At a term of Supreme Court of the State of New York held in and for the County of Oneida at the Oneida County Courthouse 200 Elizabeth Street, Utica, New York on the **19th** day of **September, 2022**.

PRESENT: HONORABLE BERNADETTE T. CLARK
Justice Presiding

STATE OF NEW YORK
SUPREME COURT COUNTY OF ONEIDA

Adirondack White Lake Association,
Protect the Adirondacks!

Petitioners,

-vs-

Adirondack Park Agency,
Red Rock Quarry Associates, LLC

Respondents.

DECISION AND ORDER

Index No. EFCA2022-000556
RJI No. 32-22-0145

APPEARANCES:

Todd D. Ommen, Esq.
Attorney for Petitioners – Adirondack White Lake Association & Protect the Adirondacks!
Pace Environmental Litigation Clinic, Inc.
78 N. Broadway, White Plains, New York 10603
(914) 422-4343

James Brody
Intern - Pace Environmental Litigation Clinic, Inc.
78 N. Broadway, White Plains, New York 10603
(914) 422-4343

Lucas C. McNamara
Attorney for Respondents – Adirondack Park Agency
New York State Office of the Attorney General
146 State Street, Albany, New York 12207
(518) 776-2402

Procedural History

Before the Court is a Verified Petition with Exhibits filed by Adirondack White Lake Association and Protect the Adirondacks! (hereinafter Petitioners) which seeks a judgment pursuant to CPLR Article 78 declaring that the Adirondack Park Agency's (hereinafter APA) grant of APA Permit 2021-0075 to Red Rock Quarry Associates, LLC, without holding an adjudicatory hearing, was arbitrary, capricious, or contrary to law, and, also, an order vacating the permit and remanding the matter to the APA to hold an adjudicatory hearing.

Petitioners also filed a memorandum of law in support of their Petition. Subsequently, the parties entered into a Stipulation with a Briefing Schedule that was So Ordered by this Court. Thereafter, Adirondack Park Agency, (hereinafter Respondent) filed an Answer in Special Proceeding along with the Certified Administrative Return as well as a Memorandum of Law in Opposition to the Petition. Thereafter, Petitioners filed a Memorandum of Law in Reply. Oral Argument was held in the Oneida County Courthouse on June 30, 2022, whereafter the Court reserved decision.

Facts

Red Rock Quarry Associates, LLC, (hereinafter Red Rock) and Thomas Sunderlin submitted an application for a mining permit with the Department of Environmental Conservation (hereinafter DEC) and an Application for Major Projects with the APA on April 5, 2021. After requesting and receiving additional information from Red Rock the APA deemed the application complete on July 7, 2021. This project generated a substantial amount of public concern and opposition, including over 300 public comments, 1,432 form letters and 1,400 petition signatures. The APA heard public comments on November 18, 2021, and December 16,

2021. Several of those commenting requested that the APA hold an adjudicatory hearing on this permit application.

The APA board members discussed the approval of this permit, APA Permit P2021-0075, during two Regulatory Affairs Meetings on January 13 and 14, 2022. Thereafter, the permit for Red Rock was granted by the APA on January 14, 2022, *with conditions*. The permit mandated that no vegetation be removed outside of the authorized limits of clearing. The permit also limited the days and hours of operation and limited blasting to no more than twice per day with maximum charge over of 100 pounds. This limitation is between 150-700 times less than allowed in other APA permitted mining operations. In addition, the permit requires all blasting must be supervised by a blaster certified by the NYS Department of Labor. The permit also caps truck traffic to 20 round trips each day during days and times allowed for mining operations. Despite numerous requests, the APA determined that no adjudicatory hearing would be held relative to the permit in this case. Shortly thereafter, the APA issued its permit, and the DEC issued a mining permit pursuant to the New York Mined Land Reclamation Law (MLRL). The DEC also rejected the request by the Petitioner for an adjudicatory hearing.

