



M E M O R A N D U M

TO: Agency Members and Designees

FROM: Terry Martino, Executive Director

DATE: November 9, 2011

RE: P2005-100 (Preserve Associates, LLC) -
Adirondack Club and Resort

The attached memorandum from Counsel addresses agenda item (4),
"Board Determination on Three Appeals of ALJ Rulings."

TM:dal
Attachment



M E M O R A N D U M

TO: Agency Members and Designees

FROM: John S. Banta

DATE: November 9, 2011

RE: Agency Project P2005-100; Rulings on Appeal from the Adjudicatory Record

APPEALS

In order to establish the complete record for deliberation, the Agency Board will need to rule on three appeals from rulings of Administrative Law Judge O'Connell, framed in the closing statement for Protect the Adks!, Inc. (Protect), Appendix A, pp. 112-115. Argument in response was provided by Counsel for Applicant in his reply statement, Appendix 5. Responding argument and recommendations were also provided by the Agency Hearing Staff and are the foundation for this recommendation of Counsel. The authority for such a determination is found in 9 NYCRR Part 580, the Agency regulation governing this proceeding.

Counsel recommends that the Board affirm the rulings of ALJ O'Connell, for the reasons set forth in the Project Hearing Staff Reply Statement, pp. 59-68 and summarized below.

Background

(1) The strict or technical rules of courtroom evidence need not be observed in an administrative hearing.¹ Consequently in administrative proceedings it is the spirit rather than the letter of judicial rules or evidence which applies. Evidence, however, must be competent, material and relevant.² Relevant evidence is evidence tending to prove, or disprove, any material fact, i.e. having probative value. Competency generally refers to the reliability of the source.

¹ State Administrative Procedure Act § 306(1); APA regulations 6 NYCRR § 580.15(a)(1)

² APA regulations 6 NYCRR § 580.15(a)(1) & (c)(1)

(2) The determination of the weight to be given evidence is separate from a determination of admissibility.

(3) There are distinctions between the process of internal review administratively and that of appellate review judicially. The standard for administrative review of an ALJ ruling, or finding, is de novo review, not a finding of error. Although an ALJ's decisions in an administrative hearing are generally entitled to deference, those decisions are not conclusive and may be overruled by the Agency Board.³ This is especially true where, as here, the ALJ is not charged with making findings of fact or a recommended decision.⁴

First Appeal: ALJ Ruling on Exhibit 195

Protect's first appeal seeks reversal of ALJ O'Connell's ruling excluding Exhibit 195 from evidence.⁵ This exhibit was marked for identification, but ALJ O'Connell ruled that it was not relevant.⁶ ALJ O'Connell further instructed that the parties could discuss his ruling in their closing statements.⁷ Counsel recommends that the Agency affirm ALJ O'Connell's ruling.

Protect fundamentally failed to provide any foundation for the relevance of the excluded exhibit as evidence. The excluded exhibit pertains to two individuals, only one of whom is associated with the proposed project. Exhibit 195 thus provides no facts that can be attributed solely to the individual involved in the project. Nor were any facts cited by Protect showing that Exhibit 195 has anything to do with that individual's role in the proposed project. Nor does Exhibit 195 provide any facts concerning the basis for that document.

Second Appeal: ALJ's Ruling on Project Sponsor's Testimony on Issue No. 1

Protect's second appeal⁸ seeks reversal of ALJ O'Connell's denial of Protect's April 29, 2011 and May 26, 2011 motion to preclude certain testimony offered by the Project Sponsor on Issue No. 1 due to the Project Sponsor's failure to produce

³ CSEA v. NYS Public Employment Relations Board, 35 AD 3d 1005, 826 NYS2d 481 (3d Dep't 2006)

⁴ Exhibit 61

⁵ Protect's closing statement, Appendix A, pp.112-113

⁶ June 2, 2011 Transcript, p.2674, lines 7-8

⁷ Id., lines 10-12

⁸ Protect's closing statement, Appendix A, pp.113-114

requested documents and its alleged failure to fully comply with the discovery process.

Protect initially made its motion during the April 29, 2011 hearing.⁹ The Project Sponsor and some of the other parties also provided responses to Protect's motion.¹⁰ On June 20th, ALJ O'Connell issued a ruling denying Protect's motion to preclude.¹¹

The present appeal by Protect does not respond specifically to any of the discussion, decisions or conclusions in ALJ O'Connell's June 20th Ruling (attached). It also does not indicate whether the Project Sponsor satisfactorily complied with Protect's May 13th Supplemental Notice to Produce Documents discovery request. Further, in its closing statement, Protect does not claim any specific harm resulting from ALJ O'Connell's June 20th ruling, or that its cross-examination was in any way hampered by the admission of the challenged testimony into the record. For the reasons set forth in staff's June 13, 2011 letter¹² and ALJ O'Connell's June 20, 2011 Ruling, Counsel recommends the Agency Board affirm ALJ O'Connell's June 20th Ruling.

