NEW YORK STATE: ADIRONDACK PARK AGENCY

In the Matter of the Application to Construct the Adirondack Club and Resort by	Rulings: 1) Motions to Compel Disclosure filed by Protect, and jointly by LSP, Inc. and the Birchery Partners 2) Motion for Protective Order filed by Applicant
Preserve Associates, LLC Applicant.	APA Case No. 2005-100
	February 22, 2011

Proceedings

On December 17, 2010, I issued a scheduling order for filing motions concerning discovery. Subsequently, the return dates in the December 17, 2010 scheduling order were modified by email dated January 3, 2011.

With a cover letter dated January 6, 2011, Protect filed a motion to compel. LSP, Inc. and the Birchery Partners jointly filed a motion to compel dated January 7, 2011.

With a cover letter dated January 21, 2011, Applicant responded to both motions to compel. Applicant also moved for a protective order regarding certain document demands made by Protect.

In correspondence dated January 24 and 25, 2011, Applicant responded further to some of Protect's First Notice to Produce Documents dated October 13, 2010. This response included additional documents relative to Protect's Demand No. 158, which is the subject of Protect's January 6, 2011 motion to compel.

As provided for by the December 17, 2010 scheduling order, Protect timely replied to Applicant's January 21, 2011 motion for a protective order. Protect's reply is dated January 28, 2011.

Standards for Discovery

The hearing procedures outlined at 9 NYCRR 580.14(a)(4)(vii) authorize discovery upon good cause shown by any party consistent with the general principles of Civil Practice Law and Rules (CPLR) Article 31. In my memorandum dated September 24, 2010, I authorized the parties to propound document demands. Though Applicant has asserted that the parties did not make the prerequisite showing of good cause to engage in discovery, I disagree.

Consistent with the procedures outlined in 9 NYCRR 580.5 and 580.7, adjacent and nearby landowners, as well as other interested persons duly obtained party status to participate in this proceeding. The Board, in its February 15, 2007 Order, identified issues for adjudication. Subsequently, some of the original issues were modified and others were added, consistent with the terms of the Board's February 15, 2007 Order. The scope of the project is substantial, and the issues for adjudication reflect this circumstance. In order to participate in the hearing, and to develop their respective positions on the record, I conclude that the parties have made the requisite showing.

In pertinent part, CPLR 3101(a) states "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action." Beginning with *Allen v Cromwell-Collier Publishing Co.* (21 NY2d 403 [1968]), the courts have held that the scope of discovery should be broad and construed liberally (*see, e.g., Mann v Cooper Tire Co.*, 33 AD3d 24, 29 [1st Dept], lv denied 7 NY3d 718 [2006]).

Privileged material, however, is not obtainable (*see* CPLR 3101[b]). Among other things, privileged matter may include trade secrets and other proprietary information (*see, e.g., General Elec. Co. v Macejke*, 252 AD2d 700, 675 [3d Dept 1998]). Here, Applicant asserts that certain requested documents are privileged, and seeks protection against disclosure. Consequently, the burden is on Applicant to establish that the protection asserted applies (*see, e.g., Spectrum Systems Intl. Corp. v Chem. Bank*, 78 NY2d 371, 377 [1991] ["the burden of establishing any right to protection is on the party asserting it; the protection claimed must be narrowly construed; and its

application must be consistent with the purposes underlying the immunity"]).

Even if Applicant meets its burden, disclosure may be ordered when the party seeking disclosure demonstrates that the information sought is indispensible and cannot be acquired in any other way (*see Mann*, 33 AD3d at 30, *citing Curtis v Complete Foam Insulation Corp.*, 116 AD2d 907, 909 [3d Dept 1986]). Therefore, the privilege is a qualified one.

Moreover, it may be appropriate to protect the proprietary information from public scrutiny with a reasonable confidentiality agreement (*see Hodgson, Russ, Andrews, Woods & Goodyear, LLP v Isolatek Intl. Corp.*, 300 AD2d 1047, 1048 [4th Dept 2002]; *Bristol, Litynski, Wojcik, P.C. v Town of Queensbury*, 166 AD2d 772, 773 [3d Dept 1990]). Administrative agencies have an affirmative responsibility to make provision for the protection of the proprietary information when it is disclosed (*see New York Telephone v Public Service Commission of the State of New York*, 56 NY2d 213, 220 [1982]).

