

SUPREME COURT
APPELLATE DIVISION

STATE OF NEW YORK
THIRD DEPARTMENT

To be argued by:
Claudia Braymer
Time requested: 10 min.

In the Matter of

THOMAS JORLING,

Petitioner-Appellant,

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

CASE NO. 533913

Supreme Court Index No.
CV21-0002

-against-

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

Respondents-Defendants.

APPELLANT'S BRIEF

Dated: May 4, 2022

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QUESTIONS PRESENTED

1. Whether as a matter of law Supreme Court erred in finding that the issue of the Adirondack Park Agency failing to conduct the required carrying capacity study (that is necessary to assess the impacts of the project prior to issuing a permit) was not ripe for review, even though Appellant has no administrative remedies available to challenge the failure of the state respondents to conduct a carrying capacity study or to reverse approval of the Project due to the lack of the required carrying capacity study.
2. Whether as a matter of law Supreme Court erred in finding that the Adirondack Park Agency applied the correct standards of review when considering the effects of the Project on wetlands, despite the fact that the uncontested fact that the Adirondack Park Agency failed to apply its own regulations.
3. Whether as a matter of law Supreme Court erred in finding that the Adirondack Park Agency's approval of a marina project without established approval criteria was not arbitrary or capricious decision-making.

PROCEDURAL HISTORY

Petitioner-Appellant Thomas Jorling (“Appellant”) commenced this proceeding for administrative review and declaratory relief by filing a Verified Petition and Complaint and Summons with Notice on December 31, 2020. The Petition and Complaint sought to annul, vacate, and set aside decisions made by State Respondents Adirondack Park Agency (“APA”) and New York State Department of Environmental Conservation (“NYSDEC” or “Department”), which approved a permit application by LS Marina, LLC (“Applicant”) for the construction of a commercial marina project in the Town of Harrietstown, Franklin County, New York (the “Project”). Appellant also filed an Order to Show Cause on or about December 31, 2020, which sought a Temporary Restraining Order and a Preliminary Injunction to enjoin the Applicant from commencing the Project during the pendency of this action. The Temporary Restraining Order was granted on or about January 6, 2021. Respondents were served with the pleadings and supporting papers on or about January 12, 2021 and January 13, 2021. Respondents served their answers and opposition to the motion for a Preliminary Injunction on or about March 12, 2021, and the parties appeared for oral arguments on April 23, 2021. Supreme Court entered its Decision, Order, & Judgment on August 8, 2021 (“Decision”). Appellant herein now appeals from the Decision.

STATEMENT OF FACTS

This case involves the approval of a permit to construct the largest commercial marina project ever reviewed or approved by respondent APA since the creation of the Adirondack Park Agency Act (“APA Act”) in 1971. The Project, involving the construction of over 64,000 square feet of new structures along the shoreline of Lower Saranac Lake, is proposed to be constructed on two sites: the Main Marina site, and the Annex Site. See R 62¹ (Petition [“Pet”] p. 2). At both of the sites, the Applicant intends to build new floating covered dock structures each extending hundreds of feet into the waters of Lower Saranac Lake, which is part of the Saranac Lakes Wild Forest in the Adirondack Park. R. 73 (Pet. P. 2). See R. 11; R. 332 (APA Shoreline Variance Application, p. 4). The Project will involve the addition of 73 new boat slips for a total of 292 boat slips on Lower Saranac Lake. R. 3542.

The Main Marina has 655+ feet of shoreline, which contain areas of wetlands, and would increase the number of boat slips/moorings there from 124 to 178. R. 62, ¶ 5. At the Main Marina, 90 boat slips would be located in covered structures with no sides. R. 62, ¶ 6. The Main Marina site also has a mechanic shop, boat storage building, a storage building, a single-family dwelling, cottage, and several small cabins. R. 62, ¶ 7. At the Main Marina, the Project involves the construction of 20,773 square feet of covered structures. R. 85, 170.

The Annex site has 1,335 ± of shoreline, which contains extensive areas of wetlands, shrub swamp, submerged and emergent marsh wetlands, and the Project would increase the number of boat slips/moorings there from 95 to 114. R. 62, ¶ 8. At the Annex site, 84 boat slips would be located in covered structures with no sides. R. 62, ¶ 9. At the Annex site, the Project involves the construction of 15,018 square feet of covered structures. R. 85, ¶ 171.

¹ References to pages of the Record on Appeal are preceded by “R”.

The new structures created by the Project will directly impact 11,597 ± square feet of wetlands. R. 85, ¶ 172. The impacts include destruction of wetlands vegetation from boat propellers, shading of the water/wetlands from the docks and covered structures (shading the water will negatively impact fish and vegetation), suspension of sediments from physical disturbance of the bed of the lake, and displacement of fish habitat by physical disturbance, among other impacts. See R. 85, ¶ 173; 9 NYCRR § 578.8 (erecting structures in wetlands will negatively “alter wetland vegetation, obstruct or interfere with surface or subsurface water flow, and interfere with fish and wildlife use”). The Project will result in the reduction of wetland functions and values including loss of habitat, reduced water quality and protection of water resources, and loss of open space, among other impacts. See R. 85, ¶ 174.

Appellant owns property at 4B Pinehurst Road, in the Town of Harrietstown, Franklin County. Appellant’s property is located in Ampersand Bay of Lower Saranac Lake, directly across the bay from the Annex portion of the project. See R. 63 (Pet ¶15), R. 94 (Affidavit of Thomas Jorling [“Jorling Aff.”] ¶ 2). Due to the proximity of Appellant’s property to the Project, Appellant will be uniquely impacted by the Project due to its increase in the intensity of uses that are currently present at the Project property, and due to increases in visibility of these uses. The Project will result in permanent changes that will impact Appellant, such as increased noise, increase light, increased motorized boat activity, increased wake turbulence, increased stormwater runoff, a reduction in property values, negative aesthetic and visual impacts, and irreparable damage to the character of Ampersand Bay. See R. 34 (Jorling Aff.)

