No. 33), which granted the Agency's motion for a preliminary injunction, simply provided that "if [petitioner] fails to apply for the necessary permits and/or submit to the agency enforcement process as outlined in Part 581 of the regulations", the Agency could apply to the Court for the removal of the structure. Pursuant to the enforcement authority delegated to it in 1992, and as stated in par. 6 d above, the staff, by Mr. Glennon, the Agency's Executive Director, wrote to petitioner's counsel on January 13, 1993 and invited him to discuss the resolution of the matter (Exh. No. 60). Petitioner's counsel informed the Agency that he had sent that letter to petitioner for petitioner's response (Hearing Exh. No. 62). Later, the Attorney General's office also invited petitioner to discuss a possible settlement in its letter dated October 20, 1993 (Hearing Exh. No. 41). Finally, in his January 4, 1994 letter (Hearing Exh. No. 61), Mr. Glennon again invited settlement discussions and informed petitioner that the resolution of the violation could result in the issuance of an after-the-fact permit, although certain environmental issues would have to be addressed. The issuance of the permit (and perhaps the payment of a civil penalty) would end the controversy in this matter.

38. Throughout this time, petitioner did not respond to the three letters requesting that he contact the Agency. While Mr. Aubin offered in his October 2, 1993 letter to meet with the Agency to "go over the facts" of the violation (Hearing Exh. 38), nothing in Mr. Aubin's letter indicated that petitioner was

willing to meet to discuss settlement of the violation. The Agency did not meet with Mr. Aubin because the matter was in litigation (Hearing Exh. No. 40), and because its research indicated that it would not be appropriate to do so except pursuant to the interim guidelines on lay representation, which required petitioner to be present. Between January, 1993 and August, 1994, petitioner refused to contact the Agency.

39. Therefore, as stated in pars. 6 r and 37 above, in August, 1994, the Agency moved for summary judgment and contempt in Jones I. The Supreme Court ruled on April 7, 1995 that it would not grant the Agency's motions until it commenced and completed its enforcement process and ordered the Agency to commence the process (Hearing Exh. No. 39). The Agency considered appealing the April 7, 1995 memorandum decision and order since it was contrary to the plain language of Executive Law § 813(2) that empowers the Agency to seek injunctive relief without having to first exhaust any administrative enforcement process. However, the Agency determined instead to commence the enforcement process in hope that that process may result in a faster disposition of this matter.

40. Therefore, as stated in par. 6 o and p above, the Agency, after providing petitioner with two additional opportunities to discuss a settlement, which petitioner refused, commenced the process on June 1, 1995 by serving the Notice of Apparent Violation (Hearing Exh. No. 6) on petitioner so that the

matter could be addressed at the Agency Enforcement Committee's June 8, 1995 meeting. The Agency received petitioner's letter requesting the formal hearing (Hearing Exh. No. 7) on June 7, 1995, one day before the Enforcement Committee's meeting.

41. The delay between June 7, 1995, when the Agency staff received petitioner's request for the hearing, and November 2, 1995, when the Agency staff informed petitioner that the hearing was scheduled to commence on November 15, was not unreasonable. As stated in pars. 6 p and q, petitioner would not provide his telephone number to facilitate the scheduling of a hearing, DEC would not assign an ALJ until the MOU between the Agency and DEC was finalized, and the administration of the Agency changed in August, 1995, which delayed the finalization of the MOU.

42. Petitioner's claim of being prejudiced as a result of the delay in scheduling the hearing (Bracy Jones I aff., pars. 38-41; Jones II petition, par. 12 (a) and Bracy Jones II aff., pars. 27-30) is unwarranted. The salient facts upon which the Agency was asserting the violation, i.e., the location of the lot in a "low intensity use" area and within the "river area of the Raquette River, the existence of wetlands on the lot and the construction of the dwelling within these wetlands, and the lack of DOH approval for the subdivision creating petitioner's lot, were straightforward and did not change between January, 1993 and November, 1995.

43. The crux of his claim of prejudice is that he could no longer call Wilfred Joseph Madore, Malvena Mary Madore and Raymond Oliver LaMora as witnesses since they died before the hearing commenced. According to petitioner, they would have testified that the "LaMora" lot (Hearing Exh. No. 28) and his lot were lots in the same preexisting subdivision.[7] Mr. Madore would have also testified whether he had applied for DOH approval or whether he inquired whether such approval was necessary (Tr., pp. 325, 482-484). Such testimony, even if available, is irrelevant - the legality of the subdivision creating petitioner's lot was never at issue in Jones I or during the enforcement hearing in Jones II. The focus of the Agency's enforcement effort against petitioner has always been the unlawful construction of his dwelling on his lot without the permits required by the APA, Rivers System and Freshwater Wetlands Acts, not the creation of his lot.

44. In any event, after hearing Mr. Aubin testify on January 23, 1996 as to the need for such testimony, and because the Agency could not find the subdivision map, I researched the record of the LaMora permit hearing held in 1981, which the Agency maintains on microfiche, to find anything that may be

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[7]Mr. Aubin states in par. 12 of his affidavit that he became aware of the LaMora permit only in June, 1995, at the same time the Agency issued petitioner the Notice of Apparent Violation and petitioner requested the formal hearing. Hence, any purportedly unreasonable delay with respect to Mr. LaMora can only be computed from June, 1995, and not from any time earlier.

relevant to the issues.[8] I found sworn testimony by Mr. Madore in the LaMora hearing transcript that he sold lots to both the LaMoras and to petitioner and that he was not aware whether he needed to obtain DOH approval for his sales of lots. This testimony was admitted into the hearing record without limitation on February 5, 1996, the last day of hearing (Tr., pp. 517-549, Hearing Exh. 82).