Third Appeal: ALJ Ruling on Admissibility of Protect's Proposed Exhibit Challenging the Credibility of the Project Sponsor's Consultants

At the June 22, 2011 hearing, Protect sought to challenge the credibility of the Project Sponsor's consultants with prior testimony from a former partner of the same consulting firm in a separate and unrelated administrative hearing.¹³ ALJ O'Connell excluded the exhibit as not relevant to Issue No.1 or the hearing.¹⁴ Protect seeks reversal of ALJ O'Connell's ruling, and asks the Agency Board to reconvene the hearing so that Protect can cross-examine the Project Sponsor's consultants on this exhibit.

The exhibit and proposed line of cross-examination would have been unnecessarily repetitious in light of examination which was allowed June 21 and 22, and particularly the admission of Exhibit 234 which also was used to challenge applicant's witnesses. Agency regulations require the exclusion of

⁹ April 29, 2011 Transcript, pp.1694-1699

¹⁰ Id.

¹¹ Exhibit 92, pp.13-16

¹² Exhibit 90, Second Motion, June 13, 2011 Letter from Van Cott to O'Connell

¹³ June 22, 2011 Transcript, pp.3705-3712

¹⁴ Id., p.3712

repetitious evidence and cross-examination.¹⁵ Moreover, exclusion on this basis is a proper exercise of the ALJ's responsibility to "do all acts and take all measures necessary for the maintenance of order and the efficient conduct of the hearing."¹⁶ ALJ O'Connell admitted to the record Exhibit 234 relating to the scope of review undertaken by sponsor's consultants for proposed development at the Bellayre Ski area¹⁷, over the objection of the Project Sponsor and after additional argument among the parties.¹⁸

This appeal addresses Protect's effort to admit an additional impeachment exhibit¹⁹. Protect offered the transcript of testimony given by a retired partner in the Project Sponsor's consulting firm at a 1997 NYSDEC hearing. According to Protect, the individual testified that the consulting firm had "fudged" a 1980's APA Visitor Interpretive Center siting study.²⁰ ALJ O'Connell ruled that the proposed exhibit was not relevant.²¹ Protect provided no factual foundation for the relevance of this testimony to the Project Sponsor's witnesses. The age of the testimony and the extended period of time between when the testimony occurred and when the study was done further diminish relevance to the present proposal.

Since Protect had already effectively challenged the credibility of the Project Sponsor's witnesses in relation to the Project Sponsor's unpaid fees²² and Exhibit 234, it is reasonable to conclude that additional challenges to their credibility also would have been unduly repetitive.

For the foregoing reasons, Counsel recommends that the Agency Board affirm the ruling by ALJ O'Connell.

¹⁵ 9 NYCRR § 580.15

¹⁶ Id., § 580.14(a)(4)(xi)

¹⁷ June 21, 2011 Transcript, p.3695, lines 14-20

¹⁸ Id., p.3689, line 22 through p.3695, line 12

¹⁹ Id., p.3705, line 20 through p.3709, line 12

²⁰ Id., p.3709, lines 15-22; See also, 1991 Annual Report of the Adirondack Park Visitor Interpretive Centers, p.2

²¹ Id., p.3712, line 19-21

²² Id., p. 3646, line 4, through 3647, line 7

NEW YORK STATE: ADIRONDACK PARK AGENCY

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

Preserve Associates, LLC
Applicant.

Ruling on Protect's
motion to preclude
Applicant's prefiled
testimony regarding
Issue No. 1;
and
APA Staff's motion
concerning the
redaction of the
prefiled testimony by
Scott Brandi.

APA Case No: 2005-100

June 20, 2011

Background

During the April 29, 2011 hearing session concerning the captioned matter (Transcript pages [Tr. pp] 1694-1723), Protect's counsel moved to preclude from the hearing record the prefiled testimony offered by Applicant's experts for Issue No. 1 (see February 15, 2007 Order by the APA Board; Memorandum Summarizing the Pre-Hearing Conference and Issues Ruling dated November 16, 2010). Issue No. 1 generally concerns the proposal's potential impacts to the Resource Management land use areas of the project site.

For Issue No. 1, Applicant prefiled testimony by S. Jeffrey Anthony, LA Group (Questions 1 - 28, 29 pages, dated April 13, 2011) with one proposed exhibit. The proposed exhibit is Mr. Anthony's resume, which is already part of the evidentiary record as Exhibit 172. In addition, Applicant prefiled supplemental testimony by S. Jeffrey Anthony and Kevin J. Franke, who is also a member of the LA Group (Questions 29 - 48, 8 pages, dated April 21, 2011). With a memorandum dated June 17, 2011 and sent via email, Applicant's counsel circulated an errata sheet and addendum concerning the prefiled testimony. Also included were two proposed exhibits identified as SJA 6 and SJA 7.

With several specific references to Applicant's prefiled testimony, Protect identified various materials that the witnesses relied upon as the basis for their testimony. Protect

argued that these materials were responsive to its discovery demands served upon Applicant's counsel on October 13, 2010. Protect stated that Applicant's counsel did not provide these materials relied upon by Applicant's expert witnesses in the preparation of their prefiled testimony to Protect's attorney.

