

In the Matter of the Application to
Construct the Adirondack Club and
Resort by

Preserve Associates, LLC
Applicant.

Ruling on
Applicant's Request
for Clarification
concerning Issues
No. 1, 7, 8, and 10

APA Case No. 2005-100

January 13, 2011

By letter dated December 10, 2010, Applicant's counsel requested clarification of Issues No. 1, 7, 8, and 10 as identified in the November 16, 2010 memorandum and issues ruling concerning the captioned matter. As part of its request, Applicant proposed some alternative language for the parties' and my consideration.

In a letter dated December 13, 2010, I provided the parties until December 23, 2010 to comment about Applicant's proposed clarification. Responses to any duly filed comments were due by January 11, 2011.

I received timely comments from the following parties:

1. Letter dated December 23, 2010 from Marc S. Gerstman, on behalf of the Adirondack Council. The Adirondack Council's comments relate to Issue No. 1 concerning the density and design criteria;
2. Memorandum dated December 23, 2010 from Curtis Read, on behalf of LSP, Inc., and B. G. Read, on behalf of the Birchery Partners. These comments relate to Issues No. 1 and 8 relative to alternatives;
3. Letter dated December 23, 2010 from John W. Caffry, on behalf of Protect the Adirondacks!, Inc. (Protect). Protect's comments relate to Issues No. 1, 7, 8 and 10;
4. Letter dated December 23, 2010 from David Gibson and Dan Plumley, on behalf of Adirondack Wild: Friends of the Forest Preserve (Adirondack Wild). Adirondack Wild's comments relate to Issues No. 1, 8 and 10;

5. Letter dated December 23, 2010 jointly filed by Don Dew, Jr., Fred Schuller, Dan McClelland, Kyle Ackerman and Jon Kopp. Among other things, Messrs. Dew, Schuller, McClelland, Ackerman and Kopp state that they will stipulate to all of Applicant's proposed clarifications;
6. Letter received by email on December 23, 2010 from Kirk Gagnier, on behalf of the Town of Tupper Lake and the Tupper Lake Planning Board. The Town and the Planning Board will stipulate to all of Applicant's proposed clarifications; and
7. Letter dated December 23, 2010 from Paul Van Cott, on behalf of Adirondack Park Agency (APA) staff. APA staff's comments relate to Issues No. 1, 7, 8, and 10.

I received timely replies from the following parties:

1. Email dated December 24, 2010 from Kyle Ackerman. Mr. Ackerman supports the comments filed by APA staff, and would like the hearing to convene as soon as possible.
2. Cover letter dated January 11, 2011 and response from Applicant's counsel. Applicant offered nothing more with respect to Issue No. 1, as it relates to the density and design criteria, and Issue No. 7. Applicant concurs with APA staff's position concerning the preliminary summary of the application. Applicant provides extensive arguments about Issues No. 1 and 8 relative to alternatives and the use of Read Road.

Discussion

I. Issue No. 1 - Density and Design Criteria

As set forth in the Board's February 15, 2007 Order (at 7 of 12), Issue No. 1 relates to the potential adverse impacts associated with the proposed Great Camp Lots on the Resource Management land use areas on the project site. For the reasons, outlined in the November 16, 2010 memorandum and issues ruling, I expanded the scope of Issue No. 1 to include: (1) a consideration of stormwater impacts on Resource Management land

use areas on the project site; (2) potential visual impacts of the project during daylight and nighttime hours, as limited by Item 5 of the Board's February 15, 2007 Order; and (3) the use of Read Road as an alternative. (See November 16 Issues Ruling at 3-5, 19-20, 27-28, and Appendix B.)

As stated in its December 10, 2010 letter, Applicant presents the following statement with respect to Issue No. 1:

Several parties have suggested that the definition of 'substantial acreage' will limit the density of development. That is not the case. The density of allowable residential development is governed by the statute's Overall Intensity Guidelines stated in Section 805(3)(g)(3). It is 15 principal buildings per square mile which equates to one (1) principal building per average lot size of 42.7 acres. Substantial acreage and clustering [see Section 805(3)(g)(2)] are design criteria, not limits on density. Furthermore, given accepted rules of statutory interpretation, residential development in small clusters must be on carefully selected and well designed sites but residential development on substantial acreage does not appear to be so limited.