45. Furthermore, although petitioner believed that the testimony of the Madores and Mr. LaMora was crucial to his defenses, he did nothing prior to their deaths to obtain and preserve their information which he believed to be necessary. Notably, Mr. Aubin states in par. 12 of his affidavits that he spoke to Mr. Madore in the summer of 1992. However, petitioner did not submit any affidavit from Mr. Madore in response to the Agency's motion in 1992 for a preliminary injunction in Jones I, (See, the list of pleadings reviewed by the Court on page 2 of its January 7, 1993 memorandum and order, Hearing Exh. No. 33). Mr. Aubin's statements in his affidavits, hearing testimony and argument indicate that, instead, petitioner waited until the

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[8]Petitioner had asked for the subdivision map and other information regarding the "Madore subdivision". Eleanor Duffus testified that she provided petitioner with the releasable contents of its "Madore subdivision" file, except for the map which she could not locate after several hours of searching on a number of occasions (Tr., pp. 516-517, 521, 526, 534). As stated in footnote 2 above, the Agency staff has not been able to locate the map since 1981 and has not been able to obtain another copy.

The LaMora project and variance file was an entirely different file from the Madore preexisting subdivision file which Ms. Duffus was requested to search.

Agency scheduled the hearing to call the Madores and Mr. LaMora as witnesses.

46. Petitioner's claim of prejudice because he could not join the Madores as violators in the enforcement process on account of their deaths is also unwarranted. Petitioner's reason for joining them appears to be the claim that Madore is a co-violator for having created petitioner's lot. He made no effort to join them as parties in response to the Agency's motions in Jones I. Furthermore, as stated above, the questions whether petitioner's lot was lawfully created, or whether the subdivision of which it was part should have received DOH approval, was not challenged by the Agency in either Jones I or in the Jones II hearing.

47. Accordingly, petitioner's claims of unreasonable delay and prejudice should be rejected.

A determination made in another matter does not estop the Agency from requiring petitioner to obtain a permit.

48. In Point D (pars. 42 - 49) of Bracy Jones I affidavit and Point D (pars. 31- 38) of the Bracy Jones II affidavit, petitioner argues that the Agency is collaterally estopped from requiring him to obtain any permits for the construction of his dwelling on account of the apparent determination in the LaMora permit (Hearing Exh. No. 28) that the wetland filling but not the construction of the dwelling required permits under the APA and Rivers System Acts. The claim of collateral estoppel is

meritless for the reasons stated below and in the Agency's memorandum of law.

49. At the outset, the LaMora permit was issued January 27, 1982, prior to May 1, 1983, the effective date of 9 NYCRR Part 578, the Agency's regulations that implement its regulatory authority under the Freshwater Wetlands Act (9 NYCRR 578.14). For this reason, the jurisdictional statements in the LaMora permit regarding the construction of the dwelling are not relevant to the Agency's exercise of its Wetland Act jurisdiction.

50. Furthermore, the jurisdictional statements in the LaMora permit which petitioner relies upon are inconsistent with Mr. Glennon's determination with respect to the LaMora permit application, conveyed in his December, 1981 memorandum to the Legal Affairs Committee, that dwellings in wetlands on lot in a "preexisting subdivision" remain subject to review if the subdivision did not receive DOH approval "for any reason" (Hearing Exh. No. 26, discussed in par. 31 above). The statements are also inconsistent with Condition No. 3 of the permit, which authorizes the construction of the dwelling and imposes terms on the construction, including a flood proofing requirement, which could not be imposed if the Agency was not asserting review over the dwelling.

51. Since January 27, 1982, the Agency has asserted review jurisdiction over the construction of a dwelling on the Beaulieu

lot and the placement of a trailer on the Daniels lot, both located adjacent to or in close proximity to the LaMora lot, and both requiring permits and variances from the 150 foot structural setback restrictions applicable to a recreational river, 9 NYCRR 577.6(b)(3) (Beaulieu and Daniel permits, Hearing Exh. Nos. 83 and 84). While the ALJ ruled that these permits could not be introduced to refute petitioner's claim of collateral estoppel (Tr., pp. 266-275), he also indicated that the Agency staff could appeal his evidentiary rulings to the Enforcement Committee (Tr., pp. 667-668). The Agency staff appealed the ALJ's ruling to preclude the use of the permits to refute petitioner's collateral estoppel claim on pages 8-9 of Point 7, subpoint (3) of its March 18, 1996 memorandum to the Enforcement Committee (Jones II return, Item D 1). In affirming the Enforcement Committee by determination that petitioner's construction of his dwelling without a permit violated the APA, Rivers System and Freshwater Wetlands Acts, the full Agency made Finding No. 12 that the doctrine of collateral estoppel does not apply and that the Beaulieu and Daniels permits establish that the LaMora permit was drafted in error (Item A). In making this finding, the full Agency necessarily overruled the ALJ's ruling that the permits could not be considered in resolving petitioner's collateral estoppel arguments.

52. Accordingly, petitioner's arguments that the Agency is collaterally estopped from requiring him to obtain a permit for the construction of his dwelling should be rejected.