ARGUMENT

“The Adirondack Park currently encompasses approximately six million acres of public and private lands”. Protect the Adirondacks! Inc. v. New York State Dep’t of Env’t Conservation, 37 N.Y.3d 73, 77 (2021). APA and DEC are responsible for the “care, custody, and control of the forest preserve” and the regulation of private lands that make up the Adirondack Park.² N.Y. Environmental Conservation Law (“ECL”) § 3-0301(1)(d); see N.Y. Executive Law § 800 et seq. (“APA Act”); see also ECL § 9-0105; ECL § 9-0301(1). Article 14 of the New York Constitution requires that the forest preserve “shall be forever kept as wild forest lands”. N.Y. Const. Art. 14, § 1. **“This unique ‘forever wild’ provision was deemed necessary by its drafters and the people of the State of New York to end the commercial destruction and despoliation of the soil and trees that jeopardized the state’s forests and, perhaps most importantly, the state watershed.”** Protect the Adirondacks! Inc. v. New York State Dep’t of Env’t Conservation, 37 N.Y.3d at 79-80.

There should be no question about the importance of protecting the Adirondack Park for its natural resources, aesthetic qualities, wilderness characteristics, and more, for both current and future generations. See 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) (noting that the APA Act places “environmental concerns above all others”). These weighty concerns have resulted in the creation of layers of legal protection for the Adirondack Park because the “Adirondack Park is a world-

² The term “Adirondack Park” refers to all land within the “blue line”, both private and state land. Helms v. Reid, 90 Misc. 2d 583, 600 (N.Y. Sup. Ct. 1977); see Claudia Braymer, *Improving Public Access to the Adirondack Forest Preserve*, 72 Alb. L. Rev. 293, 295 (2009).

renowned treasure in our own backyard.” Matter of Adirondack Wild: Friends of the Forest Preserve v. New York State Adirondack Park Agency 34 N.Y.3d 184, 187 (2019).

As is clear from the principles enshrined in our Constitution, and upheld by State Courts for over a century, “preserving the priceless Adirondack Park through a comprehensive land use and development plan is most decidedly a substantial State concern”. Wambat Realty Corp. v. State of New York, 41 N.Y.2d 490, 495 (1977). “It is [also] clearly understood that the optimum means for achieving [protection of Adirondack waterbodies from private development projects] is to provide for the dispersal of development and use, thereby alleviating the impact upon water quality and preventing the degradation of the shoreline”. Kapusinski v. Fitts, 246 A.D.2d 811, 813 (3d Dept. 1998).

In granting and supporting a permit to exponentially expand a commercial marina that threatens the waters and wetlands of Lower Saranac Lake, APA and DEC have abrogated their duty to preserve the health and serenity of the Constitutionally protected watershed within the Adirondack Park. APA’s and DEC’s approval of the Project is arbitrary and capricious and affected by errors of law because the Project cannot reasonably or legally meet the standards set forth by the Constitution and by the APA Act.

POINT I

STATE RESPONDENTS ARE REQUIRED BY LAW TO CONDUCT A CARRYING CAPACITY STUDY AND APPROVING A PROJECT THAT IMPACTS CARRYING CAPACITY BEFORE THE STUDY IS COMPLETE IS ARBITRARY AND CAPRICIOUS

APA’s decision about the impacts on Lower Saranac Lake from the Project’s increase in the number of motorboats was arbitrary and capricious because APA did not conduct the carrying

capacity study that it is a legal prerequisite to APA’s review of the Project and is necessary to assess the Project’s actual impacts – especially overuse – on Lower Saranac Lake. The approval by APA of a major project that will significantly impact Lower Saranac Lake and the Saranac Lake chain in the Saranac Lake Wild Forest without the benefit of the required carrying capacity study constitutes an unlawful exercise of APA’s authority under the APA Act, the implementing provisions of the State Land Master Plan, and the approved Saranac Lakes Wild Forest Unit Management Plan. Supreme Court erred as a matter of law when it held that this issue was not ripe for review.

A. A Carrying Capacity Study is Required by the State Land Master Plan and the Saranac Lakes Unit Management Plan; APA’s Failure to Conduct One Prior to Making a Decision to Approve a Project That Will Cause and Facilitate a Significant Increase in the Use of Lower Saranac Lake is Prima Facie Evidence that Its Decision was Arbitrary and Capricious

Section 805(1)(a) of the APA Act authorizes the establishment of the Adirondack Park Land Use and Development Plan “to guide land-use planning and development throughout the entire area of the Adirondack Park.” Section 816 of the Act (originally section 807) mandates the APA to prepare and submit to the Governor a master plan for the management of state lands, which is referred to as the State Land Master Plan (“SLMP”).³ The SLMP is binding on DEC and APA and “**shall** guide the development and management of state lands in the Adirondack park”. APA Act § 816; see Matter of Adirondack Mtn. Club Inc. v. Adirondack Park Agency 33 Misc. 3d 383, 387 (Sup. Ct. Albany Co. 2011) (finding that the SLMP has “the force of a legislative enactment”), accord Matter of Adirondack Wild: Friends of the Forest Preserve v. New York State Adirondack

³ The SLMP is available at https://apa.ny.gov/Documents/Laws_Regs/APSLMP.pdf (last visited April 26, 2022).

Park Agency 34 N.Y.3d at 192 (2019). (“accepting for purposes of this case that the Master Plan is a ‘law’”).

The SLMP approved by the Governor in 1972 and incorporated by reference in section 816 of the Adirondack Park Agency Act requires that:

“a comprehensive study of Adirondack lakes and ponds should be conducted by the Department of Environmental Conservation to determine each water bodies capacity withstand various uses particularly motorized uses and to maintain and enhance its biological natural and aesthetic qualities. First emphasis should be given to the major lakes and ponds totally surrounded by state land and for those on which the state intensive use facilities exist or may be proposed. The importance of the quality of these resources cannot be overemphasized.”

APA Act section 816 requires the Department to develop in consultation with the APA, individual unit management plans, (hereinafter referred to as “UMP”) for each unit of state land in the Park, under the Department jurisdiction. The UMP’s must conform to the guidelines and criteria set forth in the SLMP.