The Adirondack Council, Protect, and Adirondack Wild object to Applicant's proposed clarification. The Adirondack Council contends that Applicant is inappropriately attempting to limit the scope of Issue No. 1 by narrowly interpreting Executive Law § 805(3)(g)(2). Citing Executive Law § 805(3)(g), the Adirondack Council argues that at hearing the significance of the impacts to Resource Management lands must be evaluated in light of the entire section of the law. According to the Adirondack Council, Executive Law § 805(3)(g) describes the importance of Resource Management land use areas, the purpose, policies and objectives underlying such a designation, and the prescribed primary and secondary uses of these areas. At the hearing, the Adirondack Council intends to present evidence that the current design of the Adirondack Club and Resort project would result in significant adverse impacts to the natural environment and the natural resource values underlying the designation of the Resource Management lands.

Protect notes that Applicant did not propose any alternative, clarifying language with respect to Issue No. 1, as

is the case with the other proposed clarifications. Protect disagrees with Applicant's statutory interpretation, and asserts that the parties should not to debate the meaning of the statute at this point in the proceeding. Protect recommends that the statutory provision should be quoted in full without the ellipsis.

The basis for Adirondack Wild's objection is that Applicant is attempting to raise a new issue of statutory interpretation. According to Adirondack Wild, Applicant's interpretation is inaccurate. Contrary to Applicant's contention, Adirondack Wild argues that the meaning of the terms "density" and "intensity of use" are distinct. Adirondack Wild argues further that the phrase "carefully selected and well designed sites" applies to development both on substantial acreage and in small clusters, rather than to only small cluster development.

According to APA staff, Applicant's arguments concerning substantial acreage should be presented as legal arguments at the conclusion of the hearing. APA staff argues that Issue No. 1 requires no clarification. At hearing, APA staff intends to present testimony on whether the great camps are on "carefully selected and well designed sites," regardless of whether the development would take place on "substantial acreage" or in "small clusters."

As noted above, Messrs. Dew, Schuller, McClelland, Ackerman and Kopp, as well as the Town of Tupper Lake and the Tupper Lake Planning Board stipulate to Applicant's proposed clarification of Issue No. 1 as it relates to the density of design criteria.

Ruling: Clarification of Issue No. 1 is not necessary. Applicant offers argument about the meaning and intent of Executive Law § 805(3)(g)(2), and other provisions of the Executive Law applicable to this matter.

The wording of Issue No. 1, as it appears in the November 16, 2010 memorandum and issues ruling at 3 and in Appendix B, is quoted verbatim from the Board's February 15, 2007 Order (at 7 of 12). When the Board referenced Executive Law § 805(3) in Issue No. 1, the Board used the ellipsis. Therefore, I decline to modify the quoted portion of Executive Law § 805(3)(g)(2) in Issue No. 1 by eliminating the ellipsis and restating the statutory provision in full.

Given the manner in which the Board worded Issue No. 1 in the February 15, 2007 Order, I agree with APA staff's position. Though Applicant's interpretation of Executive Law § 805(3)(g)(2), as set forth in its December 10, 2010 request, may be reasonable, I, nonetheless, interpret the Board's use of the ellipsis to expressly encourage the development of the hearing record in the manner proposed by APA staff. Therefore, I will allow the parties to present evidence about whether the proposed Great Camp Lots would be on carefully selected and well designed sites, regardless of whether the proposed development would take place on substantial acreage or in small clusters.

At the conclusion of the hearing, the parties will have the opportunity to offer legal arguments about how the Board should interpret Executive Law § 805(3), and how the Board should apply Executive Law § 805(3) to either Applicant's proposed Great Camp Lots configuration, or any alternative designs presented at the adjudicatory hearing.

Applicant's request for clarification of Issue No. 1 as it relates to the density and design criteria is denied.

II. Issue No. 7

Applicant proposes to clarify the designated land use areas at the locations of the former McDonald's Marina and the State boat launch site as discussed in the November 16, 2010 memorandum and issues ruling at 13. I had stated that the former McDonald's Marina is located in an Intensive land use area.

Applicant states, however, that the site of the former McDonald's Marina is on privately owned property located on the shore of Tupper Lake, and classified as a Moderate Intensity land use area. With reference to Executive Law § 810(2)(a), Applicant notes that marinas are compatible, secondary uses in Moderate Intensity land use areas. Applicant states further that the site of the New York State boat launch is located on publicly owned forest preserve lands that are classified as an Intensive land use area.

Protect generally agrees with Applicant's proposal to correct the misstatement that the former McDonald's Marina is located in an Intensive land use area. Protect, however,

objects to Applicant's characterization that the residents and guests of the resort would use the State boat launch site from "time to time." Protect notes that Issue No. 7 as drafted by the Board did not characterize how often the State boat launch would be used.