After further discussion, I provided until May 13, 2011 for Protect to identify the documents referenced in the prefiled and supplemental prefiled testimony that Applicant did not provide to Protect (Tr. pp 1720-1722), and directed Applicant to provide the requested documents by May 20, 2011 (Tr. p 1722). I explained further that I was available during the week of May 16, 2011 for a telephone conference call with the parties if there were any issues related to the disclosure of this information (Tr. pp 1722). It was anticipated that the issue would be resolved by May 20, 2011.

Proceedings

As directed, Protect provided me with a copy of its May 13, 2011 supplemental notice to produce documents. By letter dated May 26, 2011, Protect's counsel renewed its motion to preclude Applicant's prefiled testimony concerning Issue No. 1. According to Mr. Caffry's May 26, 2011 letter, Protect and Applicant agreed that Applicant would provide documents to Protect's counsel by May 23, 2011 (*see also* Mr. Ulasewicz's letter dated May 20, 2011). However, Mr. Caffry states further in his May 26, 2011 letter that he had not yet received any documents from Applicant's counsel as of the date of the correspondence.

With an email dated May 31, 2011 from Mr. Ulasewicz's office, Applicant provided its response to Protect's supplemental notice to produce documents. The response included documents identified as PRO SD No. 1 through PRO SD No. 7, inclusive, as well as numerous references to the application materials. In addition, Applicant provided legal argument about the case law cited in Protect's May 13, 2011 supplemental notice.

When the adjudicatory reconvened on June 1, 2011, Protect asked me to reserve on its motion to preclude. Protect's counsel stated that he had received some documents from Applicant and was in the process of reviewing the materials.

Protect reserved the right to renew its motion, however, and to recall witnesses for additional examination after completing the review of the newly provided documents.

Subsequently, on June 3, 2011, Protect asked me to rule on its motion to preclude. On June 7, 2011, I set June 15, 2011 as the return date for a reply from Applicant and from any other party. In letter dated June 9, 2011, Mr. Caffry listed the papers related to Protect's motion to preclude Applicant's prefiled testimony concerning Issue No. 1, as well as testimony and discussions related to the motion that were held during the June 2 and 8, 2011 hearing sessions.

I. Protect's Motion to Preclude

As stated above, Protect seeks to preclude from the hearing record Applicant's prefiled testimony concerning Issue No. 1 because Applicant failed to disclose documents referenced in the prefiled testimony. To support this request, Protect refers to case law (see *Wilson v Galicia Contracting*, 10 NY3d 830 [2008]; *Matter of Estate of Scaccia*; 66 AD3d 1247, 1250 [3d Dept 2009]; *DuValle v Swan Lake Resort Hotel*, 26 AD3d 616, 617-618 [3d Dept 2006]), and to an administrative decision from the New York State Department of Environmental Conservation (DEC) (see *Matter of William Wolf*, Ruling of Chief ALJ McClymonds, April 28, 2011).

Protect argues that throughout the proceeding, Applicant's counsel has not provided documents responsive to Protect's discovery demands. Protect argues further that this pattern of non-compliance was also demonstrated by Mr. Caffry's *voir dire* of Scott Brandi about Mr. Brandi's prefiled testimony related to Issues No. 5 and 6.

With an email dated June 16, 2011, Mr. Caffry provided an affidavit dated June 16, 2011 with Exhibits A and B. Exhibit A is a copy of a letter dated February 1, 2011 from John C. Tubbs, Executive Director of the County of Franklin Industrial Development Agency (FCIDA) to Mr. Ulasewicz. Exhibit B consists of copies of the correspondence between Mr. Caffry and the FCIDA requesting documents pursuant to the Freedom of Information Law (FOIL).

In his June 16, 2011 affidavit, Mr. Caffry explains how and when he obtained Exhibit A from the FCIDA, and requests that Exhibit A be incorporated into the evidentiary record of the hearing. In addition, Protect argues that Exhibit A is responsive to his October 13, 2010 discovery demands (Demand No. 26), but Applicant did not disclose the document. Protect offers these circumstances to further support its motion to preclude as additional proof that Applicant improperly withheld documents responsive to its discovery demands.

II. Applicant's Reply

By letter dated June 15, 2011 with enclosures, Applicant responded to Protect's motion to preclude Applicant's prefiled testimony concerning Issue No. 1. With the June 15, 2011 cover letter, Applicant provided a reply memorandum dated June 15, 2011, an affidavit by S. Jeffrey Anthony sworn to June 15, 2011, and an affidavit by Kevin J. Franke sworn to June 16, 2011.¹ Applicant opposes Protect's motion and contends that it should be denied.

In its memorandum, Applicant provides a chronology of the events related to the proceedings that occurred between May 13, 2011 and May 31, 2011. Also, Applicant identifies the number of discovery demands it received from the parties in anticipation of the hearing and during it, and the responses it provided. Applicant acknowledges that discovery is authorized as part of the APA administrative hearing concerning the captioned matter, upon a showing of good cause (see 9 NYCRR 580.14[a][4][vii]). Applicant asserts that Protect did not show good cause for all its discovery demands. In addition, Applicant characterizes Protect's discovery demands as overly vague and burdensome, among other things.

