

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ESSEX

In the Matter of

SUZANNE CARRILLO KERN, HOWARD KERN,
JEFFREY HAIDINGER, JOHN BRENNAN, JEAN
BRENNAN, MARY ANN RANDALL, and
CHRISTOPHER COHAN

**VERIFIED PETITION
AND COMPLAINT**

Petitioners-Plaintiffs,

Index No.:

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

Date Filed:

-against-

ADIRONDACK PARK AGENCY, PAUL LEINWAND,
and MARIA CICARELLI,

Respondents-Defendants.

Petitioners-Plaintiffs Suzanne Carrillo Kern, Howard Kern, Jeffrey Haidinger, John Brennan, Jean Brennan, Mary Ann Randall, and Christopher Cohan (“Petitioners”) by and through their attorney, Braymer Law, PLLC, for their verified petition and complaint, herein allege as follows:

PRELIMINARY STATEMENT

1. This is a combined action and Article 78 proceeding seeking to annul, vacate and set aside the decisions by respondent-defendant Adirondack Park Agency (“APA”) that approved a request by Paul Leinwand and Maria Cicarelli (“Applicants”) for the construction of a development project in the Town of Santa Clara, 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. The Project involves the construction of a residential dwelling, with a secondary structure that is to be a garage with a “breezeway” connecting the two structures. The proposed garage will double as a residence. There is an access driveway, well, underground utilities, onsite wastewater treatment system, walking paths, boardwalks, bridges, log corduroys, and a dock on Upper Saranac Lake.

3. The site of the Project is 3.2 acres and is located on the shoreline of Upper Saranac Lake (240 feet of shoreline) and contains a large area of wetlands of critical importance to the ecosystem of Upper Saranac Lake. The site of the Project contains mature forest and is undeveloped except for the existence of a walking trail through the property.

4. There is a large wetland complex surrounding the Project site.

5. On May 27, 2021, APA issued a permit compliance letter to the Applicants.

6. The May 27, 2021 permit compliance letter (“Compliance Letter”) stated that the construction of the Applicants’ proposed dwelling, attached garage, access driveway, well, and underground utilities did not require any further review or approvals. A copy of the Compliance Letter is annexed hereto as **Exhibit “A.”**

7. The Compliance Letter did not authorize any cutting of trees or vegetation within, or disturbance of, the wetlands.

8. The Compliance Letter stated that the Applicants’ proposal for an onsite wastewater treatment system would require an amendment to the existing permit for the site of the Project because that permit did not allow an onsite wastewater treatment system and required use of an offsite septic area.

9. In addition, according to the Compliance Letter, the Applicants' 2021 proposal requires an amendment from "Conditions 6 and 7 of Permit 87-74, which state that any on-site sewage disposal system must 'incorporate at least two feet of fill with a percolation rate of 15 to 45 minutes/inch, below and or around the distribution lines,' and that all leaching components of any system **must be set back a minimum of 200 feet from wetlands**".

10. On June 18, 2021, APA issued a permit amendment ("Permit Amendment") that amended conditions 6 and 7 of the 1988 Permit to authorize a change to the "wastewater treatment system design and location". A copy of the Permit Amendment is annexed hereto as **Exhibit "B."**

11. Given the lack of any rational basis for removing significant protection given to the wetlands in the prior permit, and failure to comply with existing regulations, the APA's Compliance Letter and Permit Amendment were arbitrary and capricious and must be annulled.

12. Petitioners seek judgment annulling the Compliance Letter and Permit Amendment.

13. Additionally, Petitioners seek a declaration that the Applicants are prohibited from cutting trees or otherwise disturbing the wetlands on the Applicants' property, and that the existing walking trails on the Applicants' property are open to use by the Petitioners.

PARTIES

14. Petitioner Suzanne Carrillo Kern owns property located at 28 Deerwood Lane in the Town of Santa Clara, Franklin County. Her property is located on the shore of the North Basin of Upper Saranac Lake, and is adjacent to the location of the site for the Project that is the

subject of this action and proceeding. She is an owner of a lot in the Deerwood subdivision and is a member of the Deerwood Homeowners' Association.

15. Petitioner Howard Kern owns property located at 28 Deerwood Lane in the Town of Santa Clara, Franklin County. His property is located on the shore of the North Basin of Upper Saranac Lake, and is adjacent to the location of the site for the Project that is the subject of this action and proceeding. He is an owner of a lot in the Deerwood subdivision and is a member of the Deerwood Homeowners' Association.