Petitioner was not denied his rights to due process even though the Agency has not yet promulgated specific rules and regulations governing its enforcement hearings.

53. In Point E (pars. 50 - 52) of Bracy Jones I affidavit and Point F (pars. 43 - 45) of the Bracy Jones II affidavit, petitioner argues that the Agency violated his rights to due process and SAPA, Article 3 because it has not yet promulgated rules to govern its enforcement hearings. This claim is meritless for the reasons stated below and in the Agency's memorandum of law.

54. The hearing transcript shows that the hearing was held in accordance with the basic requirements of SAPA Article 3 and the relevant provisions of the Agency's permit hearing regulations in 9 NYCRR Part 580. Petitioner was given notice by the Agency's November 2, 1995 appointment letter to the ALJ that the Agency's hearing regulations, Part 580, and SAPA Article 3 would apply (Hearing Exh. No. 8).[9] Petitioner did not object during the pre-hearing conference call or at any time during the hearing. The Notice of Apparent Violation (Hearing Exh. No. 6) gave petitioner notice of the violations which would be the

[9]Executive Order No. 131 requires agencies that conduct adjudicatory hearings to conduct their hearings in a fair and impartial manner and, inter alia, develop an administrative adjudication plan. The Agency's plan was filed June 11, 1990, after a public hearing. Its plan specifically provided that the Agency's Part 580 permit hearing regulations will be applied to formal enforcement hearings until amendments to Part 581 that would govern formal enforcement hearings are adopted. The Agency is in the process of amending Part 581 as part of a comprehensive revision of all of its regulations.

subject of the hearing.[10] There was a hearing officer to conduct the hearing and make evidentiary determinations with respect to the creation of a record. The Agency staff was required to submit its evidence that the violations occurred. Petitioner was given the opportunity to cross-examine the Agency staff witnesses and to submit a written defense to the Agency's evidence and to frame his issues for the rest of the hearing (ALJ rulings, page 1, Hearing Exh. No. 31; Tr., pp. 205-212). In addition, petitioner was given the opportunity to present his witnesses and submit exhibits to establish his defenses. Accordingly, the lack of specific Agency regulations governing enforcement hearings did not deprive petitioner of due process.

Claim that the Enforcement Committee did not make any findings is not correct.

55. In Point F (pars. 53 - 57) of Bracy Jones I affidavit and Point G (pars. 46 - 50) of the Bracy Jones II affidavit, petitioner argues that the Enforcement Committee determination should be annulled because the Committee did not make specific findings as to his violations of the APA, Rivers System and Wetlands Acts. This claim is meritless for the reasons stated below and in the Agency's memorandum of law.

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[10] While petitioner complains in par. 50 of the Jones I Bracy affidavit that the statement of enforcement procedures sent with the Notice of Apparent Violation did not inform him of his right to request a formal hearing, the Notice itself informed him of that right (Hearing Exh. No. 6). He in fact requested the hearing in his letter received June 7, 1995 in response to the June 1, 1995 Notice (Hearing Exh. No. 7).

56. At the outset, the Enforcement Committee did in fact make findings which were conveyed to petitioner by the letter dated the April 25, 1996 (Jones II return, Item E). The Committee found that "the facts and applicable law are as stated in the June 1, 1995 Notice of Apparent Violation". In making such findings, the Enforcement Committee implicitly rejected petitioner's proposed findings and his defenses.[11]

57. Furthermore, the Enforcement Committee's determination is not the final determination in the Agency's enforcement process if an appeal is made to the full Agency. The Committee makes the initial determination as to whether a violation has occurred and, if so, the terms for resolving the violation without referral to the Attorney General. At that point, the alleged violator may enter into a settlement agreement (often referred to as an "Offer of Resolution"), whereby he agrees to the terms for resolving the violation, or he may appeal the determination to the full Agency, or he may decline to respond. If the alleged violator does appeal, the disposition of the appeal becomes the Agency's final decision on the violation.

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[11]While it is not germane to the issue whether the Agency's enforcement determination is supported by evidence in the record, petitioner is wrong in alleging in par. 55 of the Bracy Jones I affidavit and par. 48 of the Bracy Jones II affidavit that the cease and desist order served on him in April, 1992 expired three days after the Agency issued it. Pursuant to 9 NYCRR 581.3(b), the order was issued by me as Acting Executive Director and was a continuing order.

58. In this matter, the Enforcement Committee determination was not final because petitioner appealed the determination to the full Agency. When deciding the appeal, the full Agency made specific factual findings (Item A) that respond to petitioner's requested findings contained on page 24 of his March 17, 1996 brief to the Enforcement Committee (Jones II return, Item D 2). These findings fulfill the requirement of the Agency permit hearing regulations, 9 NYCRR 580. 18(c) and SAPA § 307(1).

59. Accordingly, petitioner's claim that the Enforcement Committee did not make specific findings should be rejected.

Petitioner's claim that I violated his due process rights by exercising a dual role with respect to the hearing is wrong.

60. In Point G (par. 58) of Bracy Jones I affidavit and Point H (par. 51) of the Bracy Jones II affidavit, petitioner alleges that my roles as the "prosecutor" for the Agency staff and as the Agency staff person responsible for administering the MOU with DEC is improper. Petitioner is wrong. I had no involvement in the preparation of the MOU. My "administrative responsibilities" under the MOU are the same as any attorney at the Agency - they simply involve the preparation of a request to DEC for an ALJ to preside over a particular permit or enforcement hearing. Neither I nor any other Agency attorney has a role in DEC's decision as to whether it can provide an ALJ. Once the matter is directed to hearing, all substantive contacts with the ALJ or with the Agency members are on notice to the permit

applicant or alleged violator and any other persons who are parties in the hearing. This is no different from the contacts that any Agency attorney who is assigned to a formal hearing may have with a local attorney or other person who is appointed to serve as the hearing officer.