In its June 15, 2011 reply memorandum, Applicant asserts six legal points to support its position that Protect's motion to preclude should be denied. Each point is addressed briefly below.

¹ With respect to Mr. Franke's affidavit, Applicant's counsel stated that Mr. Franke could not sign the affidavit on June 15, 2011. Therefore, Applicant provided an unsigned copy of Mr. Franke's affidavit with its June 15, 2011 response. With an email dated June 16, 2011, Applicant provided a signed copy of Mr. Franke's affidavit sworn to June 16, 2011.

Applicant argues that the scope of permissible discovery pursuant to CPLR Article 31 is not unlimited. To support this point, Applicant cites case law (see e.g., *Konrad v 136 East 64th Street Corp.*, 209 AD2d 228, 228 [1st Dept 1994]; *Editel, New York v Liberty Studios, Inc.*, 162 AD2d 345, 345-346 [1st Dept 1990]). According to Applicant, Protect has abused the discovery process by its many demands for documents, and its failure to demonstrate that the requested documents are material and necessary.

As its second point, Applicant acknowledges that courts have precluded evidence pursuant to CPLR 3126, but argues there must be a showing, first, that the party failed to willfully comply and, second, that the lack of compliance resulted in prejudice to the other party. With respect to the captioned matter, Applicant asserts that it has taken great steps to comply with all document demands, and that its efforts to comply with discovery demands were hampered because Protect's demands were non-specific and overly broad. Applicant notes that it complied with all other discovery demands made by other parties to the proceeding.

Applicant states as its third point that the continuing or on-going obligation to supplement discovery demands is limited to two circumstances. The first is when the initial response was incorrect or incomplete. The second is when the initial response, though correct and complete at the time it was made, is no longer correct and complete and that the failure to amend or supplement the initial response would be materially misleading. (See CPLR 3101[h].)

With reference to administrative determinations in proceedings before the DEC, Applicant argues, as its fourth point, that overbroad and vague discovery demands have been stricken outright (see e.g., *Matter of the Application of Saratoga County (Northumberland)*, Ruling No. 4 dated January 2, 1996; *Matter of the Application of Jaral Properties, Inc.*, Ruling on Motion for Protective Order dated December 12, 2007; *Matter of Exxon Mobil Corporation (New Windsor)*, Ruling dated December 22, 2003). Applicant states that it has repeatedly claimed that Protect's discovery demands were not specific and generalized, among other things, and that these demands have been extremely burdensome.

As its fifth point, Applicant asserts there is a significant distinction between precluding evidence and excluding it. According to Applicant, the hearing officer has no explicit authority to preclude evidence. Applicant acknowledges that the hearing officer may admit or exclude evidence (see 9 NYCRR 580.14[a][4][ix]). Applicant argues, however, that exclusion is a legal determination based on relevancy, redundancy and materiality. The preclusion of evidence, however, is intended to be punitive, according to Applicant.

With reference to 6 NYCRR 622.7(c)(3), Applicant states that the ALJ, in a DEC administrative enforcement hearing, may preclude evidence when a party fails to comply with discovery demands. Applicant argues, however, that no such provision appears in either the Adirondack Park Agency Act (Executive Law Article 27) or the applicable hearing regulations at 9 NYCRR Part 580 (Hearing Procedures). Given these circumstances, Applicant asserts that after the record is fully developed, the Board will consider the evidence offered during the hearing and, after considering the parties' arguments, assign the appropriate weight to the evidence when the Board makes its final determination.

Finally, Applicant asserts that Protect misrepresents all of the case law that Protect cited in support of its motion to preclude the prefiled direct testimony of Applicant's witnesses with respect to Issue No. 1. In this portion of its reply memorandum, Applicant argues that the referenced case law is distinguishable from the captioned matter on the facts.

In conclusion, Applicant argues that Protect's motion should be denied because there is no authority to support the punitive relief sought. Applicant contends that it has made a good faith effort and acted with due diligence to produce all documents responsive to Protect's discovery demands. To support this contention, Applicant offers the affidavits by Messrs. Anthony and Franke submitted with its June 15, 2011 response. Applicant wishes to proceed with the hearing as scheduled.

III. Replies from Other Parties

In addition to Applicant's reply, I received timely replies from APA Staff, John Delehanty, Don Dew, Jr., the Birchery Camp,

the Adirondack Council, Adirondack Wild, Dan McClelland, the Town of Tupper Lake and the Joint Planning Board, and the Tupper Lake Chamber of Commerce. Each is discussed below.

A. APA Staff

By letter dated June 13, 2011, APA Staff responded to Protect's motion. APA Staff opposes the preclusion of Applicant's prefiled testimony concerning Issue No. 1, and asserts that preclusion would be an extreme remedy. APA Staff argues that Applicant's pre-filed testimony would provide evidence essential to the Board's consideration of Issue No. 1.

APA Staff recommends that the hearing with respect to Issue No. 1 go forward as scheduled on June 21, 2011. Staff recommends further that the parties would have the opportunity in the closing and reply statements to "highlight potential gaps" in Applicant's disclosure to Protect's supplemental discovery request, and to argue the credibility of Applicant's witnesses. APA Staff requests that I address discovery-related issues associated with Issue No. 1 on a case-by-case basis during the hearing.