The SLMP (pp. 10-11) requires that each management plan for a particular unit of Forest Preserve land (known as a “unit management plan”) “**will contain** . . . an assessment of the physical, biological and social **carrying capacity** of the area with particular attention to portions of the area threatened by overuse”. The UMP “**will address** . . . the regulation or limitation of public use such that the carrying capacity of the area is not exceeded and the types of measures necessary to achieve that objective”. SLMP, p. 11. The SLMP points out that numerous physical characteristics “all affect the carrying capacity of the land or water both from the standpoint of the construction of facilities and the amount of human use the land or water itself can absorb.” SLMP, p. 14. In Wild Forest land areas, access to waterbodies may be provided so long as the “physical, biological and **social carrying capacity of the water body or other water bodies accessible**

from the site will not be exceeded". SLMP, p. 40. There may be a "prohibition of motorized use as appropriate to the carrying capacity of the water body". SLMP, p. 40.

The UMP for the Saranac Lakes Wild Forest ("SLWF") was prepared and approved on February 15, 2019 as consistent with the SLMP.⁴ As defined in APA Act § 802.27⁵, the waters of Lower Saranac Lake are part of the Forest Preserve (protected by Article 14 § 1 of the Constitution) and are classified in the SLWF UMP as part of the 19,000 acres of waterbodies in the Saranac Lakes Wild Forest. See Matter of Adirondack Mtn. Club Inc. v. Adirondack Park Agency 33 Misc. 3d at 390 (discussing that the "classification system [for State Forest Preserve lands] does not exclude State-owned water in general or State-owned water that is contiguous to privately held land"). The shore of Lower Saranac Lake, which is nearly surrounded by state land, is the site of the largest State-managed island campground in the Park, and includes two State-managed public boat launches. See SLWF UMP pp. 58-59, 111-112, 177-185, Maps 5, 9, 15. Therefore, the waters of Lower Saranac Lake are waters of the State of New York, held in trust for the people of New York, and are governed by the SLMP. See New York State Water Resources. Comm'n v. Liberman, 37 A.D.2d 484, 488 (3d Dept. 1971); see also Matter of Stasack v. New York State Dep't of Env't Conservation, 176 A.D.3d 1456, 1458 (3d Dept. 2019); Adirondack League Club Inc. v. Sierra Club, 201 A.D.2d 225, 232 (3d Dept. 1994), aff'd as modified, 92 N.Y.2d 591 (1998); Smith v. State of New York, 153 A.D.2d 737, 739 (2d Dept. 1989).⁶

⁴ The Saranac Lakes UMP is available at www.dec.ny.gov/docs/lands_forests_pdf/saranaclakesump.pdf.

⁵ APA Act § 802.27 defines "land means the earth, on and below the surface of the ground **including water** and air above the flora and fauna."

⁶ See generally Matter of Salvador v. State of New York, 205 A.D.2d 194, 201 (3d Dept. 1994) (discussing regulation of marinas on Lake George and noting that the "navigational servitude does not arise because of the public ownership of lands under water but because of the common-law principle that the navigable waters of the State are held in trust by the State for the benefit of

According to the SLMP (pp. 10-11), a carrying capacity study was required to be included in the SLWF UMP. However, the study was not conducted as part of the preparation of SLWF UMP. R. 82 (Pet.) ¶ 153. Instead, the SLWF UMP directed that a carrying capacity study would be completed for water bodies in the SLWF to determine their capacity to withstand use without compromising the resource values and characteristics to be maintained in the Adirondack Park. R. 84. The UMP for the SLWF recognized that the waterbodies in the SLWF, “are impacted by recreational use”, particularly motorboats that “have the potential to cause a greater variety and more significant impacts than non-motorized watercraft”. R. 83; see SLWF UMP, p. 75. The SLWF UMP also recognized that “[p]rivate lands can affect the environmental condition of the SLWF” and that “surrounding private lands . . . are regulated by the APA”. SLWF UMP, p. 61. Since “[c]rowding and conflict impact one’s experience on a waterbody”, the UMP called for an examination of a variety of factors “to determine the **capacity of waterbodies**”. SLWF UMP, p. 111. The SLWF UMP (p. 112) stated that “a comprehensive study” of Lower Saranac Lake and the other lakes in the unit needs to be completed to determine each lake’s carrying capacity. The mandatory duty of APA to protect a major resource of the Park (Lower Saranac Lake) from overuse cannot be lawfully fulfilled without the mandated carrying capacity study.

Despite the fact that the SLMP holds the force of law, and DEC’s own UMP for the SLWF requires a carrying capacity study, respondents admit that “DEC has not yet completed a full carrying capacity study of Lower Saranac Lake”. R. 190 (APA Answer) ¶161. Respondents evaded the mandate of the SLMP when they approved the SLWF UMP without a carrying capacity study and again when they approved the Project at issue herein without a carrying capacity study.

the people of the State, without regard as to who owns the banks and beds of the waterway”); ECL § 15-0105; Navigation Law § 30.

Their failure to conduct or obtain the carrying capacity study required by the SLMP, and by the SLWF UMP, is prima facie evidence that NYSDEC and APA have failed in their duties to protect the Adirondack Park, and that APA's decision in this matter was arbitrary and capricious. The approval of the Project should be vacated and the matter remanded to APA with direction to act in accordance with the APA Act, the SLMP, and the SLWF UMP.

The matter must be remanded back to APA for a carrying capacity analysis prior to authorizing a substantial change in the use of Forest Preserve waters in order to protect the resources of the Adirondack Park, and to avoid the destructive overuse issues that are now being experienced in the high peaks region of the Park. APA's approval of a 73 new boat slips (R. 3542), adding to a marina that was first established in 1924 that served boats of a much different size, speed and power than modern boats (R. 3532), for the Project without an objective carrying capacity study was not rational. APA must assess the values of quiet, solitude, and preventing conflicts between users (such as those using motorboats, jet skis, paddle boards, canoes, and kayaks) on public lands and waters when reviewing a private marina expansion project that is proposed for development in the Adirondack Park. See Point II(C), infra; APA Act § 805(4); APA Act § 809(10)(e); SLMP, p. 35 (noting that “[c]are should be taken to minimize conflict of incompatible uses”). APA did not have the information that it needed to assess the impacts to these values from the proposed Project that would add 73 motorboats (that are longer, deeper, and have higher horsepower than those typical of boats previously at the marina) to Lower Saranac Lake, which is also used heavily by people in canoes and kayaks. R. 3534 (APA Permit and Order, September 14, 2020). Therefore, APA's approval was arbitrary and capricious, and the Permit should be vacated.