The claim that the Agency is enforcing its authority in a discriminatory manner against petitioner is baseless.

61. In Point H (pars. 60 - 62) of Bracy Jones I affidavit and Point I (pars. 53 - 54) of the Bracy Jones II affidavit, petitioner argues that the Agency's administrative enforcement determination in Jones II should be annulled and the Agency's enforcement action in Jones I should be dismissed because the Agency never commenced any enforcement action against the Madores for their purported unlawful subdivision of land that created the lot that petitioner purchased. The argument is meritless. The Agency has been consistent in that it has never charged the Madores or any of the purchasers of the Madore lots, including petitioner, with any subdivision violation. While the LaMora permit contains the apparent determination that the construction of the dwelling on the LaMora lot was not subject to review, that determination is erroneous as stated in par. 50 above and need not be followed as explained in the memorandum of law, and in fact was not followed by the Agency when it issued subsequent permits with respect to other lots sold by the Madores.

62. For the foregoing reasons, the Agency's Jones II enforcement determination should be confirmed, its Jones II counterclaim for enforcement should be granted, and the motion to dismiss the Jones I enforcement complaint should be denied.

63. Furthermore, in Jones I, the Agency is moving for reconsideration of Justice Ryan's April 7, 1995 decision (Hearing Exh. par. 39) requiring the Agency to exhaust its administrative enforcement process, for permission to serve an amended complaint, for discovery and thereafter renewal of its motion for summary judgment. This motion will be pertinent in the event this Court were to annul the Agency's Jones II administration enforcement determination on those grounds that do not go to the merits of petitioner's violation. As stated in par. 39 above, there is no requirement in Executive Law §§ 813(3) or Part 581 that requires the Agency to exhaust its administrative process before commencing an enforcement action pursuant to Executive Law §§ 813(1) and (2). The annulment of the Agency's enforcement determination on any ground not concerning the actual merits of the determination would not deprive the right of the Agency to seek enforcement in court.

64. Discovery is necessary in order to move for summary judgment because petitioner has never allowed any Agency staff onto his property. The Agency believes that other violations may exist - primarily petitioner's construction of his dwelling within the 150-foot structural setback distance of 9 NYCRR

577.6(b)(3) of the Rivers System regulations without a variance (see, par 22, footnote 3 above). The Agency staff should be given permission to enter the site to determine the mean high water mark on petitioner's property to determine whether the structure is in compliance with that 150-foot setback restriction. In addition, the Agency staff must determine whether an on-site sewage disposal system can installed on the lot in compliance with 9 NYCRR 578.2(b). Accordingly, the Agency's motion should be granted.

Barbara A Rottier
BARBARA A. ROTTIER

Sworn to before me this
22nd day of January, 1997.

Notary Public
Lisa S. Kwong
Albany County
Reg# 02KW5035979
Comm. Expires 11/14/98

Affidavit of Lawrence Rappoport
(R88-R94)

STATE OF NEW YORK
SUPREME COURT : COUNTY OF FRANKLIN

ADIRONDACK PARK AGENCY,

Plaintiff,

-against-

TIMOTHY P. JONES,

Defendant.

Index No. 92-0309
RJI No. 92-0077
Justice Demarest

ANSWERING AFFIDAVIT

STATE OF NEW YORK
SUPREME COURT : COUNTY OF CLINTON

In the Matter of the Application of TIMOTHY P. JONES,

Petitioner,

For a Judgment Under Article 78 of the Civil Practice Law and Rules annulling a determination of the Adirondack Park Agency

Index No. 34476
RJI No. 96-0652
Justice Demarest

State of New York :
: ss.:
County of Albany :

Lawrence A. Rappoport, being duly sworn, deposes and says:

1. I am an Associate Attorney in the Environmental Protection Bureau of the Office of Dennis C. Vacco, Attorney General of the State of New York, counsel for the Adirondack Park Agency, (the "Agency"). The above-captioned matters were consolidated by the December 26, 1996 decision and order of the Supreme Court (Ryan, J.). I am familiar with the pleadings in them and submit this affidavit in support of the Agency's response to the allegations of Timothy P. Jones ("petitioner").

2. Briefly, Adirondack Park Agency v. Jones ("Jones I") is an action which the Agency commenced in June, 1992 against petitioner pursuant to the Adirondack Park Agency, Executive Law §§ 813(1) and (2) for his construction of a single family dwelling in wetlands on his property and within the jurisdictional "river area" of the Raquette River, the pertinent portion of which is a designated "recreational river", without an Agency permit even though being served on April 21, 1992 with a cease and desist order, in violation of the Adirondack Park Agency Act ("APA Act"), Executive Law Article 27, the Freshwater Wetlands Act, Environmental Conservation Law ("ECL") Article 24, Titles 7 and 8 and 9 NYCRR Part 578, and the Wild, Scenic and Recreational Rivers System Act ("Rivers System Act"), ECL Article 15, Title 27 and 9 NYCRR Part 577. Petitioner seeks to dismiss the action for virtually the same reasons he is asserting in Mtr. of Jones [Adirondack Park Agency] ("Jones II").