In the alternative, APA Staff requests a brief adjournment of the hearing to allow Applicant either to hand over any additional responsive documents or to explain, by affidavit, how Applicant already complied with its discovery obligations. As appropriate, Protect would have the opportunity to review any additional documents before the hearing reconvenes.

APA Staff reviewed each of Protect's May 13, 2011 supplemental document demands, and Applicant's May 31, 2011 responses to them. With respect to supplemental demands No. 1, 5, 6, 11, 13, and 16, APA Staff believes that Applicant has satisfactorily responded.

Concerning supplemental demands No. 3, 7, 8, 9, and 10, APA Staff states that the prefiled testimony of the witnesses does not suggest that additional documents exist that have not already been provided. If additional documents exist, then APA Staff asserts that these documents may not be relevant given the long history of the proposal, its many iterations, and the volume of documents generated during the review process.

Based on APA Staff's review of supplemental demands No. 12 and 15 and Applicant's May 31, 2011 response, APA Staff concludes it would be "surprising" if additional documents do not exist. Nevertheless, APA Staff argues that, with respect to supplemental demand No. 15, the proffered testimony concerning surface water and wetland resources is "essential to consideration of Issue #1 by the Agency Board."

According to APA Staff, the basis for supplemental demand No. 2 appears to be Mr. Anthony's testimony concerning the development of a written "program statement" (April 28, 2011, Tr. p 1517, lines 6 - 24; p 1518, lines 2 - 10). APA Staff asserts that evidence concerning the "program statement" is not essential to the Board's consideration of Issue No. 1. APA Staff notes that any program statement would have been developed in 2004, which predates when application materials were filed with the Agency. APA Staff recommends that the record note an apparent discrepancy between Mr. Anthony's testimony on April 28, 2011, and statements made by Applicant's counsel on April 29, 2011.

In supplemental demand No. 4, Protect requests the data and documents used to create the overlays offered during Mr. Anthony's testimony "on or about April 28, 2011." In its response, Applicant refers to the April 2005 drawings identified as EX-1 through EX-5, S-1 through S-3, and the grading plans identified as GR# sheets. According to APA Staff, Applicant fails to address Protect's request for documents that served as the bases for the overlays. APA Staff recommends that the record reflect Applicant's failure to more fully address the supplemental demand No. 4.

With respect to supplemental demand No. 14, APA Staff argues that the documents Applicant produced are not relevant to Issue No. 1 because they relate to portions of the site located in the Moderate Intensity land use area rather than the Resources Management land use area. APA Staff notes that Mr. Anthony's prefiled testimony on page 20, lines 1-10 defines the term "ecotones." APA Staff concludes that this prefiled testimony is not essential to Agency Board's consideration of Issue No. 1.

According to APA Staff, supplemental demand No. 17 restates Applicant's continuing obligation to produce documents responsive to prior discovery requests.

In an email dated June 17, 2011, Paul Van Cott, on behalf of APA Staff states that Exhibit A to Mr. Caffry's June 16, 2011 letter should be received into the evidentiary record of the proceeding. APA Staff's position, with respect to Protect's motion to preclude, however, remains unchanged. APA Staff contends, however, that concerns related to Applicant's responsiveness to discovery demands implicates the competence of Applicant's entire direct case not just the prefiled testimony related to Issue No. 1.

B. John Delehanty

With an email dated June 13, 2011, John Delehanty responded to Protect's motion. Mr. Delehanty supports the motion to preclude the prefiled testimony of Applicant's witnesses concerning Issue No. 1 in those instances where Applicant has not provided discoverable materials related to this testimony subsequent to timely filed demands.

Mr. Delehanty claims that issuance of the December 20, 2006 notice of complete application concerning the Adirondack Club and Resort was premature. To support this claim, Mr. Delehanty notes the numerous changes to the original proposal, and the voluminous submissions filed subsequent to the determination.

Mr. Delehanty argues that a complete record cannot be developed when parties improperly withhold information sought through the discovery process. According to Mr. Delehanty, parties cannot properly confront witnesses and test the veracity of their testimony without full discovery.

C. Don Dew, Jr.

In a letter dated June 14, 2011, Mr. Dew agrees with APA Staff's contention that granting Protect's motion to preclude would not provide an adequate record to base a determination on the merits. If Protect's motion is granted, Mr. Dew is concerned that the Board's final determination would be delayed, or that Applicant would withdraw its application. Mr. Dew asserts that the local community needs a project like Applicant's proposal. Accordingly, Mr. Dew opposes Protect's motion, and argues that it should be denied.

Mr. Dew asserts further that Protect's motion is frivolous, and argues that Protect does not care about the information it has requested through discovery. According to Mr. Dew, Protect is using the discovery process to delay the proceedings and to increase their costs, which burdens all taxpayers.

Mr. Dew notes that the case law cited by Protect does not include any matter decided by the APA Board. With reference to the State Administrative Procedure Act (SAPA) § 305, Mr. Dew argues that the ALJ has discretion to address discovery issues during the course of an administrative proceeding. Mr. Dew notes further that the parties may present additional arguments concerning discovery matters in their closing statements.