16. Petitioner Jeffrey Haidinger owns property located at 19 Deerwood Lane in the Town of Santa Clara, Franklin County. His property is located on the shore of the North Basin of Upper Saranac Lake, and is in close proximity to the location of the site for the Project that is the subject of this action and proceeding. He is an owner of a lot in the Deerwood subdivision and is a member of the Deerwood Homeowners' Association. Access to the site of the Project is over a dirt road located on Petitioner Haidinger's property. Upon information and belief, Applicants' contractors are using Petitioner Haidinger's property as a staging area for their construction vehicles.

17. Petitioner John Brennan owns property located at 26 Pinewood Lane in the Town of Santa Clara, Franklin County. His property is located on the shore of the North Basin of Upper Saranac Lake, and is approximately 500 yards from the location of the site for the Project that is the subject of this action and proceeding.

18. Petitioner Jean Brennan owns property located at 26 Pinewood Lane in the Town of Santa Clara, Franklin County. Her property is located on the shore of the North Basin of Upper Saranac Lake, and is approximately 500 yards from the location of the site for the Project that is the subject of this action and proceeding.

19. Petitioner Mary Ann Randall owns property located at 26 Pinewood Lane in the Town of Santa Clara, Franklin County. Her property is located on the shore of the North Basin of Upper Saranac Lake, and is approximately 500 yards from the location of the site for the Project that is the subject of this action and proceeding.

20. Petitioner Christopher Cohan is a seasonal resident of the property located at 21 Loon Over Lane in the Town of Santa Clara, Franklin County. This property is located on the shore of the North Basin of Upper Saranac Lake, and is approximately 250 yards from the location of the site for the Project that is the subject of this action and proceeding.

21. Petitioners own or reside at property that is adjacent or in close proximity to the site of the Project. They and their properties will be uniquely affected by the impacts from the Project. The Project creates a dramatic increase in the intensity of uses that are present on the subject property, which is currently undeveloped. As such, the Project will result in changes that will impact Petitioners, such as increased noise, increased light, increased activity, increased stormwater runoff, a reduction in Petitioners' property values, negative aesthetic and visual impacts.

22. In addition, the Project will irreparably alter the character of the North Basin of Upper Saranac Lake, and will have adverse impacts on the wetlands on and surrounding the Property. These wetlands have a value 1 wetlands rating (the highest rating a wetlands can have) with a Fen; together, both include active fresh water streams that are integral to maintaining the water quality of Upper Saranac Lake. Further, the wetlands are home to a wide variety of native plants not often found elsewhere. Petitioners will be negatively impacted by the degradation of the water quality, and reduction of plants species, found in the wetlands and in Upper Saranac

Lake. See Affidavit of Howard Kern, submitted simultaneously herewith and fully incorporated herein.

23. Thus, the Project will greatly impact the use and enjoyment of Petitioners' properties, such that they are entitled to maintain this combined proceeding and action.

24. 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. APA approved the Compliance Letter and Permit Amendment that this proceeding seeks to have annulled.

25. Upon information and belief, respondents-defendants Paul Leinwand and Maria Cicarelli are the Applicants and owners of the property that is the site of the Project. Applicants obtained the Compliance Letter and Permit Amendment that Petitioners seek to have annulled in this proceeding. Therefore, they are necessary parties to this action and proceeding pursuant to CPLR § 1001.

VENUE

26. 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

27. There is an existing APA permit for the Deerwood subdivision, which includes Lot 9, the site of the Project. That Permit, dated June 6, 1988 ("1988 Permit"), allowed for a subdivision of a larger parcel to create five new building lots. It also allowed for a nonbuilding

lot, and an open space parcel for a total of seven new lots. A copy of the 1988 Permit is annexed hereto as **Exhibit “C.”**

28. The 1988 Permit recognized that the 55.22-acre site contained a 1.56± acre bog pond, with outlet stream that flows into Upper Saranac Lake.

29. The 1988 Permit also recognized that the site contained a 25± acre wetland complex, including the bog pond, and a surrounding bog mat area with periphery shrub and coniferous swamp fringes. The wetland “is highly diverse and valuable” according to the 1988 Permit.

30. The APA indicated that “[b]ecause of the excessively drained nature of the soils surrounding the wetland and the acidic/bog character of the wetland complex, the effect of potential nutrient loading on the bog wetland complex is a matter of concern”.