Petitioners main claim centers around Respondents' refusal to hold an adjudicatory hearing claiming that it was arbitrary and capricious and was contrary to law because there were significant unresolved factual issues that were required to be resolved prior to the issuance of a permit. Respondent countered that the APA acted in accordance with all applicable statutes, regulations, procedures, and policies and that its determination to issue a permit to Red Rock was rational and neither arbitrary nor capricious.

Analysis

Petitioner commenced this CPLR Article 78 proceeding to challenge a mining permit issued by Respondent APA to Red Rock Quarry to allow mineral extraction in a previously existing mine. When considering a challenge to an action taken by an agency issuing a permit, the Court must determine whether there is a rational basis for the permit's issuance based upon the record.

Respondents claim that Petitioners challenge to the permit must be dismissed because they failed to allege facts that if proven at an adjudicatory hearing would have materially altered the APA's determination to issue the permit. Respondents claim that Petitioners have only speculated about proof that *may* be allowed if a hearing was held which *may* have materially altered the APA's decision to issue a permit. Respondent claims that a unanimous vote of the directors determined that a hearing was not necessary because there were no substantive and significant issues regarding any new findings or determinations that APA was required to make. *See* Executive Law § 809(3)(d).

In their Reply memorandum, Petitioners concede that it was not an option to question the validity of the permit and that the sole challenge they could make against the APA and the discrete issue before the Court is whether the APA's refusal to hold an adjudicatory hearing before granting or denying the permit was arbitrary and capricious or contrary to law. Nevertheless, Petitioners emphasized that the APA has entirely ignored its own regulations, which provide when an adjudicatory hearing is required. In support of this claim Petitioners argue that the fact that the APA "has failed to hold any adjudicatory hearings on any permit

applications since 2006 conclusively demonstrates that its interpretation of its own statutory and regulatory obligations is arbitrary, capricious and contrary to law." Petitioners further argue that the APA's statutes and regulations instruct the APA to hold adjudicatory hearings under certain conditions, and the fact that "zero" hearings have been held is, by definition, contrary to law.

However, the parties agree that: (1) the APA must find that a permit will have no "adverse impact upon the natural, scenic, aesthetic, ecological, wildlife, historic, recreational or open space resources of the park;" (2) there are development considerations which consist of 37 review criteria contained in Executive Law § 805(4); and (3) the APA's protection of the environment through this review process is more protective of the environment than review under the State Environmental Quality Review Act (SEQRA). While the parties also agree that Executive Law § 809(3)(d) governs when the APA must hold an adjudicatory hearing prior to issuing a permit, they completely disagree in their respective analyses of this law and over the APA's ultimate determination.

As stated above, after considering the pleadings, memoranda of law, and arguments of counsel, the sole and discrete issue before the Court is whether the APA's decision to not hold an adjudicatory hearing prior to issuing a permit to Red Rock was arbitrary, capricious or contrary to law. On this point, Executive Law § 809 (3)(d) provides, in pertinent part, that:

> The determination of whether or not to hold a public hearing on an application shall be based on whether the agency's evaluation or comments of the review board, local officials or the public on a project raise substantive and significant issues relating to any findings or determinations the agency is required to make pursuant to this section, including the reasonable likelihood that the project will be disapproved or can be approved only with major modifications because the project as proposed may not meet statutory or regulatory criteria or standards. The agency shall also consider the general level of public interest in a project.

Additionally, 9 NYCRR § 580.2(a) sets forth the criteria to be weighed in determining whether an adjudicatory hearing should be held and these include:

(1) The size and/or complexity of the project, whether measured by cost, area, effect upon municipalities, or uniqueness of resources likely to be affected.
(2) The degree of public interest in the project as evidenced by communication from the general public, governmental officials or private organizations.
(3) The presence of significant issues relating to the criteria for approval of the project.
(4) The possibility that the project can only be approved if major modifications are made, or substantial conditions are imposed.
(5) The possibility that information presented at a public hearing would be of assistance to the agency in its review.
(6) The extent of public involvement achieved by other means.
(7) Whether an environmental impact statement will be prepared pursuant to SEQRA.
(8) The statutory finding required by section 8104(2) of the APA act in the case of state agency projects reviewed thereunder.