The threshold question is whether the demanded documents are relevant. This burden rests with either Protect, or LSP, Inc. and Birchery Partners, as the parties who propounded the discovery demands. If the requested documents are not relevant, the inquiry ends.

If the requested documents are relevant, the next question is whether Applicant has established any right to protection. If Applicant fails to establish any protection, disclosure is required. If, however, Applicant does establish such a protection, either Protect or LSP, Inc. and Birchery Partners must show that the requested materials are indispensible and cannot be acquired in any other way. If the documents are determined to be indispensible, they may be disclosed subject to a reasonable confidentiality agreement to protect confidentiality.

I. Protect's Motion to Compel

With a cover letter dated January 6, 2011, Protect filed a motion to compel discovery and supporting papers. In his affidavit (¶¶ 6, 7, 8), sworn to January 6, 2011, Mr. Caffry states, among other things, that he and Applicant's counsel,

Thomas A. Ulasewicz, conferred during a telephone conference on December 23, 2010 in an attempt to resolve the discovery dispute without resort to making a motion.

Protect seeks a motion to compel discovery with respect to its First Notice to Produce Documents dated October 13, 2010. Protect's motion is expressly limited to Demands No. 16, 17, 22, 25, 94, 117, 118, 132, and 158.

In its response to the referenced document demands dated November 24, 2010, Applicant withholds documents because they are "proprietary information and privileged;" "privileged and confidential;" "confidential as legally privileged;" "confidential and privileged to avoid unfair competitive advantage;" and "an unwarranted invasion of privacy." Applicant also asserts that disclosure would cause "substantial injury to the competitive position of the corporation, its principals, and its investors."

In general, Protect characterizes Applicant's reasons for withholding documents as vague. Protect argues that Applicant has not specifically identified the legal basis for the claim that the withheld documents are privileged and, therefore, exempt from discovery pursuant to CPLR Article 31. According to Protect, the only recognized privilege that relates to corporate competition is the privilege for "trade secrets."

In its January 6, 2011 motion, Protect provides extensive legal argument with many references to case law concerning the trade secret privilege (¶¶ 16-22), and assuming that such a privilege applies here, additional arguments that the withheld documents should be disclosed because they are indispensible and cannot be obtained in any other way (¶¶ 23-26). However, Applicant states in its January 21, 2011 response (¶ 3) that "it never once, in all 174 demands by Protect, asserts the privilege of trade secrets as a ground for non-production of any documents." Applicant notes (¶ 4) that the phrases "trade secret" and "trade secrets" do not appear anywhere in the November 24, 2010 response.

Despite these comments, Applicant contends (¶ 6), however, that the commercial/business information sought by Protect may be protected by the following: (1) trade secret; (2) substantial injury to the competitive position of the subject enterprise; and (3) confidential business information.

According to Applicant, all three privileges are independently available under New York law. To support this contention Applicant refers to 44A NY Jur 2d § 223, and 92 NY Jur 2d § 44.

A. Demand No. 16

Demand No. 16 concerns documents related to any potential interest group as buyer of any of the Great Camp Lots. For Demand No. 16, Protect references page 39 of Applicant's June 2010 update.

In its November 24, 2010 response, Applicant acknowledges that informal discussions took place over two years ago with the Adirondack Council, the Nature Conservancy and the Open Space Institute (OSI). Applicant states that a preliminary appraisal was undertaken by the OSI. Applicant claims that the appraisal is "proprietary information and privileged." Applicant notes that the Great Camp Lot configurations have changed, and asserts that the preliminary appraisal is no longer relevant.

In its January 21, 2011 response to Protect's motion, Applicant states that it never received any written preliminary appraisal from OSI, and that OSI did not communicate a dollar amount to Applicant. Applicant states that it and those with whom it has a contractual relationship do not possess any documents responsive to Protect's Demand No. 16.

Ruling: Protect's motion to compel with respect to Demand No. 16 is denied. Applicant does not possess any documents responsive to this demand. A party may not be compelled to create documents in order to comply with discovery demands (*see Corriel v Volkswagen of Am., Inc.*, 127 AD2d 729, 731 [2d Dept 1987]).

B. Demand No. 17

Demand No. 17 concerns documents related to the Orvis Company and the project's status as an "Orvis Sporting Lifestyle Community" and the "Orvis Fly-Fishing School." Protect references pages 20 and 23 of Applicant's June 2010 update for Demand No. 17.