D. Birchery Camp

To support Protect's assertion that Applicant has inappropriately withheld documents, B.G. Read stated, during the April 29, 2011 hearing session (Tr. pp 1704-1706), that the Birchery Camp had filed a document request with Applicant. Among other things, the Birchery Camp requested the following: (1) correspondence between the principals of the Adirondack Club and Resort or its counsel and the Village of Tupper Lake; and (2) an electronic map of the project site. According to Mr. Read, Applicant's response was that nothing was available. Mr. Read explained, however, that he subsequently filed a request for documents with the Village, and received a proposed memorandum where the Village would take Read Road by eminent domain and Applicant would reimburse the Village for the expenses associated with the eminent domain process. With respect to the electronic map of the site, Mr. Read said that LA Group staff used an electronic map with a GPS device during the October 29, 2010 site visit that Mr. Read attended.

Mr. Read also filed an email dated June 15, 2011 on behalf of the Birchery Camp in support of Protect's motion to preclude the Applicant's prefiled testimony concerning Issue No. 1. According to Mr. Read, Dr. Klemens's testimony demonstrates that Applicant's biological survey of the site is insufficient to ensure that the placement of various elements of the project would minimize adverse impacts to the plant and animal communities on the site.

Mr. Read argues that without proper discovery, Applicant's witnesses cannot be cross-examined effectively, which would inappropriately "grant an aura of authenticity" to the testimony. Mr. Read argues further that accurate and complete expert testimony is essential to the decision making process. Mr. Read notes that a pattern of late and insufficient document production is an unfair tactic that "cripples" cross-examination, and creates a financial burden on the parties.

If Protect's motion is not granted, Mr. Read requests, in the alternative, that the hearing be adjourned until the documents are provided, and the parties have had the opportunity to review them in order to prepare their cross-examination.

E. Adirondack Council

With a letter dated June 15, 2011, the Adirondack Council responded to Protect's motion to preclude Applicant's prefiled testimony concerning Issue No. 1. The Adirondack Council supports the motion because Applicant has not complied with discovery demands and related orders in this matter.

With reference to 9 NYCRR 580.14(a)(4)(vii), the Adirondack Council argues that the hearing officer has the authority to order the production of documents consistent with the general principles of CPLR Article 31. The Adirondack Council argues further that parties have an ongoing obligation to amend and supplement discovery responses and productions (see CPLR 3101[h] and *Theodoli v 170 East 77th 1 LLC*, 24 Misc3d 1103, 1108 [Sup Ct, New York County, 2009] citing *Dehaney v New York City Transit Authority*, 180 Misc.2d 695 [Civ Ct, Bronx County, 1999]). According to the Adirondack Council, Applicant has not rebutted the demonstrated failure to provide documents in a timely fashion. Given these circumstances, the Adirondack Council states that the hearing officer should exercise his authority to exclude Applicant's prefiled testimony as provided by 9 NYCRR 580.14(a)(4)(ix).

The Adirondack Council asserts there would be no undue prejudice if the testimony is precluded. Applicant has the burden of proof (see 9 NYCRR 580.14[b][6][i]). If Applicant's prefiled testimony for Issue No. 1 is precluded, the Adirondack Council asserts further that the Board would have the testimony

provided by the other parties, and could evaluate whether Applicant has met its burden of proof.

F. Adirondack Wild

In an email dated June 15, 2011, Adirondack Wild supports Protect's motion to preclude Applicant's prefiled testimony concerning Issue No. 1. Adirondack Wild argues the testimony by its witness, Dr. Klemens, among others, demonstrates that Applicant's claims concerning adverse environmental impacts are unsubstantiated. Such a demonstration should require Applicant to disclose the bases for its witnesses' testimony. According to Adirondack Wild, all parties have suffered from Applicant's failure to timely provide information about its proposal.

G. Dan McClelland

Dan McClelland filed an email dated June 15, 2011, and opposes Protect's motion. Mr. McClelland argues that the relief sought by Protect is extreme and would prevent the development of a complete record. Mr. McClelland agrees with APA Staff that portions of Applicant's prefiled testimony concerning Issue No. 1 are essential to the Board's consideration of the matter and, therefore, should not be excluded from the record.

H. Town of Tupper Lake and Joint Planning Board

The Town of Tupper Lake and the Joint Planning Board (Town) jointly responded to Protect's motion in a letter dated June 15, 2011. The Town opposes the motion, and contends that it should be denied.

The Town supports the remedy proposed by APA Staff to continue the hearing as scheduled, and to provide the parties with the opportunity to present additional argument in closing statements and replies about the discovery issues.

The Town argues that preclusion is a drastic and severe remedy. The Town argues further that Applicant has been effectively sanctioned with the redaction of Mr. Brandi's testimony.

The Town concurs with APA Staff's conclusion that some of Applicant's prefiled testimony would be essential to the Board's consideration of the matter. If Protect's motion is granted, the Town proposes, in the alternative, that the hearing officer briefly adjourn the hearing to complete discovery and the review of any additional materials before the hearing continues.