The main thrust of Petitioner's argument is that the APA's failure to hold an adjudicatory hearing is in contravention of at least six of the aforementioned eight criteria. Specifically, Petitioner's allege that an adjudicatory hearing was warranted based upon: (1) the project's size and complexity; (2) the degree of public interest in it; and (3) the existence of significant issues relating to the criteria for approval of the project, including the noise levels and whether Red Rock had legal access to Stone Quarry Road (also known as Old Quarry Road); (4) the lack of a required environmental impact statement by SEQRA and the copious number of proposed changes to the permit necessary for its approval; (5) the possibility that the project can only be approved if major modifications are made; and, finally, (6) the existence of a strong possibility that information presented at a public hearing would be of assistance to the agency in its review.

More specifically, Petitioners' claim that Respondents should be required to hold an adjudicatory hearing in this case can be distilled down to three main issues: (1) whether the Red

Rock Quarry Project will cause material noise pollution that will negatively impact the local homeowners ability to use and enjoy their properties; (2) whether, as in the 2000 application, further analysis should have been required of the applicant in terms of environmental noise pollution studies and engineering reports; and (3) whether Red Rock has full legal and titled access to the relevant parcel of land. Petitioners believe that the answers to these questions should have been "fleshed out" in an adjudicatory hearing. Petitioners claim that these critical issues were required to be thoroughly examined in an adjudicatory hearing and that the APA's failure in this regard was arbitrary, capricious and contrary to law.

Respondents contend that it was a misrepresentation by Petitioners to assert that an adjudicatory hearing was required because they had produced a "detailed engineering assessment" on the proposed project. In this regard, Respondents claimed, first of all, that the "detailed engineering assessment" did not contain the opinions of a professional engineer and, more importantly, that the report did not state that their expert had reached factual conclusions demonstrating that the proposed quarry would create undue impacts on the environment and that the APA permit should, therefore, not have been issued. Respondents further argued that an adjudicatory hearing was not required because the applicant agreed with the various proposed conditions which ultimately led to the APA board's unanimous decision on January 14, 2022, to issue permit APA 200021–0075. Respondents allege that Petitioners claim of unresolved factual issues is speculative and failed to show a material factual dispute that could be adjudicated at a hearing. Respondents alleged further that "it was incumbent upon (the party seeking the hearing) to provide support for their stated concerns." *Matter of Eastern Niagara Project Power Alliance v. DEC*, 42 A.D. 3d 857, 861 (3rd Dep't 2007).

First, with regard to Petitioners' argument regarding the allegation of increased noise pollution, Respondents contend that there was no substantive and significant issue regarding the noise level since the application contained a noise assessment that fully complied with the standards and procedures established by the DEC's program policy of assessing and mitigating noise impacts. According to the Respondents, these DEC standards have been used consistently for over 20 years. Significantly, Respondents argued that Red Rock's noise levels were well within the DEC policy standards and neither Petitioners nor any public comment submitted any document which demonstrated a different noise level purporting to show a level of noise that was unacceptable. Moreover, Respondents contend that Petitioners failed to provide any expert opinion that the APA's analysis on the noise levels was improper in any manner. Respondents claim that the relevant noise decibel level would be 53.2 is significant because the DEC noise policy states that the noise levels in the 50. 0 decibel range are considered "quiet."

Petitioners argued that the APA should have required an expanded noise analysis in addition to the one provided by the applicant and that it was "not accurate that the APA followed the DEC regulations and the guidance in the manual." Nevertheless, Respondents explained during oral argument that Petitioners have not offered any evidentiary support or any expert opinions for their claim and stated further during oral argument:

> "[T]hat's a noise policy that the APA has been relying on for 20 years. The obvious reason it wasn't referenced in that early 2000 letter (is because) it didn't exist yet. It came out later that year. They describe that as inexplicable. It's the dates that describe why that happened. So, APA and DEC have been relying on that noise policy for 20 years. They argued it was bad and they should go back. Now again there's 20 years of real-world evidence out there about whether the sound policy produces bad results."