In its November 24, 2010 response, Applicant asserts that the demand is irrelevant because the reference on page 20 to the Orvis Sporting Lifestyle Community in the June 2010 update is under the heading concerning the Orvis Shooting School, which has been withdrawn from the project. Applicant asserts further that documents concerning the project as an Orvis Sporting Lifestyle Community are privileged and confidential agreements. According to Applicant, there is no reference on page 23 of the June 2010 update to the Orvis Fly-Fishing School.

According to Protect (¶ 27 January 6, 2011 Motion to Compel), the documents sought by Demand No. 17 are relevant to the first two questions set forth in Issue No. 5. Protect argues that Demand No. 17 requests documents that are the basis for the claims stated in the application materials concerning the financial viability of the project.

In its January 21, 2011 response (¶ 8), Applicant identifies three documents responsive to the request. They are: (1) Sporting Operations Management Agreement; (2) Consulting and Technical Services Agreement; and (3) Trademark License Agreement. Applicant asserts the following arguments for withholding these documents.

First, Applicant reiterates that the requested documents are irrelevant, and argues that they are not indispensible for a thorough review of Issue No. 5, which concerns the fiscal impacts of the project to governmental units including infrastructure costs.

Second, Applicant acknowledges there would be substantial marketing benefits associated with involvement by the Orvis Company, and states that those benefits are documented throughout the application materials. Applicant asserts, however, that the marketing techniques are not "material and necessary" to either the permit application or the adjudication of Issue No. 5.

Third, Applicant states that the agreements noted above contain "confidential business information" related to management fees, terms of contract durations and extensions, technical service fees and expenses, trademark license agreement terms, royalty payments, and exclusivity. Applicant argues that if marketing the project as an Orvis Sporting Lifestyle Community should become relevant to the hearing, Protect, and

any other party, could "produce a subpoena *duces tecum* for which the need for disclosure would presumably be founded in substantive testimony."

Ruling: Whether Applicant markets the project, and if so how, is not relevant to Issue No. 5. The first two questions set forth in Issue No. 5 presume the project defaults at various points subsequent to obtaining the requested approval, regardless of Applicant's efforts to market the project. It is not necessary to analyze whether and how the project might default to address the impacts on local governments assuming the project does default. Protect has failed to demonstrate that the requested documents are relevant, or could lead to relevant information. Therefore, Applicant's disclosure of them is not required. With respect to Demand No. 17, I deny Protect's motion to compel.

C. Demand No. 25

Demand No. 25 concerns documents related to the operation of the Big Tupper Ski Area by ARISE. In its November 24, 2010 response, Applicant objects to the demand, and argues that the requested information is not relevant to any hearing issue.

In its January 6, 2011 motion (¶ 41), Protect contends that the information requested in Demand No. 25 is relevant to Issue No. 6. Issue No. 6 includes, among other things, an inquiry about the assumptions and guarantees that the ski area can be renovated and retained as a community resource. Protect argues that how the ski area is operated now would be relevant to how the ski area may be operated in the future.

In its January 21, 2011 (¶ 10), Applicant identifies one document that is responsive to Demand No. 25. It is a lease agreement dated September 15, 2010 between Mt. Morris Property Management, LLC (landlord), and ARISE of Northern New York, Inc. (tenant), which terminates on September 14, 2011.

Applicant maintains that the Protect's Demand No. 25 seeks irrelevant information. According to Applicant, current operations of the ski area are temporary and of a limited nature and, therefore, have "no consequence to the permit application currently before the APA or other regulatory agency."

Ruling: With respect to Demand No. 25, Applicant's objection to the disclosure of the lease agreement dated September 15, 2010 between Mt. Morris Property Management, LLC and ARISE of Northern New York, Inc. is limited to relevancy. Issue No. 6 includes an inquiry about "[w]hat are the assumptions and guarantees that the Big Tupper ski area can be renovated and retained as a community resource."

I conclude that the current lease agreement is relevant to Issue No. 6 even though the agreement may terminate in September 2011. The current lease agreement may provide information about how the ski area would be operated in the future if the Board approves the pending application. Therefore, I grant Protect's motion for an order to compel. Applicant shall disclose this document.

D. Demand No. 94

Demand No. 94 seeks documents that serve as the basis for the claim on page 19 of the June 2010 update that the Great Camp Lots are "the most significant economic component of the Project."