31. “Bogs are thought to be deficient in available nitrogen” and that “the addition of nitrogen to bogs . . . adversely affects the vegetation”. “Decreases in species diversity of wetland systems after enrichment by nutrients has been observed in many wetlands”. 1988 Permit p. 8.

32. “Plants would be directly affected by changes in nutrients in the water”. “Replacement of species and changes in the distribution of plants is likely to occur first on the edges, where groundwater is released to wetland. Further changes would radiate out from the direction of the groundwater source”. 1988 Permit p. 9.

33. However, “[a]s a result of the revisions to the project . . . and with special septic system designs and construction the potential adverse impacts to the wetland will be mitigated”. 1988 Permit p. 9.

34. The 1988 Permit states that the project was revised to require a “**common sewage area for Lots 9 and 10 away from the wetland**” on the site. 1988 Permit p. 8.

35. The common sewage area for Lots 9 and 10 was not a condition of approval, but was a fundamental change to the proposal that was reviewed and ultimately approved by APA pursuant to the 1988 Permit.

36. The 1988 Permit contained conditions of approval that were “binding upon the heirs, successors, agents and assigns” of the applicant. 1988 Permit p. 10.

37. One condition of the 1988 Permit was that “not more than one principal building may be constructed or otherwise maintained” on the lots created because “of the extensive environmentally sensitive wetlands on the project site”. 1988 Permit pp. 10-11.

38. The 1988 Permit required site specific plans for future development of the lots, showing the one building, access, well, power, and sewage disposal facilities that are in compliance with the conditions set forth in the permit, including the 200-foot minimum setback from existing wells and from the wetlands (1988 Permit Conditions ## 6 and 7). 1988 Permit p. 11.

39. As a condition of approval, the 1988 Permit required that “all new on-site sewage disposal systems [on Lots 6, 7 and 8 must be] located more than 200 ft. from the wetland, the lake, and any existing water supplies/wells”. 1988 Permit p. 10.

40. The 1988 Permit prohibited “vegetative cutting or other disturbance within the boundaries of the wetlands on the project site”. 1988 Permit p. 12.

41. Upon information and belief, in November 2020 the Applicants’ representatives first approached APA to amend the 1988 Permit so that they could construct their Project without having to comply with the common septic system area approved in the 1988 Permit and without being subject to the conditions in the 1988 Permit.

42. In November and December 2020, Applicants and their representatives had private communications with APA's staff regarding the proposed Project while the Applicants were contract vendees for the Project site. See Affidavit of Howard Kern submitted simultaneously herewith (discussing the private communications).

43. Without seeing an application or any plans, maps or other documents, APA staff indicated that the requested changes to the 1988 Permit would be granted. See Affidavit of Howard Kern submitted simultaneously herewith (discussing the private communications).

44. In December 2020, Applicants closed on their purchase of the property despite their purchase agreement for the property originally having a contingency for "APA approval for construction of a septic system on lot 9".

45. Apparently, based upon APA staff's representations, Applicants trusted that a future request for approval of a septic system on Lot 9 would certainly be granted, despite the terms and conditions of the 1988 Permit. See Communications regarding Applicants' interactions with APA staff annexed hereto as **Exhibit "D."**

46. In January 2021, Applicants submitted an application to APA to amend the 1988 Permit.

47. On May 27, 2021, APA issued the Compliance Letter to the Applicants. See Exhibit "A."

48. The May 27, 2021 Compliance Letter stated that the newly proposed onsite wastewater treatment system would require a permit amendment because it "differs from the location of the 'Proposed Off Site Sewage System for Lots 9 and 10' depicted on the site plan for Permit 87-74 and referenced in Findings of Fact 11 and 17".

49. Notably, the May 27, 2021 Compliance Letter did not authorize any cutting of trees or vegetation in the wetlands or disturbance of the wetlands.

50. In addition, according to the May 27, 2021 Compliance Letter, the Applicants' 2021 proposal requires an amendment to "Conditions 6 and 7 of Permit 87-74, which state that any on-site sewage disposal system must 'incorporate at least two feet of fill with a percolation rate of 15 to 45 minutes/inch, below and or around the distribution lines,' and that all leaching components of any system must be set back a minimum of 200 feet from wetlands".