Further, Respondents argued that,

> "Petitioners materially misinterpret the noise analysis when they allege that the applicant did not follow the DEC noise policy and then argue the decibel reading should have been higher based upon an assumption that people would have their windows open in warmer months. Petitioners incorrectly assumed that the receptor in the noise analysis was being treated as being behind building walls with closed windows. The noise analysis makes no such assumption however and, if it had, the estimated decibel level would have been significantly reduced below 53.2 decibel calculation."

At oral argument counsel for Respondent stated in response to Petitioners claim that the APA sound analysis "isn't good":

> "They hired an environmental consulting firm. They didn't produce their own sound analysis that says there will be undue impacts; they didn't produce their own blasting analysis saying there would be undue impacts; they didn't produce their own traffic study… That's the way you make a material conflict".

Petitioners also claimed that there was an issue with regard to the ownership of Stone Quarry Road that necessitated resolution in an adjudicatory hearing. Petitioners argued that the APA was required to hold an adjudicatory hearing to establish the legal access to Stone Quarry Road. Petitioners claim that included in the public comments was an allegation that the applicant did not adequately demonstrate full titled access to the project site and that an adjoining property owner claimed that Stone Quarry Road had been abandoned. Petitioners also alleged that a deed from 1990 demonstrated that a public easement was granted to the entirety of Stone Quarry Road. Petitioners argued that "if this easement is still in place, it would traverse the entire site and would appear to prevent mining without violating the easement." Petitioners further claimed that the APA did not investigate the easement and instead relied upon the Town of Forestport's statement that Stone Quarry Road belongs to the Town and is maintained by the Town. Once again, Petitioners argued that the APA should have investigated the status of the Stone Quarry

Road further and held an adjudicatory hearing to clarify this important unresolved question of fact.

With regard to this point, Respondents argued that neither the APA Act nor the implementing regulations require the APA to determine title to the roadways that an applicant plans to use in accessing its own property. In support of their contention, Respondents' cite to the permit language which provides, in pertinent, part that it does not establish or alter real property rights "and that it does not convey any right to trespass upon the lands… of others in order to undertake the authorized project, nor does the permit authorize impairment of any easement, right, title, or interest in real or personal property." Respondent further argued that the ownership of Stone Quarry Road does not bear on any of the statutory or regulatory factors that the APA must consider in its analysis.

Respondents commented further that the Petitioners would have the right to commence an action under New York RPAPL Article 15 to quiet title and resolve the issue that they believe to be in question. In support of its argument that the ownership of the Stone Quarry Road does not bear on the APA's statutory mandate, Respondent stated "that the ownership of Stone Quarry Road would not affect whether undue impacts result from APA's permit" and that "if Red Rock does not mine on the site because it cannot use Stone Quarry Road, no undue impacts will result from that scenario which will have nothing to do with APA's permit." Respondents acknowledged that if Red Rock wanted to use a different access point, the applicant would need prior written APA authorization.

Lastly, Respondent argued that the APA was well within its discretion to not hold an adjudicatory hearing since (1) Petitioners did not establish a material issue fact to be resolved; 2)

the proposed project was small and relatively simple; 3) the site was historically used for granite mining and is not visible from the residences or the nearby roads; 4) the mining footprint is only 8.8 acres with an excavation area of 5.2 acres; 5) no buildings would be erected on the site; 6) local municipalities lodged no complaints related to APA's review of the project and; 7) public comments identified no unique resources that would be affected.

