executive Law § 809(10) and the APA's ultimate conclusion that, upon compliance with the terms and conditions of the order and permits, the project 'complies with the applicable approval criteria.' Additionally, inasmuch as '[t]he making of findings of fact [by the APA] shall constitute a ruling upon each finding proposed by the parties' (9 NYCRR 580.18 [c]; *see* State Administrative Procedure Act §307[1]), we reject petitioners' claim that the APA was required to explicitly rule on any proposed findings of fact that may have been implied in their submittals."

The voluminous record here, amassed over more than six years of effort by LS to obtain the permits and variances, contains substantial and mostly uncontroverted evidence to support the determinations by the APA and DEC to grant the permit and variance applications. Thus, the second and sixth causes of action are without merit.

## B.

Shoreline restrictions under the Adirondack Park Agency Act (*Executive Law art. 27*) are set forth in Executive Law §806 and involve minimum lot widths and shoreline frontages, minimum setbacks for principal buildings and accessory structures, standards for removal of vegetation on shorefront lots, and "overall intensities of principal buildings (other than boathouses) per linear mile of shoreline or proportionate fraction thereof . . ." (*Executive Law §806[5]*). Paragraph 3(a) of §806 provides that "a variance from the strict letter of the shoreline restrictions in connection with any new land use or development or subdivision of land" *shall* be granted "where there are practical difficulties or unnecessary hardships in the way of carrying out the strict letter of the restrictions . . . so that the spirit of such restrictions shall be observed, public safety and welfare secured and substantial justice done."

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The terms “practical difficulties” and “unnecessary hardships” are not defined in the APA Act<sup>90</sup>. However, the APA adopted its own standards for its review and determination of variance applications (*9 NYCRR Part 576*). The permit here specifically addresses each of the six factors required to be considered by the regulation (*9 NYCRR 576.1[c]*)<sup>91</sup>. There is ample evidence in the record to support the APA’s analysis of those factors and its conclusions that the variance afforded the minimum relief necessary, would not be substantially detrimental to adjoining or nearby landowners, could not be obviated by a feasible method other than a variance, and would not have an adverse effect upon the park’s resources, aesthetic character, or the lake, particularly with the conditions imposed. The difficulty arose not due to any fault on the part of LS, but because the pre-existing nine boathouses over which the APA had no jurisdiction if rebuilt were in such dilapidated condition as to require replacement of some kind, and

<sup>90</sup> Prior to a change in Town Law §267, those terms were applied in the context of town zoning decisions and “court decisions generally applied the ‘unnecessary hardship’ test in use variance cases, while requiring a demonstration of ‘practical difficulties’ in area variance cases (*see, Matter of Village of Bronxville v. Francis*, 1 A.D.2d 236, 238, 150 N.Y.S.2d 906, *aff’d* 1 N.Y.2d 839, 153 N.Y.S.2d 220, 135 N.E.2d 724; *see also, Matter of Hoffman v. Harris*, 17 N.Y.2d 138, 144, 269 N.Y.S.2d 119, 216 N.E.2d 326; *Dauernheim, Inc. v. Town Bd.*, 33 N.Y.2d 468, 471, 354 N.Y.S.2d 909, 310 N.E.2d 516; *Matter of Off Shore Rest. Corp. v. Linden*, 30 N.Y.2d 160, 168, 331 N.Y.S.2d 397, 282 N.E.2d 299).” (*Matter of Sasso v. Osgood*, 86 N.Y.2d 374, 380, 633 N.Y.S.2d 259, 261, 657 N.E.2d 254, 256 [1995]).

<sup>91</sup> “(c) In determining whether a variance shall be granted, the agency will consider, among other relevant factors: (1) whether the application requests the minimum relief necessary; (2) whether granting the variance will create a substantial detriment to adjoining or nearby landowners; (3) whether the difficulty can be obviated by a feasible method other than a variance; (4) the manner in which the difficulty arose; (5) whether granting the variance will adversely affect the natural, scenic, and open space resources of the park and any adjoining water body, due to erosion, surface runoff, subsurface sewage effluent, change in aesthetic character, or any other impacts which would not otherwise occur; and (6) whether the imposition of conditions upon the granting of the variance will ameliorate the adverse effects referred to in paragraph (5) of this subdivision.” See Respondent APA Administrative Record Volume XV, pages R03052-R03055 for APA discussion, analysis and determination of these factors.

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the project represented a significant improvement environmentally. Jorling's claim that the APA did not properly address or consider "whether the application requests the minimum relief necessary" (9 NYCRR 576.1[c][1]) is without merit as this factor was specifically addressed in the permit and order<sup>92</sup>. Also, over the more than six years LS has been pursuing permits and a variance from the respondents APA and DEC, it has substantially reduced the scope of the project in response to input from those agencies<sup>93</sup>.