51. Shortly thereafter, as a matter of fact accomplished, on June 18, 2021, APA issued a permit amendment that amended conditions 6 and 7 of the 1988 Permit to authorize a change to the "wastewater treatment system design and location" to allow a septic system to be constructed on the site of Lot 9 **100 feet from wetlands**.

52. Notably, the June 18, 2021 Permit Amendment did not authorize any cutting of trees or vegetation or disturbance of the wetlands. See Exhibit "B."

LEGAL BACKGROUND

53. 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.

54. APA reviews proposed development projects for compliance with the APA Act (including the shoreline restrictions of APA Act § 809(10)(d)) and the Adirondack Park Land Use and Development Plan (New York Executive Law § 805).

55. It must be noted that the APA Act (New York Executive Article 27) places “environmental concerns above all others”. Ass’n for Prot. of Adirondacks, Inc. v. Town Bd. of Town of Tupper Lake, 64 A.D.3d 825, 830 (3d Dept. 2009) (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.

56. APA’s statutory duty to prioritize environmental protection of the Adirondack Park 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).

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

58. Therefore, APA’s Compliance Letter and Permit Amendment must be annulled.

AS AND FOR A FIRST CAUSE OF ACTION

59. Petitioners repeat and reallege each of the preceding allegations as if set forth in full herein.

60. The APA’s approval of the onsite wastewater treatment system violates APA’s own regulations.

61. In order to protect the wetlands and Upper Saranac Lake, the 1988 Permit prohibited septic systems from being located within 200 feet of the wetlands.

62. At the time, APA's 1988 Permit found that the wetlands had a value 2 rating, but stated that a hydrological and wildlife values survey, documenting the existing wetland and vegetational inventory of the wetlands, must be completed and submitted to the APA within 6 months of the 1988 Permit. See 1988 Permit, p. 12 (Condition 8b). That study was never conducted.

63. The 1988 Permit specifically prohibited any onsite septic system for Lot 9 because of the potential for wetlands impacts on that particular lot.

64. Upon information and belief, the percolation rate on the site of the Project is less than 1 minute per inch.

65. There are three streams that run through or adjacent to Lot 9, the site of the Project, into Upper Saranac Lake. See 1988 Permit, p. 6.

66. There is a stream less than 130 feet from the proposed septic system. See Affidavit of Suzanne Kern annexed hereto as **Exhibit "E"**; see also septic overlay map annexed hereto as **Exhibit "F"**.

67. Applicants' materials did not include the streams that run through Lot 9, and there are no indications on the Applicants' materials showing the distances between the proposed structures and the streams.

68. Upon information and belief, APA did not identify the location of these streams.

69. The APA's regulations require a minimum separation distance between septic systems and streams: Appendix Q-4 of the APA regulations states, "Within 200 feet of the

shoreline of a lake, pond, river or stream, if the soil percolation rate is 0 to 3 minutes per inch, a leaching facility for an onsite wastewater treatment system will not be permitted.¹

70. Nevertheless, without precise mapping of the wetlands and streams, APA granted the Permit Amendment, and both approved an onsite wastewater treatment system for Lot 9 when an onsite system was originally prohibited, and allowed that onsite system to be located within 200 feet of a stream in violation of APA regulations.

71. No variance was granted to reduce the minimum separation distance between the septic system and the wetlands and streams.

72. APA's approval of the proposed onsite wastewater treatment system, on soils with such a low percolate rate, is arbitrary and capricious and affected by an error of law

73. Therefore, the Compliance Letter and Permit Amendment must be annulled.

AS AND FOR A SECOND CAUSE OF ACTION

74. Petitioners repeat and reallege each of the preceding allegations as if set forth in full herein.

75. APA's decision-making was arbitrary and capricious because it failed to evaluate the adverse impacts of the Project's impacts on the wetlands, which are important for the

¹ “[W]astewater treatment systems associated with a project which are designed to treat less than 1,000 gallons of wastewater per day shall be designed, installed and maintained in accordance with the standards set forth in “*Wastewater Treatment Standards--Residential Onsite Systems*” Appendix 75-A, Title 10, of the *Official Compilation of Codes, Rules and Regulations of the State of New York*, and with the additional standards set forth in Appendix Q-4 of this Title. 9 NYCRR § 574.4.

protection of Upper Saranac Lake, as part of its review of whether to grant or deny the Compliance Letter and Permit Amendment for the Project.

76. The Applicant's Project involves impacts to onsite and offsite wetlands that have a value rating of 1, which is the highest value rating that may apply to APA's review of a project's wetlands impacts.