APA staff recommends that the land use designation for the former McDonald's Marina should be corrected. APA staff notes that the scope of Issue No. 7 is limited to the potential impacts that the proposed project would have on the Forest Preserve, "such as State facilities in Intensive Use areas." APA staff objects to Applicant's characterization that the residents and guests of the resort would use the State boat launch site from "time to time" because how frequently and intensely the State boat launch site would be used by residents and guests of the resort has not been adjudicated.

Ruling: The November 16, 2010 memorandum and issues ruling is modified to correct my mischaracterization of the land use designation of the former McDonald's Marina. The former McDonald's Marina is located in a Moderate Intensity land use area rather than in an Intensive land use area.

Applicant's proposal to characterize the potential use of the State boat launch site by residents and guests of the resort is denied. The Board did not include such language in the February 15, 2007 Order (at 8 of 12). As I noted in the November 16, 2010 memorandum and issues ruling (at 13), the parties did not propose any additional revisions to Issue No. 7 during the October 20, 2010 pre-hearing conference or otherwise object to the issue in its current form. As APA staff correctly notes, the focus of Issue No. 7 is to develop a record about the potential impacts of the proposed project on the Forest Preserve. Record development of Issue No. 7 may include whether, and if so, how frequently, the State boat launch site may be used by residents and guests of the proposed Adirondack Club and Resort, as well as any adverse impacts associated that the anticipated level of usage.

Finally, there is a typographical error associated with Issue No. 7 as it appears on page 13 of the November 16, 2010 memorandum and issues ruling (*also see Appendix B*). In the second line, the phrase "Forest Reserve" should be "Forest Preserve."

III. Issues No. 1 and 8 - Alternative Incorporating Read Road

In the November 16, 2010 memorandum and issues ruling (at 27-28, and Appendix B), the scope of Issues No. 1 and 8 was expanded to include a consideration of alternative Great Camp Lot configurations that would rely on Read Road for access (Issue No. 1), and potentially obviate the need to construct the on-site wastewater treatment facility on Cranberry Pond (Issue No. 8).

To the extent that Issues No. 1 and 8 require a record to be developed about alternatives, Applicant objects to a consideration of any alternatives that may rely on the use of Read Road. Applicant contends that it does not own Read Road, and has no legal interest in Read Road. Furthermore, Applicant states that it has no interest in purchasing Read Road. Applicant argues, therefore, that it cannot be compelled to consider using Read Road as part of any alternative. Applicant argues further that the Board cannot consider Read Road as part of any alternative. To support this argument Applicant refers to the following regulatory provisions (9 NYCRR 571.5[a]; 572.4[a][1]; 572.4[c][6] and 6 NYCRR 617.9[b][5][v][g]; also see *Quiver Rock, LLC v. APA and Angell*, Sup. Ct. Herkimer County - Index No. 6775-10).

Curtis and Bayard Read object to Applicant's proposed clarification. According to the Reads' December 23, 2010 comments, Applicant has offered to purchase portions of Read Road on several occasions since 2005, and proposed various alternatives during the mediation discussions that incorporated portions of Read Road into the project. The Reads note further that portions of Read Road remain available for sale if mutually satisfactory terms and conditions are reached.

The Reads argue that using Read Road would avoid or minimize adverse impacts associated with Applicant's current proposal. If Read Road is not considered, then the Reads argue further that the hearing record should be developed to determine the costs of fencing and other measures to prevent trespass on the road.

Protect acknowledges Applicant's right to object, but opposes the proposed clarification. Protect states that it disagrees with Applicant's arguments. Protect argues that Applicant's proposed clarification is untimely because Applicant

did not provide its legal citations at the October 20, 2010 pre-hearing conference.

Adirondack Wild opposes Applicant's proposed clarification of Issues No. 1 and 8 to exclude a consideration of using Read Road as part of alternatives to the proposal. Adirondack Wild contends that using Read Road would enhance clustered development while avoiding habitat fragmentation and its associated adverse impacts.

APA staff opposes Applicant's proposed clarification, and supports the consideration of alternatives that may incorporate Read Road. APA staff acknowledges that Read Road is not part of the project proposal. APA staff notes, however, that Read Road is "within the project site." Accordingly, APA staff argues that Read Road is relevant to development considerations, including, but not limited to, natural resource considerations (see Executive Law § 805.4[a]), site development considerations (see Executive Law § 805.4[c]), and governmental considerations (see Executive Law § 805.4[d]).

APA staff argues that the Read families should have the opportunity to present their evidence concerning the benefits of using Read Road. APA staff argues further that Applicant may present a case for not incorporating Read Road into the project, and provide legal argument at the conclusion of the hearing to support its position.