I. Tupper of Lake Chamber of Commerce

The Tupper Lake Chamber of Commerce opposes Protect's motion, and contends that it should be denied. By email dated June 15, 2011 from David Tomberlin, Vice President, Board of Directors, the Chamber of Commerce concurs and adopts the arguments set forth in the Town's June 15, 2011 response.

IV. Discussion and Ruling

Consistent with the general principles of CPLR Article 31, discovery is authorized upon good cause shown (see 9 NYCRR 580.14[a][4][vii]). Applicant acknowledges that discovery is authorized. However, Applicant claims, in general, that Protect has not shown good cause for its numerous discovery demands.

Applicant's claim is unfounded for the following reasons. Applicant notes in its June 15, 2011 response, among other things, that its proposal is one of the largest, if not the largest, private land use projects ever considered by the Board. I also note that the Board referred the captioned matter to hearing with an Order dated February 15, 2007 that identified ten issues for adjudication, and which authorized me to include additional issues. I have concluded that Protect and others have met the requirements outlined at 9 NYCRR 580.7 to intervene as parties in the proceedings concerning the captioned matter. Based on these circumstances, I concluded there was good cause to authorize discovery.

As noted above, Applicant has characterized almost all of Protect's discovery demands as vague, overly broad and burdensome, among other things. In its June 15, 2011 response, Applicant cites to rulings by DEC ALJs that provided relief to parties who were served with vague, overly broad, and burdensome discovery demands. Yet, except for Applicant's January 21, 2011 motion for protective order limited only to Demands No. 22, 117

and 118, Applicant sought no relief from me about the scope of Protect's discovery demands (see Rulings: Motions to Compel Disclosure and Motion for Protective Order dated February 22, 2011).

I note further that during the April 29, 2011 hearing session, I stated that I would be available for a telephone conference during the week of May 16, 2011 if any concerns related to Protect's supplemental discovery demands arose. During the week of May 16, 2011, neither Applicant's representative nor Protect's contacted me about the scope of Protect's supplemental discovery demands and the exchange of additional documents. I cannot grant relief, unless and until a party requests it.

Pursuant to 9 NYCRR 580.14(a)(4)(ix), the hearing officer may admit or exclude evidence. Without reaching the issue of whether the distinction between the exclusion and the preclusion of evidence is significant within the context of Protect's motion, I conclude that 9 NYCRR 580.14(a)(4)(xi) would provide me with additional and alternative authority to do all acts and to take all measures necessary for the maintenance of order and the efficient conduct of the hearing.

A. Applicant's Rebuttal of Mr. Dodson

Beginning on April 27, 2011 (Tr. pp 1191-1273), Applicant offered the expert testimony of Mr. Anthony and Mr. Franke to rebut the alternative configurations discussed during the testimony of the Adirondack Council's expert witness, Larry L. Dodson, FASLA. With the rebuttal testimony, Applicant offered Exhibits 172 through 178. Subsequently, the parties had the opportunity to cross-examine Messrs. Anthony and Franke with respect to this rebuttal evidence (April 28, 2011, Tr. pp 1316-1569).

Although Protect's supplemental document demands No. 1 through 4 relate to the development of the record about Issue No. 1, these supplemental document demands concern Applicant's rebuttal evidence rather than the April 13, 2011 prefiled testimony and the April 21, 2011 supplemental prefiled testimony. Nevertheless, Applicant responded to Protect's supplemental document demands No. 1 through 4 and disclosed

additional documents (see e.g., PRO SD No. 1, PRO SD No. 2, and PRO SD No. 3).

To the extent that Protect intended its motion to preclude to extend to Applicant's rebuttal evidence addressing the alternative configurations outlined in Mr. Dodson's testimony, I deny the motion.

B. Issue No. 8

Protect's supplemental document demand No. 5, with its reference to Mr. Franke's testimony on May 3, 2011, relates to Issue No. 8. All parties had an opportunity to fully develop the record concerning Issue No. 8 when the hearing convened on May 3, 2011.

Applicant's prefiled testimony concerning Issue No. 8 is beyond the scope of Protect's motion as discussed during the April 29, 2011 hearing session. Therefore, I deny Protect's motion to preclude.

C. Applicant's Prefiled Testimony dated April 13, 2011

The purpose of the April 29, 2011 adjournment was to provide Protect with the opportunity to seek additional discovery related to Applicant's April 13, 2011 prefiled testimony and the April 21, 2011 supplemental prefiled testimony concerning Issue No. 1. Protect's supplemental document demands No. 6 through 16, inclusive, refer to either questions or answers made in Applicant's prefiled testimony dated April 13, 2011.

With its May 31, 2011 response, Applicant either provided additional documents, or referenced materials already provided, that are responsive to Protect's supplemental discovery demands. I note that Applicant's May 31, 2011 response was untimely based on the schedule I established during the April 29, 2011 hearing, and that the parties did not ask me to adjust the schedule.

Protect's motion to preclude Applicant's April 13, 2011 prefiled testimony concerning Issue No. 1 is denied, without prejudice. The hearing will convene as scheduled for the examination of Applicant's and the other parties' witnesses. I

find this to be an efficient use of hearing resources given the availability of the witnesses over the next two weeks.