77. As noted above, the hydrological and wildlife values survey required by the 1988 Permit was never conducted.

78. Petitioners Suzanne Carrillo Kern and Howard Kern raised the lack of the survey to the APA, and requested that the APA require the Applicants to conduct this survey prior to the initiation of any construction or site clearing. When these concerns and requests were ignored by APA, the Kerns completed this study at their own personal expense.

79. The study documented the wetlands as a level 1 status, the rarest and most sensitive of wetlands, and also documented several unique plants on this property that according to the ecologist/botanist were not seen anywhere else in the Adirondacks. This report was provided to the APA and the Kerns asked APA staff to meet to discuss it, but their requests were refused and the APA never acknowledged this study. The failure of the APA to consider this study further documents the arbitrary and capricious actions of the APA and its reckless disregard for APA's primary mission, to protect the environment especially when the staff in 1988 agreed that this was a critical study that needed to be completed.

80. The Project involves impacts to rare, threatened and/or endangered species. See Exhibit "B", Permit Amendment, APA Checklist.

81. In this area, there is a bobcat, a mating pair of bald eagles, a pair of common loons (notably, this is where the loons teach their chicks to fish). The shorelines of the North Bay

at Deerwood are also the spawning area for fish and there are smelt runs going up the streams at certain times of the year.

82. The Project will directly impact the large wetlands complex that is located on and around the site of the Project. See Curran Ecology Report annexed hereto as **Exhibit “G.”**

83. The Curran Ecology Report was submitted to APA, but was not reviewed by APA staff. Upon information and belief, the APA’s resource analysis staff were not consulted about the Project and the Curran Ecology Report was intentionally withheld from the APA’s resource analysis staff’s review.

84. The Project will destroy wetlands vegetation and degrade wetlands functions from the loss of habitat, reduced water quality and protection of water resources, and loss of open space.

85. The wetlands and streams on and adjacent to Lot 9 flow into the North Basin of Upper Saranac Lake.

86. The disturbances and pollution of the wetlands and streams due to the Project will cause the wetlands to be degraded.

87. Locating a wastewater treatment system in close proximity to wetlands and surface water bodies can quickly introduce nutrients downgradient which will further degrade the wetlands (already planned for substantial clearing to provide a lake view) and enter the lake which can result in algae blooms in the lake. The soil percolation rates in this area are very fast (some less than 1 minute/inch), so once the nutrient-rich effluent is discharged to the underlying soils, they could quickly enter the groundwater and rapidly reach the downgradient areas.

88. Cutting trees in the wetlands to create boardwalks and a “view” for the Applicants will require heavy equipment and root/stump removal that will disturb and potentially destroy

the wetlands, and lead to silting that reduces the water quality, and warming of the water running into Upper Saranac Lake as a result of the loss of shade.

89. Due to the significant presence of wetlands and the wetland values provided by the wetlands on and adjacent to the Project site, the Project site has a wetlands value rating of “1” and the Project’s impacts must be evaluated pursuant criteria for wetlands rated “1”. See 9 NYCRR § 578.4.

90. APA assigned an incorrect wetlands value rating of “2” to the wetlands that will be impacted by the Project. As a result, APA failed to consider the proper criteria for its review of the Project. See 9 NYCRR § 578.10.

91. APA’s failure to fully consider the wetlands impacts when it issued the Compliance Letter and Permit Amendment was arbitrary and capricious, and its review under an incorrect standard was an error of law.

92. Accordingly, APA’s Compliance Letter and Permit Amendment must be annulled.

AS AND FOR A THIRD CAUSE OF ACTION

93. Petitioners repeat and reallege each of the preceding allegations as if set forth in full herein.

94. APA failed to undertake the proper review required by the APA Act for the consideration of the Project pursuant to APA Act 806 and 809.

95. First, separating and segmenting the “Compliance Letter” review from the “Permit Amendment” review was arbitrary and capricious and resulted in APA not undertaking a comprehensive review of the full impacts of the Project.

96. Second, APA’s expedited review of the Project was incorrect given that this Project does not meet the criteria of 9 NYCRR 572.5 because the Applicants proposed more than a single-family dwelling and the 1988 Permit granted approval for more than a two-lot subdivision.

97. Third, treating the Applicants’ requested change to the 1988 Permit as not a material change was arbitrary and capricious and an error of law. See APA Act § 809(8); 9 NYCRR § 572.19.