3. Jones II is an Article 78 proceeding which petitioner commenced to challenge the Agency's August 8, 1996 administrative determination and findings, made after a formal adjudicatory hearing, that his construction of his dwelling without a permit violated the APA, Freshwater Wetlands and Rivers System Acts. The Agency held the hearing after the April 7, 1995 decision and order of the Supreme Court in Jones I directed the Agency to commence its administrative enforcement process. When the Agency served petitioner with a "Notice of Apparent Violation" after

attempting to settle the violation, petitioner requested the formal hearing.

4. In Jones I and II, petitioner asserts grounds that address the lawfulness of the Agency's enforcement determination (affidavit of Evan F. Bracy, Esq., in Jones I, Points B, D, H; Bracy Jones II affidavit, Points B, D, E, I) and other grounds that are collateral and address the lawfulness of the hearing process (Bracy Jones I affidavit, Points A, C, E, F, G; Jones II affidavit, Points A, C, F, G, H). All the points are meritless for the reasons stated in the affidavits of Barbara A. Rottier, Esq. and James M. Marrin, Esq., and the Agency's memorandum of law, submitted herewith. The Agency's affidavits and memorandum of law clearly establish that its enforcement determination is rationally supported by substantial evidence in the hearing record and that the Agency's hearing process did not violate petitioner's rights to due process or the State Administrative Procedure Act, Article 3.

5. The Agency believes that the Jones II proceeding should be transferred to the Appellate Division, Third Department for the disposition of all the issues raised in it, and the disposition of the motion to dismiss in Jones I should be held in abeyance, because the Agency held a formal adjudicatory hearing at petitioner's request, and petitioner has raised the issue in par. 12(b) of his petition whether the Agency's determination is supported by substantial evidence in the record . CPLR 7803(4).

6. In Jones II, the Agency has also counterclaimed for enforcement since, if the Agency's determination is affirmed, there would not be any triable issues to be litigated regarding its entitlement to summary judgment for permanent injunctive relief and civil penalties.

7. In Jones I, the Agency has cross-moved to dismiss petitioner's motion to dismiss and, in addition, in the unlikely event this Court were to annul the Agency's enforcement determination on the basis of petitioner's arguments that address the lawfulness of the hearing process without reaching the lawfulness of the decision, the Agency has also moved for:

a. reconsideration of the Court's April 7, 1995 decision and order withholding further relief to the Agency until it completed its administrative enforcement process;

b. permission to serve an amended complaint in Jones I, complaint, as set forth in Exhibit A attached hereto;

c. permission to enter upon and make a site inspection of petitioner's property; and

d. permission to renew its motion for summary judgment upon completion of the site investigation.

8. The Agency is making this motion in Jones I because, as more fully stated in Point VIII of its memorandum of law, a decision annulling the Agency's enforcement determination on the basis of the collateral grounds asserted by petitioner would affect only the efficacy of the administrative enforcement

process which the Court's April 7, 1995 decision and order directed the Agency to commence. Such a decision would not, and could not, deprive the Agency of its statutory authority to pursue enforcement against petitioner pursuant to Executive Law §§ 813(1) and (2).

9. Accordingly, the motion to amend the Jones I complaint does not duplicate the Agency's counterclaim in Jones II. The Agency can proceed with its Jones II counterclaim only upon the dismissal of the Jones II petition. In the unlikely event that the Jones II petition is granted upon petitioner's collateral grounds, the Agency could no longer pursue its counterclaim, but, as stated above, it would still possess the authority to seek enforcement pursuant to Executive Law §§ 813(1) and (2).

10. Furthermore, an amendment of the Jones I complaint is necessary since the pending complaint is premised primarily upon petitioner's violation of the cease and desist order which the Agency issued in April, 1992. With the amendment, the Agency would be proceeding primarily upon petitioner's substantive violations of the APA, Freshwater Wetlands and Rivers System Acts. Petitioner cannot be prejudiced by the amendment of the Jones I complaint. The hearing held at his request has already given him notice of the violations which the Agency is asserting against him.

11. The motion for permission to enter petitioner's property in order to make a site inspection arises because

petitioner has refused such access to the Agency staff. The site inspection is necessary so that the Agency staff can locate the mean high water mark of the Raquette River in order to determine whether petitioner's dwelling complies with the 150-foot setback distance applicable to structures in the "river area" of a "recreational river" or whether a variance from this restriction is required. In addition, a site investigation is necessary to determine if it is possible to find a suitable location to place an on-site sewage disposal system on petitioner's property.

12. I must also address one of petitioner's arguments. In Points B of the Bracy Jones I and Jones II affidavits, petitioner argues, inter alia, that the common law rule of construction of zoning ordinances apply to the provisions of the APA Act and regulations and under that rule, the APA Act and regulations must be construed in a manner favoring his interests. The argument is erroneous for the reasons stated in Point II of the Agency's memorandum. One case in support of the Agency on this issue is Mtr of Kapusinski v. Adirondack Park Agency, Supreme Court, Washington County, Index No. 6308D, October 25, 1996, a copy of which is attached to the Agency's memorandum, in which the common law rule of construction was raised and rejected. (Kapusinski has not yet perfected his appeal).