The importance of the mandate to conduct an analysis of use or carrying capacity is further emphasized by the fact that, since the original marina was constructed well before the enactment of the APA Act, there have been several major public boat launches constructed or greatly expanded. See SLWF UMP pp. 58-59, 111-112, 177-185, Maps 5, 9. These additional public boat launches and expansions of existing boat launches have vastly increased boat traffic compared to conditions that existed when the original marina was constructed.

Previously, APA asserted that it did not need to consider the Project's impacts on "use and boat capacity of the Saranac Chain of Lakes" because the Project is a private business (R. 3543) and asserted to Supreme Court that it would be "absurd" for APA to protect public lands during its review of a private project. APA alternatively claimed that there was a boat traffic study as part of its review, but the record indicates that APA did "not have this study and it is not part of the Agency's review". R. 3281. In any event, the "boat traffic assessment" that was conducted by the Applicant and submitted to the Town of Harrietstown analyzed boat traffic safety on Lower Saranac Lake. R. 1183. The boat traffic assessment found that "under the worst case scenario of all boats remaining on Lower Saranac Lake, that peak period boat traffic would slightly exceed Lower Saranac Lake's carrying capacity by 10%". R. 1190 (boat traffic assessment). Moreover, as noted by the Town's engineering consultant, the boat traffic assessment relied on an estimate of boat density that "is calculated mainly as a function of *safety*" and did not assess "density for less intangible values such as quiet or solitude". R. 1198 (memorandum from the Town's engineering consultant to the Town's attorney). Therefore, the boat traffic assessment was not a "carrying capacity" study that assessed the "social impacts (e.g., trip satisfaction, visitor conflict)" and "recreation use (e.g., people at one time, visitor overnight use)" of Lower Saranac Lake as required by the SLMP and the SLWF UMP. SLWF UMP, p. 111.

The Court should conclude that State Respondents' failure to uphold their statutory mandates, and their post-hoc rationalizations is arbitrary and capricious. See Matter of Tessler v. City of New York, 38 Misc. 3d 215, 228 (Sup. Ct. New York Co. 2012) ("respondents may not now support [their arguments] with grounds . . . not found in the original administrative record: a *post hoc* rationalization").

B. Supreme Court's Holding That This Issue is Not Ripe for Review is Incorrect Because There Are No Other Administrative Avenues for Appellant To Pursue To Challenge the Lack of Carrying Capacity Study That Was Needed Before This Permit Application Was Considered By APA

In its Decision, Order & Judgment (R. 26-27), Supreme Court ruled that the issue regarding the lack of a carrying capacity study was not ripe for judicial review, holding:

To the extent that Jorling relies upon the recommendation in the Saranac Lake Wild Forest Unit Management Plan of the State Land Master Plan that a 'comprehensive study of Lower Saranac Lake and other lakes in the unit' for carrying capacity be completed such reliance is misplaced. The issue of carrying capacity is not ripe for judicial review.

In support for this holding, Supreme Court quotes Matter of Adirondack Council, Inc. v. Adirondack Park Agency 92 A.D.3d 188, 191 (3d Dept 2012), holding that "because 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 R. 27 (Decision, Order & Judgment, p. 24). Supreme Court's reasoning was erroneous and should be overturned.

"Ripeness pertains to the administrative action which produces the alleged harm to plaintiff; the focus of the inquiry is on *the finality and effect of the challenged action* and whether harm from it might be prevented or cured by administrative means available to the plaintiff." Ward v. Bennett 79 N.Y.2d 394, 400 (1992) (quoting Church of St. Paul & St. Andrew v. Barwick, 67

N.Y.2d 510 [1986]). Here, the failure of State Respondents to perform the required carrying capacity study in the review of APA's permit for the Project is ripe for review; there is no administrative means by which Appellant could challenge the lack of a carrying capacity study or legally bring this grievance to respondents or to the court. See Police Benevolent Ass'n of New York State, Inc. v. State, 150 A.D.3d 1375, 1377 (3d Dept. 2017) (finding "that the matter is ripe for judicial review"). Moreover, there is no further "administrative action" by APA that could grant Appellant reversal of the approval of the Project, even if a carrying capacity study later reveals that the Project would have an adverse impact on the Adirondack Park and should not have been approved.

In the case cited by Supreme Court, Adirondack Council v. Adirondack Park Agency, petitioner challenged snowmobile trail "guidance" adopted by respondent, and the court held that there was no concrete injury because it was only anticipated harm that may be prevented by further administrative action (such as final approved UMPs and State Environmental Quality Review Act ("SEQRA") review). Adirondack Council, Inc. v. Adirondack Park Agency, 92 A.D.3d 188, 191 (3d Dept. 2012). In Adirondack Council, the "guidance" at issue did not permit or approve any specific project or trail, leaving that type of approval for the UMP process for each unit. Also, the guidance at issue in Adirondack Council allowed NYSDEC to implement further restrictions beyond the scope of the guidance. Id. at 191. The court in Adirondack Council further noted that, in determining whether an administrative action is ripe for review, courts must consider "whether it is final" and that an "action will be deemed final if 'a pragmatic evaluation' reveals that the decision-maker has arrived at a definitive position on the issues that inflicts an actual, concrete injury." "If the claimed harm is 'contingent upon events which may not come to pass, the claim is nonjusticiable as wholly speculative and abstract.'" Id. at 190.

Here, APA “has arrived at a definitive position” regarding the Project by granting the permit and variances, and the claimed harm is not contingent upon events that may not come to pass. Id. 190. The claimed harm is based upon APA approving the Project without satisfying APA regulations and mandated prerequisites such as the carrying capacity study. Unlike the “guidance” in Adirondack Council, the harm alleged by Appellant will not be prevented by further administrative action, insofar as the project has been approved, and the approval is not contingent upon a carrying capacity study being conducted before operations may begin.