98. The 1988 Permit states that the project was revised to require a “**common sewage area for Lots 9 and 10 away from the wetland**” on the site. 1988 Permit p. 8.

99. The common sewage area for Lots 9 and 10 was not a condition of approval, but was part of the project that was reviewed and ultimately approved by APA pursuant to the 1988 Permit.

100. Notably, Lot 10 has successfully used the common sewage area for over 20 years.

101. In addition, there were two important conditions (Conditions 6 and 7) that restricted the use of onsite wastewater treatment systems on the *other* lots approved as part of the 1988 Permit.

102. The Applicants’ proposal to change the previously approved project design, to allow an onsite wastewater treatment system for Lot 9, in contravention of Conditions 6 and 7, should have been considered a material change and subject to approval as a new application.

103. The Applicants' proposal to construct an onsite wastewater treatment system within 200 feet of wetlands is one that is both outside of the original scope of activities approved by the 1988 Permit, and is a material change to the conditions of the 1988 Permit.

104. At the very least, the Applicants' proposal "may" involve a material change to the 1988 Permit. APA Act § 809(8)(b).

105. "In the case of a request which *may* involve a material change . . . the agency shall . . . mail a written determination to the permit holder that *the request shall be treated as an application for a new permit.*" APA Act § 809(8)(b).

106. Notably, at the May 19, 2021 meeting of the APA Board, APA Board Member Art Lussi stated that permit amendment applications involving revised or new on-site septic systems near sensitive waterbodies, such as Lake Placid and Upper Saranac Lake, deserve review and scrutiny by the APA Board, not simply the APA staff.

107. The Applicants' requested change to allow for a new onsite septic system near Upper Saranac Lake should have been considered a material change and treated as an application for a new permit.

108. The APA Board Members did not review the Project or approve of the Compliance Letter or the Permit Amendment.

APA Act § 806 – Shoreline Restrictions

109. "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).

110. “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” 75 feet in low intensity use areas. APA Act § 806(1)(a)(2).

111. Here, the Project involves the construction of new structures, including boardwalks and bridges to reach the Applicants’ proposed dock/boathouse on the shoreline, that do not meet the definitions provided for docks or boathouses.

112. The 1988 Permit did not authorize the construction of these structures for the Applicants (or any owners of Lot 9) to reach the shoreline of their property.

113. The Permit Amendment did not review or authorize the construction of these structures.

114. Moreover, the boardwalk and path do not currently exist. Remnants of this boardwalk/path are seen as single timbers and submerged sections of the old boardwalk, but nothing resembling a usable walking path or board walk.

115. The Compliance Letter apparently relies on a February 9, 2007 letter to Edward and Dorothy Yankitis, that the “existing paths and boardwalk comply with the terms of Condition 3 and 4 of permit 87-74A. This letter to Yankitis was revoked by a later letter issued after the APA inspected the site and found that the boardwalk was *not in compliance*. APA had initially determined that the Yankitis’ boardwalk, while not compliant, could remain, but then required Yankitis to remove sections that were especially offensive to the wetlands.

116. By granting the Applicants now, in the Compliance Letter, the right to “use the existing walkway” and repair and replace it, they are in effect, issuing a further amendment to

Permit 87-74A in terms of Condition 3, without any rationale for doing so and perhaps without realizing that it was granting this approval.

117. This issue demonstrates the APA's lack of objectivity and diligence accomplished in reviewing the levels of compliance for the current application and the APA's apparent rush to grant the various accommodations demanded by the Applicants.

118. Therefore, the Compliance Letter indicating that these structures were permissible is contrary to the 1988 Permit and in violation of the shoreline restrictions in APA § 806.

119. No cutting of trees or vegetation within the wetlands or disturbance of the wetlands is permitted by the 1988 Permit, the Compliance Letter or the Permit Amendment.

120. Therefore, the Applicants' site plan and other application materials, showing cutting of trees and vegetation within the wetlands and disturbance of the wetlands, is in violation of the 1988 Permit, the Compliance Letter and the Permit Amendment.

121. Petitioners seek a declaration that the Applicants are prohibited from cutting trees within the wetlands, or otherwise disturbing the wetlands, on the Applicants' property.

APA Act § 809 – Undue Adverse Impacts

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

123. APA may not approve 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).

124. The Project has adverse impacts that APA failed and refused to consider.

125. 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”.