In its response dated January 11, 2011, Applicant offers the following. Applicant lists the 12 letters that members of the Read families, or their representatives, filed with APA staff from August 2005 until February 1, 2007 about the project.¹ According to Applicant, the intent of these letters was to convince APA staff to solicit additional information from Applicant about incorporating Read Road into Applicant's proposal. Applicant asserts further that the Read families requested an adjudicatory hearing about the project. Applicant contends that the Board was aware of the Read families' position when the Board determined the issues for adjudication, and argued that the Board expressly chose to exclude Read Road from the consideration of alternatives in Issues No. 1 and 8.

¹ I do not have copies of these letters.

With reference to 9 NYCRR 580.2(a)(3 and 4), and to 6 NYCRR 624.4(c)(2), Applicant argues that the intervening parties have not proposed a substantive and significant issue for adjudication. Applicant argues further that Read Road is not an "existing alternative" because the Read families have insisted that the road would have to be brought up to Town specifications which, among other things, would require additional regulatory approvals.

Applicant contends that a consideration of alternatives cannot extend to properties not owned or controlled by the project sponsor. To support this contention, Applicant refers to 6 NYCRR part 617 (State Environmental Quality Review [SEQR]) as well as related case law, including, *Horn v. Int'l Business Machines, Corp.*, 148 AD2d 130 (3d Dep't. 1989), and DEC administrative decisions,² such as, *Matter of Dynegy Northeast Generation, Inc.*, Interim Decision dated May 13, 2005.

Ruling: Applicant seeks reconsideration, not clarification, of my ruling to expand the scope of Issues No. 1 and 8, as set forth in the Board's February 15, 2007 Order, to include the use of Read Road as part of the consideration of alternatives.

The project site owned or under the control of Applicant, located west of Lake Simond, is bisected by Read Road, which is private property owned by the Read families. In its December 10, 2010 request, Applicant states, among other things, that it has no interest in buying Read Road. In its January 11, 2011 response, Applicant restates its position that it has no interest in buying Read Road. Nevertheless, the Reads contend that adverse environmental impacts from the project could be mitigated or avoided if Read Road, or portions of it, are incorporated into the project. This contention is compelling given the location of Read Road in relationship to Applicant's parcels of property located west of Lake Simond.

I note that Applicant accurately quotes 6 NYCRR 617.9(b)(5)(v)(g) in its January 11, 2011 response, which states in relevant part that:

[s]ite alternatives **may** be limited to parcels owned by, or under option to, a private project sponsor (emphasis added).

² It is not clear whether DEC administrative decisions have precedential value in APA proceedings such as this one.

The regulatory language at 6 NYCRR 617.9(b)(5)(v)(g), is permissive and not mandatory. Consequently, 6 NYCRR 617.9(b)(5)(v)(g), to the extent that it applies to the captioned matter, does not expressly exclude a consideration of Read Road because Applicant neither owns nor otherwise has control over it.

In addition, the Board's February 15, 2007 Order is not specifically limited to a consideration of alternative sites, but to alternatives. By incorporating Read Road into the project, intervening parties have asserted, for example, that alternative technologies could be used to treat wastewater, and that alternative project designs would mitigate or avoid adverse environmental impacts or change the scale or magnitude of the project (see 6 NYCRR 617.9[b][5][v]). Moreover, APA staff supports the consideration of alternatives that may incorporate Read Road.

The Board's final determination concerning this matter could neither require the project sponsor to purchase Read Road, nor compel the Reads to provide Applicant with access to their property. I conclude, however, that the Board's final determination would benefit from having a range of alternatives identified and developed on the record, against which the project can be evaluated. Part of the evaluation would include the reasonableness of any proposed alternative. At the close of the hearing, the parties will have the opportunity to present arguments about whether the alternatives offered at the hearing are reasonable.

Applicant's request for reconsideration of the scope of Issues No. 1 and 8, as it relates to Read Road is denied.

IV. Issue No. 10

To address Issue No. 10, APA staff offered to provide a summary of the record and draft conditions for the proposed project before the adjudicatory hearing commences. Applicant states in its December 10, 2010 request that APA staff may have unintentionally mischaracterized the proposed summary document. Applicant refers to APA staff's letter dated October 13, 2010,

which was sent to Messrs. Ulasewicz, Gerstman and Caffry,³ as well as an APA pamphlet that outlines the adjudicatory hearing procedures.

Applicant argues that APA staff's offer to prepare "preliminary findings of fact at the outset of the hearing process" is no different from circulating "proposed permit conditions" in advance of the hearing. Applicant argues further that the parties would benefit from allowing APA staff to present both preliminary findings of fact and draft permit conditions in advance of the hearing.