In its November 24, 2010 response, Applicant asserts that it does not possess any responsive documents that relate to individual lots. However, to the extent that general studies, appraisals, and other estimates of value may exist, which relate to the residential component of the project, Applicant contends that the "information is confidential and privileged to avoid unfair competitive advantage." Applicant notes that the reference to page 19 of the June 2010 update in Protect's discovery demand is taken out of context.

According to Protect (¶ 27 January 6, 2011 Motion to Compel), the documents sought by Demand No. 94 are relevant to the first two questions set forth in Issue No. 5. Protect argues that Demand No. 94 requests documents that are the basis for the claims stated in the application materials concerning the economic significance of the Great Camp Lots to the viability of the project.

In its January 21, 2011 response (¶ 11), Applicant states there are no documents related to this demand. According to Applicant, anyone who may have assisted in the preparation of

the application materials (from 2003 to 2006) "likely utilized professional experience, comparable developments/markets, etc. to evaluate these Great Camp Lots."

Given the lack of documents, Applicant argues there is no disclosure to compel. Applicant states that "if something should manifest itself during the preparation of pre-filed testimony, Applicant would immediately disclose such text."

Ruling: Protect's motion to compel with respect to Demand No. 94 is denied. Applicant does not possess any documents responsive to this demand. A party may not be compelled to create documents in order to comply with discovery demands (*see Corriel*, 127 AD2d at 731).

E. Demand No. 132

With Demand No. 132, Protect requests "[a]ny proposed or draft lease, contract, or other financing document for the IDA financing for the Project." In its November 24, 2010 response, Applicant states that it has a draft lease form dated May 2006 for IDA financing prepared internally for the principals of Adirondack Club and Resort, LLC. In its November 24, 2010 response Applicant claims an attorney-client privilege for withholding the document.

In its January 6, 2011 motion (¶ 36), Protect argues that the attorney-client privilege is vitiated when documents are seen by third parties (*see Beller v William Penn Life Ins. Co. of New York*, 15 Misc 3d 350, 355 [Sup Ct, Nassau County 2007]). However, Protect does not expressly make this contention with respect to Demand No. 132 (¶ 37 Protect's January 6, 2011 motion).

In its January 21, 2011 response (¶ 13), Applicant provides additional details about the withheld document. Applicant reasserts the attorney-client privilege, and asserts further that the document qualifies as attorney-client work product.

Applicant argues that the attorney-client privilege extends to both Applicant and to the Franklin County IDA (*see* 44A NY Jur § 80; CPLR 4503[a]). Applicant also cites to *Rossi v Blue Cross & Blue Shield of Greater New York*, 73 NY2d 588, 592 (1989) for the proposition that clients may avail themselves of the

attorney-client privilege whether the communication is with corporate staff counsel or outside counsel.

Ruling: I conclude that the attorney-client privilege applies to the May 2006 draft lease. With respect to Demand No. 132, Protect has not shown that the attorney-client privilege was vitiated (*see Beller*, 15 Misc 3d at 355). Therefore, I deny Protect's motion to compel.

F. Demand No. 158

Demand No. 158 concerns documents related to the cost of the capital improvements to the ski area for each phase of the project. For Demand No. 158, Protect references page 58 of Applicant's June 2010 update.

In its November 24, 2010 response, Applicant asserts that the demand is vague and does not accurately reflect what is stated on page 58 of Applicant's June 2010 update. In its January 21, 2011 response (¶ 14), however, Applicant explains that counsel conferred subsequent to the filing of Protect's January 6, 2011 motion to resolve the dispute concerning this discovery demand.

Applicant refers to the February 2006 APA application submission, Vol. III – Attachment 28 entitled, *Ski Area Pro Forma Adirondack Club and Resort*. Also, with a cover letter dated January 24, 2011, Applicant provided Protect with a copy of a report dated December 13, 2004 by Jack Johnson Company entitled, *Big Tupper Ski Resort – Pro Forma Financial Analysis for Mountain Development and Operations*. Applicant states that these are the only documents it possesses that are responsive to Protect's Demand No. 158.

Ruling: I deny Protect's motion to compel with respect to Demand No. 158. Applicant has provided the responsive documents identified above to Protect.

II. Applicant's Motion for Protective Order

In addition to responding to Protect's January 4, 2011 motion to compel, Applicant moves for a protective order with respect to Protect's Demands No. 22,117, and 118. As provided

for by the December 17, 2010 scheduling order, Protect timely replied to Applicant's January 21, 2011 motion for a protective order. Protect's reply is dated January 28, 2011.