13. Though Kapusinski is not binding on this Court, it is entitled to due consideration since petitioner's assertion of the common law rule of construction against the Agency in this matter

appears to be a collateral reargument of this issue that was raised and rejected in Kapusinski. Petitioner's arguments on this issue appear to be similar to the arguments raised in the Kapusinski petitioner's memorandum of law. See, the pertinent part of that memorandum, attached hereto as part of Exhibit C together with the pertinent portions of the Agency's memoranda refuting the arguments.

14. The Jones II petition should be denied and the Agency's counterclaim should be granted. The motion to dismiss in Jones I should be denied, or if in the unlikely event the Agency's enforcement determination is annulled on the collateral grounds raised by petitioner, the Agency's cross-motion for alternative relief in Jones I should be granted.

LAWRENCE A. RAPPOPORT

Sworn to before me this
23rd day of January, 1997.

Notary Public
Lisa S. Kwong
Albany County
#02KW5035989
Comm. Exp. 11/14/98

STATE OF NEW YORK
SUPREME COURT : COUNTY OF FRANKLIN

ADIRONDACK PARK AGENCY,

Plaintiff,

-against-

TIMOTHY P. JONES,

Defendant.

Index No. 92-0309
RJI No. 92-0077
Justice Demarest

ANSWERING AFFIDAVIT

STATE OF NEW YORK
SUPREME COURT : COUNTY OF CLINTON

In the Matter of the Application of
TIMOTHY P. JONES,

Petitioner,

For a Judgment Under Article 78 of the Civil Practice Law and Rules Annulling a Determination of the Adirondack Park Agency

Index No. 34476
RJI No. 96-0652
Justice Demarest

State of New York:
: ss.:
County of Essex :

Michael Hannon, being duly sworn, deposes and says:

1. I am employed by the Adirondack Park Agency as an enforcement officer, though my official title is an "Adirondack Park Project Representative." I have been in this position since November, 1989. Prior to that date, I was employed by the Schoharie County Department of Social Services as a welfare fraud investigator.

2. Among my responsibilities, I investigate complaints of violations of the statutes and regulations administered by the Agency or of conditions of permits issued by the Agency to determine if an apparent violation exists. As part of my investigation, I determine the location and land use classification of the land involved in the complaint, review pertinent documents on file at the Agency or with the local municipality in which the land is located, interview the person or persons making the complaint and the landowner or permit holder and conduct site investigations. If an apparent violation exists, I then inform an Agency staff attorney assigned to the matter of the results of my investigation so that the attorney may determine how to proceed. If an alleged violator requests a formal hearing, I would testify at that hearing with respect to my investigation of the violation.

3. I am the enforcement officer currently assigned to the petitioner's enforcement matter (E92-053). I attended portions of the administrative enforcement hearing on petitioner's violation and testified at the hearing on February 5, 1997 (Jones II, Item B, Hearing Transcript, pp. 550-630). I was present at the first day of hearing on November 15, 1995, during the testimony of Raymond Curran, the Agency's Supervisor of its Natural Resource Analysis unit. I heard Mr. Curran's testimony and saw the slides he projected on a screen during his testimony (Jones II return, Hearing Transcript, pp. 120-133; Item C, Hearing Exhibit No. 18 a-d).

4. Because the slides could not be reproduced for submission to the Court and to the parties in this proceeding, I took the slides, Hearing Exhibit No. 18 a-d, to a photofinisher in Saranac Lake, New York, who made photographic prints of them. Submitted as Item C, Hearing Exhibit No. 18 a-d are colored photocopies of the prints made from these slides. The colored photocopies are accurate reproductions of the prints of the slides, and the prints are accurate reproductions of the images from the slides that I saw while they were projected during the November 15, 1995 session of the enforcement hearing.

Michael P. Hannon
Adirondack Park Project Representative

Sworn to before me this
22nd day of JANUARY, 1997.

Richard R. Terry
Notary Public

RICHARD R. TERRY
Notary Public, State of New York
Qualified in Essex County
No. 4697031
Commission Expires Dec. 31, 1997

Affidavit of James Marrin
(R98-R101)

STATE OF NEW YORK
SUPREME COURT : COUNTY OF FRANKLIN

ADIRONDACK PARK AGENCY,

Plaintiff,

-against-

TIMOTHY P. JONES,

Defendant.

Index No. 92-0309
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ANSWERING AFFIDAVIT

STATE OF NEW YORK
SUPREME COURT : COUNTY OF CLINTON

In the Matter of the Application of TIMOTHY P. JONES,

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RJI No. 96-0652
Justice Demarest

State of New York :
: ss.:
County of Essex :

James M. Marrin, being duly sworn, deposes and says:

1. I am Counsel to the Adirondack Park Agency (the "Agency"), appointed to this position on March 4, 1996. As Counsel, I am responsible for the legal interpretation and enforcement of the Adirondack Park Agency Act, Executive Law Article 27, the Wild, Scenic and Recreational Rivers System Act, Environmental Conservations Law ("ECL") Article 15, Title 27 and Part 577 of the Agency's regulations with respect to designated rivers within the Adirondack Park, and the Freshwater Wetlands

Act, ECL Article 24, Titles 7 and 8 and Part 578 of the Agency's regulations with respect to freshwater wetlands within the Park.