In my December 13, 2010 letter to the parties, which outlined the schedule for filing comments and replies to Applicant's request for clarification, I requested that APA staff advise me if I misapprehended Staff's position as discussed in § III.J in the November 16, 2010 memorandum and issues ruling (at 15). I also requested that APA staff provide clarification if necessary.

Protect objects to Applicant's proposed clarification, and notes that Applicant did not propose any clarifying language. Protect asserts that Applicant is inappropriately attempting to reargue the position it stated at the October 20, 2010 pre-hearing conference.

Protect argues that the controlling authority is 9 NYCRR part 580 (Hearing Procedures), and not the APA pamphlet summarizing hearing procedures. According to Protect, the applicable hearing procedures limit the role of APA hearing staff. Protect contends that, at this point in the proceeding, the "record" does not exist (see 9 NYCRR 580.14[g][2]), and argues that it would be premature for APA staff to prepare any summary document before the hearing commences.

Adirondack Wild also objects to Applicant's proposed clarification. Adirondack Wild is concerned that APA staff's proposed summary at this point in the proceeding could bias the development of the hearing record.

In its December 23, 2010 response, APA staff provides the following clarification. APA staff proposes to provide a "preliminary summary of the application." APA staff contends

³ I was not copied on APA staff's October 13, 2010 letter. As of the date of this ruling, it is not part of the hearing record.

that the proposed preliminary summary of the application would promote a more focused understanding of the project as the parties prepare their respective cases for the hearing. One goal of the proposed "preliminary summary" would be to address concerns voiced by some parties that Applicant has not provided an integrated application that takes into account recent design changes. APA staff takes exception to any suggestion that the proposed offer would signal either a bias in favor of Applicant or an intention to pre-judge or "color" the project.

According to APA staff, nothing in 9 NYCRR part 580 precludes the development of a preliminary summary of the application. APA staff requests that I reconsider my position with respect to the proposed preliminary summary. APA staff notes that it will prepare draft permit conditions as recommended in the November 16, 2010 memorandum and issues ruling.

Ruling: Clarification of Issue No. 10 is not necessary. Applicant's concern does not relate to the express wording of the issue as it appears in the Board's February 15, 2007 Order (at 9 of 12), and which appears verbatim in the November 16, 2010 memorandum and issues ruling (at 15 and Appendix B). Rather, the controversy centers on APA staff's offer to prepare a preliminary summary of the application.

I have no concern about APA staff's ability to provide an objective preliminary summary of the application. I am concerned, however, about whether APA staff's offer to provide a preliminary summary of the application complies with the duties required of APA staff as outlined in 9 NYCRR 580.6. Based on APA staff's December 23, 2010 response and clarification, the proposed preliminary summary of the application would be different from the summary of the record as contemplated by 9 NYCRR 580.18(a).

In the November 16, 2010 memorandum and issues ruling (at 17), I stated that APA staff's offer, as I understood it at that time:

appears to be in excess of what is required by 9 NYCRR 580.6, and would be premature given the regulation at 9 NYCRR 580.18(a).

Based on that understanding, I recommended (*id.*) that APA staff provide only the opening presentation required by 9 NYCRR 580.6(b). An additional basis for my recommendation concerning the preparation of the summary was that:

staff is not required to assume the project sponsor's burden of proof (9 NYCRR 580.6[a]).

My recommendation that APA staff complies with the duties outlined in 9 NYCRR 580.6 remains unchanged. However, to the extent that the preparation of the proposed preliminary summary of the application by those members of APA staff, who will be participating in the adjudicatory hearing, would not conflict with the duties outlined at 9 NYCRR 580.6, then APA staff may present the proposed preliminary summary of the application. I note that though Applicant, in its December 10, 2010 request (at 5), appears to equate "preliminary findings of fact" with "potential permit conditions," APA staff does not in its December 23, 2010 comments (at 2-3).

Adirondack Wild's Petition to Intervene

In their December 23, 2010 letter, Messrs. Dew, Schuller, McClelland, Ackerman and Kopp appeal from my November 19, 2010 ruling granting party status to Adirondack Wild. Subsequently, by email dated December 29, 2010, Messrs. Dew, Schuller, McClelland, Ackerman and Kopp withdrew their appeal. Though their objection to my ruling granting party status to Adirondack Wild remains, they do not want to delay the commencement of the adjudicatory hearing.

_____/s/_____
Daniel P. O'Connell
Administrative Law Judge

Dated: Albany, New York
January 13, 2011

To: Service List