D. Supplemental Prefiled Testimony dated April 21, 2011

As noted above, Applicant has offered supplemental prefiled testimony by S. Jeffrey Anthony and Kevin J. Franke, dated April 21, 2011. Upon careful review of Protect's May 13, 2011 supplemental notice to produce, none of Protect's supplemental document demands reference Applicant's April 21, 2011 supplemental prefiled testimony. Accordingly, I conclude that Protect's motion to preclude does not extend to Applicant's April 21, 2011 supplemental prefiled testimony and, therefore, deny Protect's motion to exclude.

To the extent any party objects to Applicant's April 21, 2011 supplemental prefiled testimony, I will hear those objections when the proceedings reconvene.

Mr. Brandi's Prefiled Testimony

I. Background

With respect to Issues No. 5 and 6, Applicant offered the expert testimony of Scott Brandi. Consistent with the schedule for submitting prefiled testimony for Issues No. 5 and 6, Applicant distributed Mr. Brandi's prefiled testimony dated May 20, 2011 to the parties and me.

On June 8, 2011, Protect moved to exclude Mr. Brandi's prefiled testimony after a *voir dire* of the witness showed that Mr. Brandi relied on several documents to prepare his testimony. Protect argued that the documents, which served as the basis for some of Mr. Brandi's testimony, were responsive to its timely filed discovery demands and that Applicant's counsel should have disclosed these materials.

After hearing arguments from Applicant and the other parties, I granted, in part, Protect's motion, and redacted portions of Mr. Brandi's prefiled testimony by putting a line through selected questions and answers. I ruled further that the parties would be precluded from cross-examining Mr. Brandi

about the redacted or "lined-out" portions of the prefiled testimony.

Subsequently, Protect requested that I either remove the redacted portions of Mr. Brandi's prefiled testimony from the transcript or otherwise make the redacted portions illegible.

I denied this request. I explained that because I am not the final decision maker in this matter, the Board may want to review my ruling and would need to review the redacted materials. I explained further that if the Board overturned my ruling about redacting Mr. Brandi's testimony, the Board would remand the matter for further proceedings.

To preserve the issue for appeal, Protect took exception to my ruling that the redacted portions of the prefiled testimony, though lined-out, would remain part of the document incorporated into the transcript of the hearing.

II. APA Staff's Motion

By letter dated June 10, 2011, APA Staff asked me to reconsider the June 8, 2011 ruling not to remove the lined-out portions of Mr. Brand's prefiled testimony. APA Staff argued that the stricken portions of Mr. Brandi's testimony are not material, and that I have authority, pursuant to 9 NYCRR 580.14(a)(4)(ix), to exclude evidence from the hearing record. APA Staff requested that I direct the full redaction of the stricken portions of Mr. Brandi's prefiled testimony to ensure that the Board would not consider the redacted prefiled testimony.

III. Responses

By email dated June 13, 2011, I provided the parties with the opportunity to respond to APA Staff's June 10, 2011 motion, and set June 15, 2011 as the return date. I received timely responses from the following, in support of the motion:

1. Email dated June 10, 2011 from John Delehanty;
2. Email dated June 13, 2011 from Protect's attorney, John Caffry;

3. Email dated June 13, 2011 from DEC Staff's attorney, Scott Abrahamson;
4. Email dated June 13, 2011 from Dan Plumley and David Gibson on behalf of Adirondack Wild;
5. Email dated June 13, 2011 from Phyllis Thompson;
6. Email dated June 15, 2011 from Dennis Zicha;
7. Email dated June 15, 2011 from B.G. Read;
8. Email dated June 15, 2011 from Elaine Yabroudy and Peter Littlefield; and.

In an email dated June 15, 2011, Dan McClelland opposes APA Staff's June 10, 2011 motion. Mr. McClelland argues that all of Mr. Brandi's prefiled testimony should be incorporated into the record because the testimony provides valuable economic information relative to Issues No. 5 and 6. In the alternative, Mr. McClelland contends that the redacted version of Mr. Brandi's prefiled testimony should not be modified in the manner proposed by APA Staff.

With its June 15, 2011 response to Protect's motion to preclude the prefiled testimony of Applicant's witnesses concerning Issue No. 1, Applicant also responded to APA Staff's motion related to Mr. Brandi's prefiled direct testimony.

Applicant states that at least three documents associated with Mr. Brandi's should have been identified, and acknowledges that Applicant did not. Applicant notes that the documents associated with Mr. Brandi's testimony are "public documents." Applicant asserts, nonetheless, that the failure to identify the documents was not deliberate.

According to Applicant, the testimony that was stricken was not material or essential to the Board's determinations regarding Issues No. 5 and 6. Applicant does not object to APA Staff's request.

IV. Ruling

APA Staff's June 10, 2011 motion is granted. I will provide the stenographer with a copy of the redacted version with instructions to substitute the attached document for the one provided on June 8, 2011.

Daniel P. O'Connell
Administrative Law Judge

Dated: Albany, New York
June 20, 2011

To: Service List dated April 6, 2011