2. I also advise the Agency Chairman and members, the Executive Director and the Agency staff as to the legal implications of the Agency's policy and administrative decisions. I am also responsible for all the legal business of the Agency concerning its compliance with the State Environmental Quality Review Act, the State Administrative Procedure Act, the Open Meetings Law, the Freedom of Information Law, the Personal Privacy Act, the State Historic Preservation Act, the Federal Power Act and the Public Utilities Regulatory Procedures Act. In addition, I am responsible for the administration of the Agency's Legal Division and its programs, though the Associate Counsel handles many of the supervisory and adminsitrative tasks under my direction.

3. Prior to becoming the Agency's Counsel, from 1984 to 1995, I served as the Executive Director and General Counsel of the New York State Emergency Financial Control Board for the City of Yonkers. From 1969 to 1984, I served as Counsel to the New York State Bill Drafting Commission.

4. In par. 59 of the affidavit of Evan F. Bracy, Esq. in Adirondack Park Agency v. Timothy P. Jones ("Jones I"), and in par. 52 of Mr. Bracy's affidavit in Mtr. of Timothy P. Jones (Adirondack Park Agency) ("Jones II"), petitioner alleges that I was involved with his enforcement hearing and subsequently

engaged in improper ex parte contacts with the Agency's Enforcement Committee and the Agency members in violation of SAPA § 307(2) and 9 NYCRR 587(d)(2)(iii). The allegations are not correct.

5. The formal hearing had ended on February 5, 1996, almost a month before I arrived at the Agency. Shortly after my arrival, the Agency Chairman and the Executive Director expressed their wish that I, as the newly arrived Counsel having no prior involvement with the Agency, should attempt a settlement of this highly publicized matter. I agreed to do so.

6. On the same day that I spoke to the Chairman and Executive Director, I called Howard L. Aubin and told him that while I would not discuss the facts or merits of the case, I would attempt to resolve the matter to our mutual satisfaction and inquired whether petitioner would entertain a settlement offer. Mr. Aubin replied that petitioner would consider a settlement. Later that day, I transmitted a settlement offer by fax to Mr. Aubin. That offer was rejected very quickly afterward. A few days later, I transmitted a revised offer. Mr. Aubin initially indicated that petitioner might accept it, but petitioner did not do so. Mr. Aubin related that petitioner would accept nothing short of a statement of non-jurisdiction from the Agency, which I believed was not acceptable to the Agency. I then ended any effort to reach a settlement in the matter.

7. In April, 1996, the enforcement hearing record and the parties' memoranda were submitted to the Agency's Enforcement Committee for determination at its monthly meeting. I attended the meeting as Counsel of the Committee. No oral argument by the parties was presented. Upon the Committee members' request, I advised them as to what I believed were appropriate terms for a settlement offer at that juncture. I did not convey any of the substantive terms of either of the two rejected settlement offers to them. In August, 1996, on petitioner's appeal, the full Agency, except for those members who sat as the Enforcement Committee, considered the hearing record and memoranda in an executive session. I attended the meeting as Counsel to the Agency. Again, there was no oral argument by the parties.

8. As the foregoing establishes, my only contacts in this matter with either of the parties was incidental and for the sole purpose of attempting a speedy, mutually satisfactory settlement. I was never part of the staff responsible for pursuing this matter. Accordingly, petitioner's contention that I engaged in improper ex parte contacts with the Agency members is meritless and should be rejected.

JAMES M. MARRIN

Sworn to before me this
21st day of January, 1997.

Richard R. Terry
Notary Public

RICHARD R. TERRY
Notary Public, State of New York
Qualified in Essex County
No. 4697031
Commission Expires Dec. 31, 1997

Exhibit B of Rappoport Affidavit - Legal Memos
(R102-R118)

EXCERPT

STATE OF NEW YORK

SUPREME COURT COUNTY OF WASHINGTON

In the Matter of the Application of

GEORGE KAPUSINSKI
Hulett's-on-Lake George
Hulett's Landing, New York 12841,

Petitioner,

For a Judgment under Article 78 of the Civil Practice Law and Rules Annulling a Determination of the Adirondack Park Agency

-against-

DANIEL T. FITTS, EXECUTIVE DIRECTOR OF THE ADIRONDACK PARK AGENCY, and THE ADIRONDACK PARK AGENCY,

Respondents.

Index No. 6308D

Court Control No. 57-1-96-0268

Assigned Judge: Hon. John G. Dier

PETITIONER'S MEMORANDUM OF LAW

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that the Respondents' interpretation of the law is contrary to a fundamental rule of statutory construction and is such that it constitutes a de facto amendment to the Adirondack Park Agency Act.

POINT I

THE ADIRONDACK PARK AGENCY ACT IS IN THE NATURE OF A ZONING REGULATION IN DEROGATION OF THE COMMON LAW AND MUST BE STRICTLY CONSTRUED BY THE ADIRONDACK PARK AGENCY IN FAVOR OF THE PROPERTY OWNER

The statement of legislative findings and purposes found in §801 of the Adirondack Park Agency Act finds that development pressures on the Park resources are to be "provided for within a land use control framework." §801, third unnumbered paragraph. To provide such a framework, the Legislature adopted a detailed plan called the "Adirondack Park Land Use and Development Plan" (the "Plan") in order to "sensibly" balance the needs of all the people of the state with the need of the Park's populations "for growth and service areas, employment, and a strong economic base." §801, seventh and eighth unnumbered paragraphs. In more specific terms, the Legislature defined the Plan to mean §§805(1), 805(3), 805(4) and the shoreline restrictions contained in §806. §802(29). Clearly then, the provisions of §806 under review in this proceeding are part of a specific land use control "Plan" administered by the Respondents.