There is no further administrative action available to Appellant to challenge State Respondents’ failure to conduct or obtain a carrying capacity study prior to the issuance of the permit and variances for the Project.⁷ Nor is the harm alleged by Petitioner “conditional” or “wholly speculative and abstract” (Matter of New York State Inspection, Sec. & Law Enforcement Empls., Dist. Council 82, AFSCME, AFL-CIO v. Cuomo, 64 N.Y.2d 233, 240 [1984]) or “subject to [APA’s] own corrective action” such that there “remains a possibility that the perceived injury to [petitioner] will be prevented or significantly ameliorated” (Matter of Vincent R. Guido v. Town of Ulster Town Board 74 A.D.3d 1536, 1537 [3d Dept. 2010]). Therefore, the failure to perform the required carrying capacity study is ripe for review. By failing to perform the required carrying capacity study prior to approving the Project, respondents failed to exercise its legally mandated due diligence to protect a major resource of the Adirondack Park. See Point I(A), supra.

⁷ To the extent that there *may* be some further administrative action available to prevent the harms associated with the Project (Petitioner is unaware of any), it is well-settled that “the ripeness doctrine does not impose a threshold barrier requiring pursuit of all possible remedies that might be available through myriad government regulatory and legislative bodies....” because “such a requirement might create a bureaucratic nightmare and undue hardship.” Matter of Ward v. Bennett, 79 N.Y.2d at 401 (internal quotations and citations omitted.)

POINT II

STATE RESPONDENTS FAILED TO CORRECTLY CONSIDER THE IMPACTS OF THE PROJECT ON WETLANDS

APA has promulgated rules regarding the protection of shorelines and freshwater wetlands. Supreme Court erred in not reviewing APA's compliance with its rules. If Supreme Court had done so, it would have revealed that APA did not apply the rules, specifically 9 NYCRR § 576.1(a) and 9 NYCRR § 578.5(k), to the surface water wetlands impacted by the proposed Project at the Annex site. The failure of APA was not a matter of judgment or discretion, it was the abject failure to apply its own variances rules by requiring a showing of "practical difficulties" and a failure to apply its own factual wetland rating regulations to the wetlands at the Annex site. The Project should not have been approved because it will cause negative impacts on the wetlands due to the destruction of wetlands vegetation from boat propellers, and shading of the wetlands due to the docks and covered structures (shading causes negative impacts on fish and vegetation), among other impacts. See R. 85 (Petition ¶173); see 9 NYCRR § 578.8 (erecting structures in wetlands will negatively "alter wetland vegetation, obstruct or interfere with surface or subsurface water flow, and interfere with fish and wildlife use").

A. The Project Fails to Meet a Key Element of the Shoreline Variance Criteria Because the Required "Practical Difficulties" Were Not Present

In order to obtain a variance from the shoreline restrictions, there must be "practical difficulties in carrying out the strict letter" of those restrictions. 9 NYCRR § 576.1. The Project fails to meet the "practical difficulties" element required to issue a variance from the shoreline restrictions of the APA Act. R. 81 (Pet. ¶ 144), R. 125 (Affidavit of Barbara Rottier, sworn to on December 31, 2020 ["Rottier Aff."]), ¶6). The "practical difficulties" requirement comes directly

from APA Act § 806(3), and, in the past, was treated similarly to a variance from town zoning requirements that can be granted by a local municipal zoning board.

APA's review of a variance from the applicable shoreline requirements is governed by the APA Act (and the regulations promulgated thereunder at 9 NYCRR § 576.1), which is separate and distinct from Town Law § 267-b (3). The Court of Appeals has stated that:

To “preserv[e] the priceless Adirondack Park through a comprehensive land use and development plan,” the Adirondack Park Agency “serve[s] [this] supervening State concern transcending local interests” by “prevent[ing] localities within the Adirondack Park from freely exercising their zoning and planning powers” by reviewing and **even undoing zoning variances** granted by local governments (*Wambat Realty Corp. v. State of New York*, 41 N.Y.2d 490, 494–495, 393 N.Y.S.2d 949, 362 N.E.2d 581). **The APA is charged with an awesome responsibility and the Legislature has granted it formidable powers to carry out its task.**

Matter of Long v. Adirondack Park Agency, 76 N.Y.2d 416, 421 (1990).

As explained in Sasso v. Osgood, the State Legislature amended the standard that a town zoning board of appeals uses to review a variance from town zoning laws. “The standard for area variances is contained in section 267-b (3) of the Town Law in a provision that does not expressly require the applicant to prove ‘practical difficulties.’” Matter of Sasso v. Osgood, 86 N.Y.2d 374, 382 (1995). Accordingly, the court found that “an applicant need not show ‘practical difficulties’ as that test was formerly applied” by town zoning boards of appeal. Sasso v. Osgood, 86 N.Y.2d at 384.

However, APA has “formidable powers” that are stronger than those exercised by local municipalities’ zoning boards granting zoning variances pursuant to Town Law. Therefore, Town Law § 267-b, and the “common-law” stemming from Sasso v. Osgood that lessened the requirements for granting town zoning law variances, are **not applicable** to APA’s review of a

variance from APA's shorelines restrictions. Matter of Lake George Assn. v. Lake George Park Commn., 213 A.D.2d 867, 868 (3d Dept. 1995). In Lake George Association, Inc. v. Lake George Park Commission, the court rejected the argument that "common-law definitions" of an area variance applied because the Lake George Park Commission has its own "regulation[s] [that detail] a specific framework from which the Commission determines whether an applicant has sustained its burden by substantial credible evidence". Id.⁸ Similarly, APA has its own specific statutory framework for evaluating whether an applicant may be granted a variance from the shoreline restrictions. Therefore, the Sasso v. Osgood common-law does not apply to APA's review of a shoreline variance request, and a showing of "practical difficulties" is required in order to obtain a variance from APA.