A. Demand No. 22

Demand No. 22 concerns documents related to the purchase of real property for the project from the Oval Wood Dish Liquidating Trust (OWDLT). In its November 24, 2010 response, Applicant asserts that the demand seeks documents that are confidential as "legally privileged information in furtherance of preventing injury to its competitive position."

In its January 6, 2011 motion (¶ 20), Protect argues that the information requested in Demand No. 22 will become public if Applicant purchases the property because a copy of the deed will be recorded in the Franklin County Clerk's office. Protect argues further (¶ 30) that the requested information is necessary to determine what portion of Applicant's funds would be allocated toward the purchase of the property and which funds would be available to develop the property.

In its January 21, 2011 motion for protective order (¶ 6), Applicant contends that the APA Board's February 15, 2007 Order did not identify any issue requiring adjudication about the purchase of real property from the OWDLT or from any other entity. Consistent with the Executive Law and implementing regulations, Applicant notes that all landowners are required to sign any permit application filed with the APA. According to Applicant, the OWDLT and Applicant are joint signatories to the application currently pending before the Agency. Applicant argues that the requested documents are not relevant and, therefore, do not need to be disclosed. Applicant notes further that deeds reflecting the purchase and sale of properties relevant to the project are a matter of public record, and are part of the application.

Applicant acknowledges there are on-going land transactions between OWDLT and Applicant. According to Applicant, these transactions are private legal transactions between buyer and seller. Applicant argues that economic hardship would result from the disclosure of sensitive financial information. To support its argument, Applicant cites *Traendly v Beswick*, 268 AD2d 469 (2d Dept 2000), and Public Officers Law § 89.

With reference to *Hunter v Tryzbinski* (278 AD2d 844, 845 [4th Dept 2000]), Applicant argues further that disclosure of the information being sought would not "sharpen factual issues," "advance the truth-finding process" or relate in any way to the potential for "unfair surprise." Applicant maintains that the requested documents are not material and necessary. Applicant argues that the project sponsor must satisfactorily demonstrate ownership of the site in order to obtain a determination of complete application from the APA. Applicant notes that it obtained such a completeness determination over four years ago.

Referring to Issues No. 5 and 6, Protect in its January 28, 2011 reply argues that the documents requested in Demand No. 22 are relevant or would lead to relevant information. According to Protect, the record concerning Issues No. 5 and 6 requires a thorough examination of the financial feasibility of the project. (*Also see* ¶ 30 Protect's January 6, 2011 Motion to Compel.)

Protect contends that Applicant has claimed that the approval and sale of the Great Camp Lots, which would be located primarily on OWDLT property, are essential to the financial success of the project. Protect argues that the price of the property, and the terms and conditions of the purchase could be essential components of any financial analysis of the project's feasibility. If the project turns out to be infeasible, then the public would be vulnerable and there would be negative impacts to the governmental units.

Protect argues further that Applicant's contentions, that disclosure could cause economic hardship and that the project sponsor is entitled to a right of privacy, are unsubstantiated. With respect to discovery, Protect asserts such privileges are not recognized. Protect asserts further that *Traendly* (268 AD2d 469) and Applicant's reference to the Public Officers Law have no bearing on the discovery demands in this matter.

Ruling: With respect to Demand No. 22, the threshold question is relevancy. Contrary to Protect's arguments, I conclude that the requested documents related to Applicant's purchase of the property from the OWDLT are not relevant to Issues No. 5 and 6.

As noted above with respect to Demand No. 17, the first two questions set forth in Issue No. 5 presume the project defaults at various points subsequent to obtaining the requested approval. The cause or causes of the default are immaterial.

With respect to Issue No. 6, the potential fiscal impacts of the project to the government units would vary depending on whether any construction commences, if an approval is granted, or whether the project is completed as planned. Potential impacts, including potential fiscal impacts, to the government units would also vary depending on how long it takes the project to be completed, if it is commenced. Protect has not demonstrated how the actual fiscal viability of Applicant would impact (either positively or negatively) the potential fiscal impacts of the project on the government units in the event of a default.

Protect has failed to demonstrate that the requested documents are relevant, or could lead to relevant information. With respect to Demand No. 22, I deny Protect's motion to compel. Therefore, Applicant's motion for a protective order is rendered moot.