Furthermore, the regulations provide that "[a] variance will be granted when the adverse consequences to the applicant resulting from denial are greater than the public purpose sought to be served by the restriction" (9 NYCRR §576.1[b]). In weighing the adverse consequences to LS of having to reconstruct its nine boathouse structures and fueling station on the original shoreline footprints in wetland areas should the variance be denied against the restrictions' purposes of protecting shorelines and natural resources, it was rational for the APA to conclude that the negative consequences not only to LS but to the shorelines and wetlands were "greater than the public purpose sought to be served by the restriction". The determination to grant the variance was not arbitrary or capricious, affected by an error of law, or made in violation of lawful procedure.

The third cause of action is thus dismissed.

## C.

The fourth and fifth causes of action are also dismissed as without merit.

To the extent that Jorling relies upon the recommendation in

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<sup>92</sup> Respondent APA Administrative Record Volume XV, page R03053.

<sup>93</sup> See Burth affidavit.

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the Saranac Lake Wild Forest Unit Management Plan of the State Land Master Plan that a “‘comprehensive study’ of Lower Saranac Lake and the other lakes in the unit”<sup>94</sup> for carrying capacity be completed, such reliance is misplaced. The issue of carrying capacity is not ripe for judicial review. “[B]ecause the harm anticipated by petitioner may be prevented by further administrative action, it has not alleged an actual, concrete injury and its . . . challenges are therefore not ripe for review (*see Matter of New York State Inspection, Sec. & Law Enforcement Empls., Dist. Council 82, AFSCME, AFL-CIO v. Cuomo*, 64 N.Y.2d at 240, 485 N.Y.S.2d 719, 475 N.E.2d 90; *Matter of Guido v. Town of Ulster Town Bd.*, 74 A.D.3d 1536, 1537-1538, 902 N.Y.S.2d 710 [2010]; *Matter of Federation of Mental Health Ctrs. v. DeBuono*, 275 A.D.2d at 562, 712 N.Y.S.2d 667; *see also Matter of Brunswick Smart Growth, Inc. v. Town of Brunswick*, 73 A.D.3d 1267, 1268-1269, 901 N.Y.S.2d 387 [2010]).” (*Matter of Adirondack Council, Inc. v. Adirondack Park Agency*, 92 A.D.3d 188, 191, 936 N.Y.S.2d 766, 769 [3d Dept., 2012]).

A review of the administrative record, as well as the presentation by staff to the APA board members, and the questions and answers between them,<sup>95</sup> revealed that the permit and variance applications reflected a proposal by LS to forego its legal rights to replace legally pre-existing boathouse and fixed dock structures in wetlands without APA permits and variances in exchange for submitting to APA jurisdiction and engaging in what the staff and committee members appeared to consider to be significant, environmentally responsible<sup>96</sup> development. Neither the Crescent

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<sup>94</sup> Petition and Complaint at page 24, paragraphs 160-161.

<sup>95</sup> *Id.*, and Respondent APA Administrative Record Volume XV, pages R02839-R03032.

<sup>96</sup> While it may be argued that the proposal does not include enough environmentally responsible development, or that such development does not outweigh the negative environmental impacts therefrom, such is a matter for the respondents-defendants APA and DEC to determine. “[T]he courts have no right to review the facts



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Bay nor Annex sites had any stormwater management facilities, erosion controls, or invasive species protections, and the wastewater treatment systems were out-of-date. The project, if approved, would reduce the number of covered boat slip structures, remove structures from portions of wetland areas, replace fixed dock and boat slip structures with floating structures, implement boat traffic restrictions and invasive species management practices (to be determined at a later date) to protect and preserve wetlands and fishery, construct up-to-date wastewater treatment facilities, and install landscaping, plantings and erosion controls. None of the foregoing could be required of LS were it to merely reconstruct the legally pre-existing marina structures and facilities within critical wetland areas. According to the vast amounts of information before the APA, staff reported that approval of the permit and variance applications would have a positive impact upon wetlands by reducing the number of boats operating and berthed in wetland areas, with a resulting decrease in turbidity in those areas; the removal of barriers, in the form of boathouse structures along the shoreline, to wildlife movement between the riparian and littoral zones of the lake; and the natural formation of approximately 16,131 square feet of new wetland vegetation.