126. 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 “critical environmental areas”, including wetlands, among many other considerations.

127. In granting the Compliance Letter and Permit Amendment for the Project, APA failed to consider the adverse impacts of the Project on the wetlands, waters, water quality, and use of the adjoining waters of Upper Saranac Lake. *See* Second Cause of Action.

128. APA’s Compliance Letter and Permit Amendment were arbitrary and capricious and affected by an error of law and must be annulled.

AS AND FOR A FOURTH CAUSE OF ACTION

129. Petitioners repeat and reallege each of the preceding allegations as if set forth in full herein.

130. One condition of the 1988 Permit was that “not more than one principal building may be constructed or otherwise maintained” on the lots that were created by that subdivision approval because “of the extensive environmentally sensitive wetlands on the project site”. 1988 Permit pp. 10-11.

131. A single family dwelling is a principal building. APA Act § 802(50).

132. “‘Single family dwelling’ means any detached building containing one dwelling unit”. APA Act § 802(58).

133. Applicants’ proposed structure that contains an upstairs residential apartment is not permitted because it contains one dwelling unit and is a second principal building that is expressly not allowed by the 1988 Permit.

134. Therefore, APA’s Compliance Letter stating that Applicants’ second principal building was permissible was contrary to the 1988 Permit.

135. APA’s Compliance Letter and Permit Amendment were arbitrary and capricious and affected by an error of law and must be annulled.

AS AND FOR A FIFTH CAUSE OF ACTION

136. Petitioners repeat and reallege each of the preceding allegations as if set forth in full herein.

137. The 1988 Permit authorized walking trails for the benefit of the Deerwood Homeowners’ Association (“HOA”) and its members.

138. There are existing walking trails on the Applicants’ property that are used by the Deerwood HOA and its members who are owners of lots in the Deerwood subdivision.

139. Applicants have directed their contractors and other representatives to prevent people from using the walking trails on their property and to threaten people with prosecution for trespass.

140. Petitioners-Plaintiffs who are members of the Deerwood HOA seek a declaration that existing walking trails on the Applicants’ property are open to use by those Petitioners-

Plaintiffs and that the Applicants are prohibited from preventing use of the walking trails by HOA members or threatening claims of trespass against HOA members.

WHEREFORE, Petitioners-Plaintiffs respectfully request that this Court enter judgment as follows:

1. Annuling, vacating and setting aside APA's Compliance Letter and Permit Amendment;
2. Declaring that the Applicants are prohibited from cutting trees or vegetation within the wetlands, or otherwise disturbing the wetlands, on the Applicants' property;
3. Declaring that existing walking trails on the Applicants' property are open to use by those Petitioners-Plaintiffs who are members of the Deerwood HOA and that the Applicants are prohibited from preventing use of the walking trails by HOA members or threatening claims of trespass against HOA members;
4. Awarding Petitioners-Plaintiffs the costs, disbursements, and attorneys' fees incurred in connection with this proceeding; and
5. Awarding Petitioners-Plaintiffs such other and further relief as this Court shall deem just, proper, or equitable.

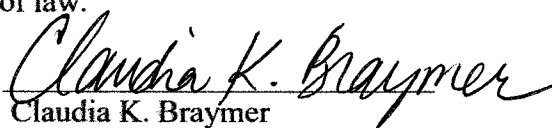
Dated: July 26, 2021
Glens Falls, New York

BRAYMER LAW, PLLC
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VERIFICATION

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

I, the undersigned, am an attorney admitted to practice in the courts of New York State. I am the attorney for the petitioners-plaintiffs herein. I have read the foregoing petition and complaint and know the contents thereof and the same are true to my knowledge, except those matters therein stated to be alleged on information and belief, and to those matters I believe them to be true. My belief, as to those matters therein not stated upon knowledge, is based upon my review of documents maintained at my office, correspondence and other writings furnished to me by the petitioners-plaintiffs and interviews with petitioners-plaintiffs. The reason I make this verification, instead of a petitioner-plaintiff, is that the petitioners-plaintiffs reside outside of the county wherein I maintain an office for the practice of law.


Claudia K. Braymer

Sworn to me this 26th
day of July, 2021


Notary Public

BENJAMIN MICHAEL BOTELHO
Notary Public, State of New York
No. 02BO6351375
Qualified in Saratoga County
Commission Expires 11/28/2020
2021
BMB