B. Demands No. 117 and 118

Demand No. 117 concerns documents related to the funds that would be "internally generated" for the ski area improvements as discussed on page 46 of the June 2011 update. Demand No. 118 requests documents concerning funds that would be obtained from private debit equity and developer equity as discussed on pages 45 and 46 of the June 2010 update.

With respect to Demand No. 117, Applicant asserts, in its November 24, 2010 response, that the documents demanded are "confidential and privileged as an unwarranted invasion of privacy," and that the disclosure of which "would cause substantial injury to the competitive position of the corporation and its principals and investors."

In response to Demand No. 118, Applicant asserts, in its November 24, 2010 response, that the documents demanded are "confidential," and if disclosed would cause "substantial injury to the competitive position of the principals/investors."

In its January 6, 2011 motion to compel (¶ 27), Protect argues that the requested information is relevant to Issue No. 5. Protect argues further that Demands No. 117 and 118 seek documents that support specific claims stated in the application materials about the financial viability of the project. Protect notes that it restates these claims from the application materials in Demands No. 117 and 118.

Protect also asserts (¶ 29) that Demand No. 117 seeks documents relevant to Issue No. 6 concerning the generation of funds for improvements to the ski area. Assuming that the requested information is privileged, Protect asserts further that the information is indispensible to its case.

In its January 21, 2011 motion for protective order (¶ 7), Applicant states that its arguments apply to both of Protect's demands. First, Applicant explains that the financing of the project consists of a "Plan" and states further that Applicant has been forthright in explaining the "Plan." Applicant notes, however, that it remains a "Plan" and that no documents exist for the breakdown of financing sources and their projected dollar contribution within the "Plan."

With reference to the June 2010 update (at 45), Applicant states that the financing strategy for the project is to minimize the front-end expenses and to avoid speculative building, while providing enough resort infrastructure and amenities to create buyer confidence. Applicant states further that the project would minimize risk by starting development where demand would be the highest and where infrastructure costs would be the lowest, which would be those portions of the site located east of Read Road.

Applicant explains further that "private debt and equity" means approaching banks and private investors after the project has been permitted. Applicant argues that no one would commit investment dollars to a project that remains "subject to the government's discretionary, regulatory approval." Applicant states that "internally generated" funds for the ski area improvements means using the proceeds and profits from lot sales, which initially would be the Great Camp Lots, to finance improvements to the ski area.

With respect to "developer equity," Applicant states that "the hearing issues do not implicate the need to disclose

confidential communications" with its funding sources. Applicant argues that "[p]otential funding sources have a legitimate expectation of privacy." Applicant argues further that Protect's demands for documents related to "developer equity" would be "an unwarranted invasion of privacy that has no relevancy to sharpening factual issues or advancing the truth-finding process." Applicant states further that this line of inquiry is "an unreasonable annoyance and prejudicial to individual rights of privacy." To support this statement Applicant cites CPLR 3103(a), 92 NY Jur 2d § 41, and 92 NY Jur 2d § 66 concerning personal privacy protection law.

In its January 28, 2011 reply, Protect acknowledges Applicant's claim that it has no documents, which would appear to make Protect's January 6, 2011 motion to compel and Applicant's January 21, 2011 motion for a protective order moot. Protect asserts, however, that Applicant's November 24, 2010 responses to Demands No. 117 and 118, and the arguments offered in Applicant's January 21, 2011 motion for a protective order are not true.

To demonstrate this assertion, Protect offers the following. Protect refers to Applicant's December 8, 2010 responses to Protect's Demands No. 26 and 27. With respect to Demand No. 26, Protect seeks documents filed with or received from the Franklin County Industrial Development Agency (FCIDA). With respect to Demand No. 26, Protect seeks documents that identify assets that would be used as security or collateral for bonds issued by FCIDA to finance the project, in whole or, in part.

In its December 8, 2010 response, Applicant objects to both demands as overly broad and vague. With respect to Demands No. 26 and 27, Applicant responds that it has provided all documents as part of the application materials. With respect to Demand No. 27, Applicant responds further that no other documents exit.