The State Legislature enacted the shoreline restrictions "to provide adequate protection of the quality of the lakes, ponds, rivers and streams of the park and the qualities of their shorelines". APA Act § 806. APA Act § 806(3)(a) states that

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

The State Legislature did not amend the APA Act to eliminate the requirement for an applicant to show "practical difficulties" in "carrying out the strict letter of the restrictions" in order to allow

⁸ Notably, in that case, the property owner showed that "the natural dam and rock shoals [on the] property present safety hazards to boats and boaters at the marina", "that there is no request for an increase in the number of vessels served and that the actual square footage of the docks will be reduced", and that the variance was "imperative to the economic feasibility of the marina" based upon evidence from the applicant's accountant, "as well as tax returns and an appraisal". None of those physical conditions or evidence of economic feasibility are present in this case.

APA to “vary or modify” the restrictions. APA Act § 806(3)(a). Therefore, pursuant to the APA Act, **an applicant must show “practical difficulties” before APA can approve a variance request.** See Matter of Tyler v. Board Members of Adirondack Park Agency, 58 A.D.2d 718, 719 (3d Dept. 1977) (holding that an applicant must be given “an opportunity to demonstrate practical difficulty or unnecessary hardship” to obtain a variance from the shoreline restrictions).

Indeed, APA’s application form for a variance from the shoreline restrictions states that the applicant must:

(a.) **Describe any characteristics of the variance site** (i.e. boulders, ravines, wetlands, etc., or the size or dimensions of the lot itself) **which make compliance** with the applicable shoreline restriction **practically difficult or impossible.** Provide photographs depicting these characteristics.

(b.) Describe and document **whether the specified practical difficulty** in complying with the restrictions identified by the applicant **can be avoided** by any feasible method other than a variance. Discuss any alternatives in terms of size, location or design of the land use or development in question that would address the difficulty and allow compliance with the shoreline restrictions. **Explain all measures considered to address the perceived practical difficulty.**

(c.) **Describe the existing character of the shoreline** in the area of the land involved on both the same and opposite sides of the water body, particularly in regard to existing shoreline development, including lot widths and setbacks. Provide photographs depicting the existing character of the shoreline.

R. 335; see 9 NYCRR § 576.1(a).

Ironically, the APA Permit itself states that a variance may be granted “where there are practical difficulties in carrying out the restrictions set forth in Section 806(1)(a)(2) of the APA Act”. R. 3541. However, APA granted the shoreline variance without making any findings about “practical difficulties”.

Here, there are no practical difficulties related to the project site that would necessitate a variance from the strict provisions of the shoreline restrictions. The Applicant could use the properties, by constructing permissible docks without covers, without obtaining a variance from

the shoreline restrictions. See R. 126 (Rottier Aff. ¶10). While APA's Permit purports to address the criteria set forth in 9 NYCRR § 576.1(b) and (c), APA's Permit states nothing about 9 NYCRR § 576.1(a), presumably because APA could not affirm that "practical difficulties" were present in this situation. Moreover, Supreme Court's opinion about how the "difficulty arose" (R. 25) is not based upon any finding made by APA on the specific regulatory criteria, and may not be relied upon by this Court because the Court may not "surmise or speculate" about a finding that was not made by the agency. Cohen v. New York State & Loc. Employees' Ret. Sys., 81 A.D.3d 1156, 1158 (3d Dept. 2011). Accordingly, APA's Permit was arbitrary and capricious, affected by an error of law, and the matter must be remanded to back to the APA with direction to act in accordance with the APA Act and APA's shoreline restrictions.

B. APA Applied the Wrong Standard to the Review of the Project's Wetland Impacts Because APA Failed to Consider the Size of the Wetlands in its Rating Calculation

APA's decision to issue the Permit was arbitrary and capricious because it applied the wrong standard when it reviewed the impacts of the Project on the Annex site's extensive wetlands. APA regulations at 9 NYCRR § 578 provide that when wetlands contain three or more value-two characteristics, the wetland is considered to have a value one rating. APA admits that the "wetlands at the Annex site have a valuation rating of "2" for emergent mar[s]h, a valuation rating of "2" for wetlands comprised or two or more structural groups, and a valuation rating of "2" because it is greater than 2 acres in size". Jorling Aff. ¶19; see R. 178 (APA Answer ¶ 19). Accordingly, since the wetlands at the Annex site have three (3) value-two characteristics, the wetlands are considered to have a value one (1) rating.

In its review process, APA did apply 9 NYCRR § 578.5(c) correctly as an emergent marsh that receives a value rating of '2'. R. 3527 (Permit Writing Form, p. 2); see R. 215 (Affidavit of

John Burth, sworn to March 11, 2021 [“Burth Aff.”], ¶ 35), R. 751 (APA Declaratory Ruling). APA also applied 9 NYCRR § 578.5 (g) correctly based on structural groups and assigned a value rating of ‘2’ for this characteristic. R. 215. Accordingly, APA found that the wetlands have two “value-two characteristics”. However, APA did not evaluate the impacted wetlands under 9 NYCRR § 578.5(k) governing surface water systems and their importance based on **size**, despite having acknowledged that 10.4 acres of wetlands on the site were within the mean high water mark of Lower Saranac Lake. R. 566 (Letter from APA, Richard Weber to Applicant dated December 22, 2014 [“2014 Weber Letter”], p. 1).

It is uncontested that the wetlands at the Annex site are at least 16.4 acres in size, with 10.4 acres within the mean high water mark of Lower Saranac Lake. R. 566. Pursuant to 9 NYCRR § 578.5(k), surface water wetlands greater than 20 acres are assigned a value of ‘1’; wetlands under 2 acres are assigned a value of ‘3’; and **wetlands between 2 and 20 acres are assigned a value of ‘2’**. 9 NYCRR § 578.5(k) (describing wetlands between 2 and 20 acres in size as having a value rating of 2). Therefore, APA was required to assign a third “value-two characteristic” to the affected wetlands based on size, but it failed to do so. This from the agency that is obligated to “preserve, protect and conserve freshwater wetlands and the benefits derived therefrom” as one of its highest priorities. ECL § 24-0103; see Jones v. Adirondack Park Agency, 270 A.D.2d 577, 577 (3d Dept. 2000).