While concerns were expressed by committee members over the visual impact of the project and its effect upon the "carrying capacity" of Lower Saranac Lake, they did not find either issue sufficient to justify rejection of the applications by LS for a permit and variances. The committee members, and later the entire APA Board, were able to assess the extent of the project's visual impact

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generally as to weight of evidence, beyond seeing to it that there is 'substantial evidence' (*Cohen and Karger, Powers of the New York Court of Appeals*, §108, p. 460; *1 N.Y.Jur., Administrative Law*, ss 177, 185; see *Matter of Halloran v. Kirwan*, 28 N.Y.2d 689, 690, 320 N.Y.S.2d 742, 743, 269 N.E.2d 403 (*dissenting opn. of Breitel, J.*))." [internal quotation marks omitted] (*Pell v. Bd. of Ed. of Union Free School Dist. No. 1 of Towns of Scarsdale and Mamaroneck, Westchester County*, 34 N.Y.2d 222, 230, 356 N.Y.S.2d 833, 839, 313 N.E.2d 321, 325 [1974]).

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from numerous photographs<sup>97</sup>, a visual analysis, and other data. The committee also recognized that there were no standards for determining “carrying capacity” of a water body and that limiting the number of boat slips at Crescent Bay and the Annex would not necessarily limit the number of boats on the lake due to the number of other, unregulated public and private access points where no restrictions on access exist. As at least one committee member noted, it was speculative to suggest that limitations on the number of boat slips would reduce boat traffic on the lake for the foregoing reasons and because not all boats moored with LS would necessarily be used every day, all at once, or at any discernable frequency, and some of those boats may already be in use on the lake and will be docked with LS for convenience purposes.

Jorling alleges no specific failures on the part of DEC in issuing the temporary revocable permit for the docking facilities on November 6, 2021. The record here supports the issuance of that permit based upon LS having “met all requirements for the issuance of permits pursuant to ECL 15-0503 (1)(b)(1) and (2) and Navigation Law 32 and 35-a.”<sup>98</sup> Moreover, as an upland owner LS possesses the riparian right to build floating docks, and rent slips to boat owners, as long as navigation is not obstructed (*see, Town of Hempstead v. Oceanside Yacht Harbor, Inc.*, 38 A.D.2d 263, 328 N.Y.S.2d 894 [2d Dept., 1972], *affd sub nom. Town of Hempstead v. Oceanside Yacht Harbor*, 32 N.Y.2d 859, 346 N.Y.S.2d 529, 299 N.E.2d 895 [1973]).

## V. Conclusion

"[I]t cannot be said that the [APA or DEC] acted with ‘no rational basis’ (*Matter of Pell*, 34 N.Y.2d at 231, 356 N.Y.S.2d 833,

<sup>97</sup> Among other photographs in the record, see APA Administrative Record Volume XVII, page R03559 to Volume XXV, page R04007.

<sup>98</sup> Affidavit of Kristofer Alberga, sworn to March 11, 2021.

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313 N.E.2d 321),’ (*Save Am.’s Clocks, Inc. v. City of New York, supra.*, at 209, 100 N.Y.S.3d at 647, 124 N.E.3d at 197). Jorling’s remaining allegations have been examined and the same are found to be legally insufficient to justify annulling and vacating the permits and order. Simply put, the administrative determinations challenged by Jorling were not made in violation of lawful procedure, affected by an error of law, or arbitrary or capricious. Therefore, the petition and complaint and this combined proceeding and action are dismissed.

*It is so ordered and adjudged.*

ENTER

  
 Hon. Richard B. Meyer, A.J.S.C.

i The Court has considered the following papers submitted by:

Petitioner-Plaintiff Thomas Jorling: Petition and complaint verified December 30, 2020; affidavit of Thomas Jorling sworn to December 30, 2020, with exhibits A through D; affidavit of Barbara Rottier sworn to December 31, 2020, with exhibit A; affidavit of Claudia K. Braymer, Esq. sworn to December 31, 2020 with exhibit A; memorandum of law dated December 31, 2020; and reply memorandum of law dated April 2, 2021.

Respondents-Defendants APA and DEC: answer and objections in point of law verified March 11, 2021; administrative return consisting of twenty-five volumes comprised of 4,090 pages and two compact discs of audio and video recordings; affidavit of John Burth sworn to March 11, 2021; affidavit of Kristofer Alberga sworn to March 11, 2021 with exhibit A; affidavit of Carolyn L. Wiggin sworn to March 10, 2021 with exhibits A through F; memorandum of law dated March 12, 2021.

Respondent-Defendant LS Marina, LLC: Answer verified March 12, 2021, objections in point of law dated March 12, 2021, affirmation of Matthew D. Norfolk, Esq. dated March 12, 2021 with exhibits A through I, affidavit of Michael Damp sworn to March 12, 2021, affidavit of Stephen P. George sworn to March 10, 2021 with exhibits A and B, affidavit of Todd Lepine sworn to April 11, 2018, with exhibits A through C, supplemental affidavit of Stacey Allot sworn to April 12, 2018 with exhibits A and B.