Protect explains, however, that it filed a request for documents with FCIDA, pursuant to the Freedom of Information Law (FOIL, *see also* Public Officers Law Article 6). Enclosed with its January 28, 2011 reply, Protect provides copies of some of the documents that FCIDA provided in response to the FOIL request. These documents include emails from Applicant and Applicant's counsel to FCIDA, and a proposed payment-in-lieu-of-tax (PILOT) agreement with the Franklin County IDA, dated

October 2010. According to Protect, Applicant was in possession of these documents when Protect served its October 13, 2010 document request, and that these documents are responsive to Demands No. 25 and 26. Based on the foregoing, Protect challenges the veracity of Applicant's claims that it either has no documents, or has provided all responsive documents.

Contrary to Applicant's assertions, Protect contends there is no right of privacy that provides a privilege exempting disclosure. Protect notes that Applicant does not cite to any supporting authority.

Though not authorized by the December 10, 2010 scheduling order, Applicant filed a lengthy letter dated February 3, 2011 in response to Protect's January 28, 2011 reply. Applicant objects to the allegations that it has not participated in good faith with the discovery process.

Ruling: Although Applicant does not expressly assert that the documents requested in Demands No. 117 and 118 are irrelevant, the threshold question, nonetheless, is relevancy. Contrary to Protect's arguments, I conclude that the requested documents concerning internally generated funds for improvements to the ski area, and information related to are not relevant to Issues No. 5 and 6.

Protect has failed to demonstrate that the requested documents are relevant, or could lead to relevant information. With respect to Demands No. 117 and 118, I deny Protect's motion to compel. Therefore, Applicant's motion for a protective order is rendered moot.

III. LSP's and the Birchery Partners' Motion to Compel

On October 13, 2010, LSP, Inc.[1] served discovery demands upon Applicant's counsel for documents. On November 15, 2010, Applicant responded.

[1] By letter dated April 20, 2007, LSP, Inc. requested party status. At that time, Mark Gerstman, Esq., appeared as legal counsel for LSP, Inc. During the October 20, 2010 pre-hearing conference, Curtis Read stated that he, rather than Mr. Gerstman, would be representing LSP, Inc. Subsequently, by letter dated January 3, 2011, Mr. Gerstman advised the parties and me that he was withdrawing as attorney for LSP, Inc.

In their January 7, 2011 motion to compel (at 2), LSP, Inc. and the Birchery Partners[2] jointly request an order directing Applicant to respond to the "original Discovery item #10," and to "define the exact number of PBR's [principal building rights] that are to be transferred across our property in the latest version of the application." In general, the latter request concerning principal building rights appears to relate to items No. 7, 8 and 9 of the October 13, 2010 discovery demands.

In its January 21, 2011 response, Applicant moves to dismiss the January 7, 2011 motion to compel jointly filed by LSP, Inc. and the Birchery Partners. Applicant argues that the motion to compel should be dismissed for the following reasons.

First, LSP, Inc. and the Birchery Partners failed to comply with the directions outlined in the December 17, 2010 scheduling order, which required: (1) an affidavit from the moving party reciting good faith efforts to resolve the dispute without resort to the motion,[3] and (2) service of the motion by electronic copy followed by hard copy sent by regular mail. Applicant notes that the January 7, 2011 motion jointly filed by LSP, Inc. and the Birchery Partners does not include an affidavit. Also, Applicant states that it did not receive a hard copy of the January 7, 2011 motion.

Second, the January 7, 2011 motion filed by LSP, Inc. and the Birchery Partners does not state, in plain language, what documents they are seeking. Third, the motion does not provide any legal foundation for why Applicant was in error in its responses to the demanded documents. Finally, with reference to *Penn Palace Operating, Inc. v Two Penn Plaza*, 215 AD 2d 231 (1st Dept 1995), Applicant contends that LSP, Inc. and the Birchery Partners cannot use discovery to test whether certain unknown documents exist.

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[2] Throughout this proceeding, B.G. Read has appeared on behalf of the Birchery Partners, which is also known as the Birchery Camp.

[3] In their January 7, 2011 motion, LSP, Inc. and the Birchery Partners state, in pertinent part, that:

> [n]either the Reads nor AC&R have initiated any informal communication by phone in the interim.

According to Applicant, LSP, Inc. and the Birchery Partners have mischaracterized the responses that Applicant provided. In its January 21, 2011 response, Applicant outlines the materials that it provided to LSP, Inc. and the Birchery Partners.