The method for determining overall wetland value, set forth in 9 NYCRR § 578.6, prescribes a formula for aggregating the multiple, specific characteristics of wetlands to achieve an overall value. If the agency had applied its own rule – specifically the valuation of ‘2’ based on emergent marsh, the value of ‘2’ based on structural groups and the value of ‘2’ based on the size of wetlands associated with open water – it would have resulted in three (3) or more high-

value characteristics of ‘2’. As a result, the overall wetland value rating of the wetlands would have been raised to a value ‘1’ rating with the accompanying restrictions. See 9 NYCRR § 578.6(c). APA itself acknowledged this in its December 22, 2014 letter to the Applicant (R. 566), in which it stated: “According to 9 NYCRR §578.6, if a condition exists where three or more value ‘2’ characteristics are determined to exist in a wetland complex, the value rating of the wetland will become value ‘1’”. R. 567. However, APA then arbitrarily ignored its own regulation regarding the wetland size characteristic that it acknowledged in the very same letter, including only three⁹ value ‘2’ characteristics, when four were clearly present and identified by the agency.

Accordingly, APA was required to review the Project’s impacts pursuant to the criteria for wetlands with a value rating of “1”, as set forth in 9 NYCRR § 578.10(a)(1). APA did not apply that standard and it did not make the findings required by that standard. Instead of applying the standard for wetlands with a value rating of ‘1’ (one), APA incorrectly applied the standard for wetlands with a value rating of ‘2’ (two) as set forth in 9 NYCRR § 578.10(a)(2).¹⁰ See R. 03046, 03056.

Failing to apply its regulations, as required, is prima facie evidence that APA acted unlawfully, and its abuse of discretion constituted an arbitrary and capricious action. Supreme Court did not address this legal issue in its decision and relied upon the “vast amounts of information” in the record (R. 28). Therefore, Supreme Court’s Decision must be reversed as a matter of law, the Permit must be annulled, and the matter remitted to APA with directions to apply

⁹ One of the four value ‘2’ characteristics initially identified (unusual species abundance) was contested by the Applicant and overturned in APA’s Declaratory Ruling (R. 751). No other wetlands characteristics with a value ‘2’ rating were ever contested, so there were still three uncontested wetlands characteristics with a value ‘2’ rating making the overall value rating a ‘1’.

¹⁰ Even if the criteria for wetlands rated ‘2’ is applied, the Permit is arbitrary and capricious because those criteria have not been met. See R. 87 (Petition ¶¶ 188-190).

correctly the formulas and standards laid out in its own regulations. An agency cannot cavalierly and arbitrarily fail to apply a central provision of its own regulation that bears directly on its duty to protect wetlands and the Adirondack Park with impunity. This Court must hold the agency accountable for such malfeasance and vacate and remit this matter; only in this manner can an agency's decisions be respected and trustworthy.

C. The Project Would Have an Undue Adverse Impact Upon the Adirondack Park

APA's issuance of a Permit for this Class A project was arbitrary and capricious because the Project would have an "undue adverse impact" upon the resources of the Adirondack Park. APA failed to conduct an analysis of the Project's adverse impacts on the use of the adjoining waters of Lower Saranac Lake, and the Project's impacts on adjoining and nearby land uses, in the context of reviewing the marina expansion as a Class A project.

According to APA Act § 809(10)(e), APA may not approve a permit for a Class 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.

The APA Act places "environmental concerns above all others". Matter of Association for the Protection of the Adirondacks, Inc. v. Town Board of Town of Tupper Lake, 64 A.D.3d 825, 830 (3d Dept. 2009) (concurring opinion). Indeed, "the APA's mandate is more protective of the environment than that embodied within [the State Environmental Quality Review Act]" and does not allow balancing of environmental harm against economic benefit. Id.

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” the development considerations set forth in APA Act § 805(4). Those “development considerations” require APA to evaluate the Project’s “potential for adverse impacts” upon the “water” and upon “adjoining and nearby land uses”, among many other considerations. APA Act § 805(4)(a),(c). Regardless of the ownership of the land under the waters of Lower Saranac Lake, these waters are resources of the Adirondack Park that are protected by the Adirondack Park Agency Act.¹¹ Moreover, the Saranac Lakes Wild Forest (“SLWF”), which is protected as part of the State Forest Preserve, is adjacent to the Project and likewise protected by the Adirondack Park Agency Act. APA Act § 805(4). In its review, APA failed to identify that the SLWF is adjacent to the Project.¹²

APA admitted that the “creation of up to 73 additional boat slips available at the marina may create impacts to adjoining and nearby landowners on Lower Saranac Lake”. R. 03054. APA also admitted that “views along the shoreline of Crescent Bay and Ampersand Bay on Lower Saranac Lake will be impacted by the installation of the open-sided structures”. R. 03052. Despite recognizing this, APA did not review such impacts on the nearby SLWF. There was no analysis by APA of whether those impacts, particularly to the carrying capacity of SLWF, would create an “undue adverse impact”, as required by APA Act § 809(10)(e) in evaluating whether to grant or deny the Class A permit for the Project, because APA claimed it “[o]verall use and boat capacity

¹¹ Only as a result of this litigation has DEC allegedly discovered that the underwater land at the Annex site is not Forest Preserve owned by the State. R. 257. At the time of APA’s review of this Class A project, the information before APA was that the Annex site was located in Forest Preserve (underwater land and waters). R. 1404, 1432.

¹² The Saranac Lake Islands campground is within the Saranac Lakes Wild Forest. The public Ampersand Bay Boat Launch, used for non-motorized (canoe and kayak) access is nearby. The public uses the rock on the northwestern portion of the Main Marina site to swim in Lower Saranac Lake. R. 03044. The public’s use of these resources is negatively impacted by the Project’s addition of new boats, and intensity of use, to Lower Saranac Lake.

of the Saranac Chain of lakes cannot be regulated through private businesses”. R. 3543. APA completely misses the point, and acted arbitrarily and capriciously by its failure to exercise its own authority, duty, and responsibility to protect the resources of the Adirondack Park when reviewing private development projects in the Adirondack Park. See APA Act § 805; see Point I(A), supra.