In an Article 78 Special Proceeding, this Court's review is, of course,

> [l]imited to whether the determination lacks a rational basis and is, thus, arbitrary and capricious. An action is arbitrary and capricious when it is taken without sound basis in reason or regard to the facts. If the agencies determination has a rational basis, it will be sustained even if a different result would not be unreasonable. [The Court] may not substitute [its] Judgment for that of the agency responsible for making the determination and difference to the judgment of the agency, when supported by the record, is particularly appropriate when the matter under review involves a factual analysis in the area of the agency's expertise. *Matter of Adirondack Wild: Friends of the Forest Preserve v. New York State Adirondack Park Agency, 161 AD3d 169, 176 2018 3rd Dept. quoting Matter of Fuller v. NYS Dept. of Health, 127 AD3d 1447 2015 3rd Dept.*

As stated above, the question for this Court is whether the APA rationally declined to hold an adjudicatory hearing. *Matter of Beer v. NYS DEC, 189 A.D.3d 1916, 1920 (3rd Dept. 2020); Matter of River Keeper Inc. v. NYS DEC, 42 A.D. 3d 857, 861 (3rd Dept. 2017).* It is well established that the determination as to whether to hold a public hearing rests within APA's discretion. Executive Law § 809 [3][d]. Under these circumstances, the Petitioner "bears the burden of demonstrating that any issue relating to the application is both substantive and significant". *Matter of Beer, supra*, at 1920.

After due consideration of the voluminous record before the Court and the lengthy oral argument by counsel, the Court finds that Petitioners have failed to meet their burden of

demonstrating a substantive or significant factual issue with regard to increased noise pollution and access to the mine that would require an adjudicatory hearing in order to resolve. In this Court's view, the APA's determination declining to hold an adjudicatory hearing was rational and not arbitrary or capricious. In fact, their determination was consistent with its prior determinations not to hold adjudicatory hearings unless there are factual issues that are both substantive and significant.[1] This Court agrees with Respondents' argument that "...it would be quintessentially arbitrary to hold an adjudicative hearing just because the APA has not held one in the last 14 years." This Court verily believes that the APA conducted a diligent review of this permit application. The Court also finds that this permit application did not present any unique or unfamiliar issues which would require an adjudicatory hearing.

The Court finds that the APA's analysis that this project was small and relatively simple, on a previously mined site with an excavation area of only 5.2 acres, that no buildings would be erected on the site, and that no unique resources would be impacted, was sound and rational. While there can be no dispute that APA holds adjudicatory hearings sparingly, there is no evidence before this Court that established that the APA's failure to hold one in this case was an abuse of discretion, arbitrary, or capricious or contrary to law.

Now, therefore, in accordance with the above, it is hereby

ORDERED that the Petition is **DISMISSED** in its entirety.

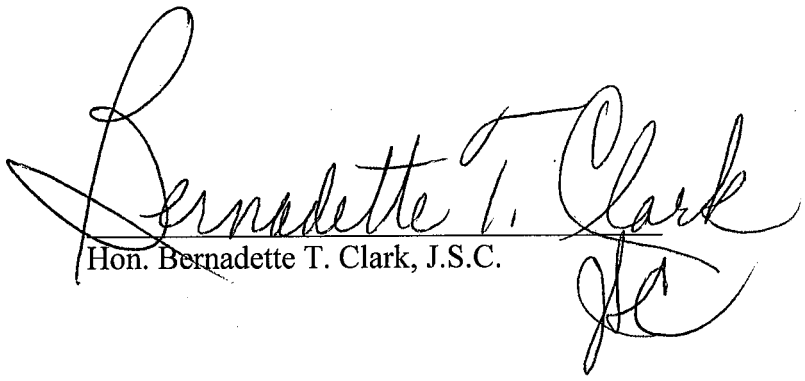
This shall constitute the Decision and Order. The original Decision and Order is returned to counsel for Respondents. All other papers are being delivered by the Court to the

[1] Since 1997, 2495 permits have been issued by the APA and 9 adjudicatory hearings have been held.

County Clerk for filing. The signing of this Decision and Order does not constitute entry or filing under Civil Practice Law and Rules § 2220. Counsel is not relieved from the applicable provisions of that rule with respect to filing, entry, and notice of entry.

ENTER:

Dated: September 19, 2022
Utica, New York



Hon. Bernadette T. Clark, J.S.C.

13