A. Item No. 10

Curtis Read on behalf of LSP, Inc. propounded twelve discovery demands upon Applicant. In Item No. 10, LSP, Inc. requested:

> [a]ll documents upon which P[reserve] A[ssociates] relies or will rely regarding cost estimated for both the Read Road upgrade and the proposed ACR alternative By-Pass Road and extensions. This documentation should include engineering design criteria, wetlands maps, consultant filed reports, stormwater calculations and designs, surveys and all associated construction details for both alternatives.

With a document dated November 15, 2010, Applicant responded to all twelve of the demands served by LSP, Inc. Part of Applicant's response to Item No. 10 included an attachment identified as "READ 2." Applicant provided me with a copy of its November 15, 2010 response without attachments.

In its January 21. 2011 response (¶ III at 2), Applicant reiterates its position that Read Road is not part of the proposal, and that Applicant has no legal interest in Read Road. According to Applicant, the Reads have the burden of establishing that their road as a viable alternative. Applicant states further that it did not analyze proposals that are not part of its project. Applicant notes that neither the by-pass road nor Lake Simond Road Extension will be public roads and, therefore, neither will be bonded (January 21. 2011 response at 8).

B. Principal Building Rights

Items No. 7, 8 and 9 of LSP, Inc.'s discovery demands relate to principal building rights. Item No. 8 requests:

> [a]ll documents concerning any additional Principal Building rights that are proposed to be transferred across Read Family Property.

Applicant's November 15, 2010 response addresses Items No. 7, 8 and 9. For Item No. 7, Applicant identified the land uses and the approximate acreage, as well as the potential, proposed, and remaining principal building rights for each land use area. With respect to Item No. 8, Applicant states in its November 15, 2010 response that it "is not in possession of any such documents at this time." Regarding Item No. 9, Applicant provided LSP, Inc. with a document identified as "Read 1." In its January 21, 2011 response, Applicant reiterated the responses it provided to LSP, Inc. in its November 15, 2010 response.

Ruling: I deny the jointly filed motion by LSP, Inc. and the Birchery Partners for an order to compel. Applicant has responded to LSP's discovery demands. To the extent that Applicant had documents responsive to LSP's discovery demands, Applicant provided LSP, Inc. with copies. If Applicant did not have any responsive documents, it so advised LSP, Inc. Under such circumstances, Applicant is not obliged to develop information responsive to a particular request (*see Corriel*, 127 AD2d at 731).

Summary of Rulings

1. Protect's motion for an Order to Compel is granted with respect to Demand No. 25. Applicant shall provide Protect with a copy of the responsive document within five calendar days from hard copy receipt of this ruling.

2. Protect's motion for an Order to Compel is denied with respect to Demands No. 16, 17, 22, 94, 117, 118, 132, and 158.

3. Applicant's motion for a Protective Order is denied with respect to Protect's Demands No. 22, 117, and 118.

4. The motion for an Order to Compel jointly filed by LSP, Inc. and Birchery Partners is denied.

Protect's Request for Relief

In its January 6, 2011 motion to compel (¶¶ 52-58), Protect seeks the following relief. Applicant should be ordered to disclose the withheld documents by a date certain. In the event that Applicant does not timely comply with the order to disclose the documents, Protect requests further that Applicant be precluded from offering the documents at the adjudicatory hearing, and any testimony related to them. Protect argues that the applicable hearing regulations provide the ALJ with the authority to order this relief (*see* 9 NYCRR 580.14[a][4][ix] and 580.14[a][4][vii]; *also see* CPLR 3126[2]).

In its January 28, 2011 reply, Protect restates its initial request for relief. Citing CPLR 3126, Protect seeks penalties against Applicant for failing to disclose the documents that Project enclosed with its January 28, 2011 reply. Because Applicant's first attempt at compliance with Protect's discovery demands was not complete, Protect requests further that Applicant be directed to conduct a second search of its files for any additional documents that may be responsive to its discovery demands.

Ruling: All parties are reminded that they have an ongoing obligation to disclose documents responsive to previously served discovery demands during preparations for the adjudicatory hearing.

In the event that any party fails to disclose requested documents, and subsequently offers them at hearing, I will take all measures necessary for the maintenance of order and the efficient conduct of the hearing (*see* 9 NYCRR 580.14[a][4][xi]). These measures may include, but are not limited to, granting adjournments to provide the parties with an opportunity to review the documents, and excluding the document and related testimony from the hearing record.

/s/

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Daniel P. O'Connell
Administrative Law Judge

Dated: Albany, New York
February 22, 2011