Finally, APA Act § 816 requires State Respondents to manage State lands in conformance with the SLMP. The SLMP states that “[p]ublic use of motor vehicles will not be encouraged” on as Wild Forest waters such as Lower Saranac Lake and “[c]are should be taken to minimize conflict of incompatible uses”, but the Project is encouraging increased motorized boat use, and it is not minimizing conflicts with different, incompatible uses. SLMP, p. 35. Additionally, “motorboating” on Lower Saranac Lake is not permitted to “materially increase” beyond the “motorized uses that conformed to the Master Plan at the time of its adopted in 1972” and it may “not adversely affect the essentially wild character of the land”. SLMP, p. 40. Having failed to identify, consider or even appreciate the SLMP’s mandates or the potential negative impacts of the Project on the publicly owned Saranac Lakes Wild Forest shows that APA failed in its duty to comply with APA Act §§ 809(10)(e), 816 and that its decision-making was arbitrary and capricious. See APA Act § 805(4)(e) (directing APA not to approve any private development project unless it determines that the project is in “conformance with other governmental controls”, which include the SLMP).

Therefore, given the adverse impacts on Lower Saranac Lake from the Project’s increase in the use of motorized watercraft on Lower Saranac Lake, and the adverse impacts to adjoining and nearby land uses, APA failed in its duty to protect the resources of the Adirondack Park from the undue adverse impacts of the Project. APA’s Permit is arbitrary and capricious and should be annulled.

POINT III

STATE RESPONDENTS' LACK OF STANDARDS FOR MARINAS IS ARBITRARY AND CAPRICIOUS BECAUSE IT ALLOWS THE AGENCY TO MAKE ARBITRARY DETERMINATIONS AS IT DID WITH THIS APPLICATION

It is axiomatic that an agency with administrative authority to grant permits for new activities must make rational decisions that adhere to legal requirements. When there are not standards or objective criteria for an agency to apply, the agency is prone to making arbitrary and capricious decisions. Supreme Court erred as a matter of law by not reviewing whether the APA's approval of this Permit adhered to basic principles of administrative law and conformed to "sound standards developed in this state and nation since their founding through constitutional statutory and case law."

A major objective of administrative law is to ensure the even, fair application of the law to all persons subject to the law. Specifically agencies issuing permits or licenses must adhere to principles and procedures that assure that all people are treated evenly and according to the same standards or criteria. Only in this manner can agencies that have turnover in staff and decision-maker personnel avoid making inconsistent, arbitrary and capricious actions. In the case of permit processes, central to the achievement of consistency and even application of the law is foreknowledge of the standards and criteria against which a permit is to be evaluated. For instance, in the Adirondack Park, any person seeking to construct a dock, a boathouse or a marina must receive a permit from the Adirondack Park agency. In the case of docks and boat houses, APA has promulgated regulations setting forth criteria and standards that must be met. While elements of

the proposed marina in this case meet the definition of docks and boat houses, APA did not evaluate the project by those regulations.

Rather, through a series of private meetings with the applicant, APA without any promulgated guiding standards or criteria, in effect defined the criteria and standards for a marina as meeting the Adirondack Park Agency Act's mandate to protect the natural resources and character of the Adirondack Park.¹³ APA cannot exercise its authority and assure even and fair treatment to any and all parties seeking to construct marinas without criteria or standards defining the specifications, promulgated through a rule-making process including wide public participation. The APA Act specifically grants authority to APA to promulgate regulations (See APA Act 804.9) necessary to administer the Act and carry out its mandates.

Without promulgated standards or criteria to guide its decision, APA acted arbitrarily and capriciously. Even more challenging to proper application of administrative law and lawful conduct by an agency, the APA by defining the standards and criteria in a private negotiation with APA staff has, in effect, through principles of equity, defined standards and criteria for marinas in a permit proceeding and not through rule making. Future applicants to construct a marina will argue under principles of equity they should be judged, in fairness," by the standards and criteria established in an earlier permit proceeding. Such a possibility represents manifest malfeasance by an executive agency and defeats the entire objective of administrative law to achieve consistency and avoid subjective, arbitrary and capricious decision-making. Appellant respectfully requests that this Court remand this permit to APA with directions to promulgate regulations regarding

¹³ This is in contrast to another government agency with jurisdiction over certain activities, including marinas affecting Lake George in the Adirondack Park. There, the Lake George Park Commission has promulgated criteria and standards limiting the construction of acceptable "marinas" on Lake George. See 6 NYCRR § 646-1.

criteria and standards for marinas in the Adirondack Park. This would compel the agency to adhere to the minimum requirements for proper implementation of its authority and elevate the Agency to a professional, lawful and respected public agency, not subject to the whims of staff or the power of applicants or other third parties.

Here, APA, without creating rules or specific limitations, has granted approval for the entire marina project that sets precedence allowing a marina of any size within waters of the Adirondack Park, any distance out from the shoreline. Permitting a marina without any regulatory criteria or standards (such as those that exist for docks and boathouses) represents a purely subjective decision and is therefore an arbitrary and capricious action.

Rather than creating guidelines via variance and permit proceedings, APA is required to undertake a regulatory rulemaking that would establish standards and criteria for marinas on waters. Establishing standards and criteria for marinas consistent with the protection of the waters of the Adirondack Park can only be accomplished through a regulatory process that ensures that all applicants, current and future, and the public are treated fairly and equitably.

CONCLUSION

APA and DEC have failed in their duties to preserve and protect the natural resources within the Adirondack Park, and their approvals allowing a commercial marina to exponentially expand threatens the waters and wetlands of Lower Saranac Lake. APA's and DEC's approvals of the Project are arbitrary and capricious and affected by errors of law because the Project does not meet the standards set forth by the Constitution and by the APA Act.

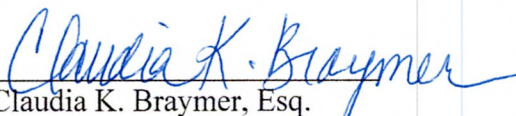
Pursuant to the foregoing, Appellant respectfully requests that the Court reverse Supreme Court's Decision and Judgment, and

- (1) Annul, vacate, and set aside APA's September 2020 Order;
- (2) Annul, vacate and set aside DEC's temporary revocable permit; and
- (3) Award Petitioner such other and further relief as this Court shall deem just, proper, or equitable.

Dated: May 4, 2022
Glens Falls, New York

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CERTIFICATION OF COMPLIANCE

Pursuant to Rule 1250.8(j)

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