The Plan has been labeled by the Court of Appeals as "comprehensive zoning and planning legislation enacted by the state Legislature to insure preservation and development of the resources

of the Adirondack Park region." Wambat Realty Corp. vs. State, 41 NY2d 490, 491. Relative to the administration of the Plan by the Respondents, Judge Weiss of the Appellate Division, Third Department, in a dissenting opinion (which became the law in the subsequent Court of Appeals case) stated that "Respondent Adirondack Park Agency ... was created ... virtually as a mega zoning board ...." Hunt Brothers vs. Glennon, 180 AD2d 157, 163 (Third Dept., 1992). In the following Hunt Brothers case in the Court of Appeals, the opinion of the court stated that: "The Agency's powers and goals thus resemble those of both a local planning board and a local zoning entity." Hunt Brothers vs. Glennon, 81 NY2d 906, 909 (1993). Similarly, in a more recent case, Judge Mercure stated under the circumstances of that case that the Adirondack Park Agency, "like any zoning board, has inherent power to reconsider its determinations upon a showing of new facts." Carter vs. Adirondack Park Agency, 203 AD2d 788, 789 (Third Dept.,.1994). Although much may be said about the unique nature of the Adirondack Park, the above cited cases establish that the Respondents are nevertheless an administrative body similar in its power and functions to a zoning board or planning board and, therefore, are subject to the same rules of law that otherwise apply to zoning boards and planning boards.

Since the Plan constitutes comprehensive zoning and planning, and since the Respondents are not unlike a zoning board, the Respondents in exercising their statutory construction function are required to follow the fundamental rule of law of strict

construction; that is, since zoning regulations are in derogation of the common law, they must be strictly construed in favor of the property owner. 440 East 102nd Street Corp. vs. Murdock, 285 NY 298 (1941). Put another way, since zoning regulations are in derogation of the common law, they must be strictly construed against the municipality which seeks to enforce them. Allen vs. Adami, 39 NY2d 275 (1976). Applications of the rule are as follows: "In construing a zoning regulation, the issue is not whether the use is permissible, but, rather whether it is prohibited." Matter of D. Masko Scrap Iron and Metal Corp. vs. Zurk, 62 AD2d 92, 98, affd. 46 NY2d 864. "Zoning regulations may not be extended by implication." Matter of Monument Garage Corp. vs. Levy, 266 NY 339. "Zoning ordinances are in derogation of common-law rights and, accordingly, must be strictly construed so as not to place any greater interference upon the free use of land than is absolutely required. Matter of 440 E. 102nd Street Corp. v. Murdock, supra, 285 NY, at 304. "Any ambiguity in the language used in such regulations must be resolved in favor of the property owner." Matter of Allen vs. Adami, supra, 39 NY2d, at 277. The above rules are basic to statutory construction and must be followed by the Respondents with respect to an analysis of §§806(1)(a)(1) and 806(1)(a)(4). These rules of construction have their philosophical underpinning in the idea that rights in land, which were relatively free of restraint prior to the enactment of zoning regulations, deserve the highest degree of protection under

the common law and the federal and state constitutions. Anderson, New York Zoning, §17.01, page 740.

In the face of these well settled and time honored rules, the Respondents' Memorandum of Law ("Memorandum") takes the position that the Adirondack Park Agency is exempt from rules of law that otherwise apply to administrative bodies. The assertion is made on page 16 of the Memorandum that "The common law rule of construction asserted by Petitioner does not apply to the construction of the Adirondack Park Agency Act," and on page 19 that "... the common law rule asserted by Petitioner should be rejected because it is not applicable to the Agency's construction of Executive Law §§806(1)(a)(1) and (1)(a)(4)." The implication of the Respondents' position is that if the Respondents were not exempt from the fundamental rules of construction the Respondents would have to construe 806 as construed by the Petitioner. But implications are not necessary, because by taking the position of exemption the Respondents have not only violated common law but also they have violated their own regulations at §588.4(c) where construction is mandated in accordance with Chapter 6, Statutes, Book 1 of McKinney's Consolidated Laws of New York. From that authority, §153 states: "A change in long-established rules of law is not deemed to have been intended by the Legislature in the absence of a clear manifestation of such intention." The commentary to the rule then goes on to say: "This principle is analogous to the doctrine that statutes in derogation of the common law are to be strictly construed." As will be developed below, the

Respondents have not only violated these rules by taking the opposite, more restrictive approach, but also they have fabricated new interpretations that are tantamount to amending the Adirondack Park Agency Act legislation.

POINT II

THE RECORD PRODUCED BY THE RESPONDENTS EXPOSES THE INNER WORKINGS OF THE ADIRONDACK PARK AGENCY AND ESTABLISHES THAT THE RESPONDENTS' INTERPRETATION OF THE DEEDED ACCESS REQUIREMENTS OF §806(1)(a)(4) IS ILLEGAL IN ONE INSTANCE AND TOTALLY UNSUPPORTED BY ANY LANGUAGE IN THE STATUTE IN ANOTHER

The substance of this Article 78 proceeding relates to the intent of the Legislature with respect to deeded access to a lake under the restrictions set forth in §806(1)(a)(4). There is no doubt but what the Legislature intended to allow deeded "backlot" deeded access because §806(1)(a)(4) expressly provides a scheme for such access. The statute is clear with respect to less than five backlots, i.e., there is no restriction or regulation in derogation of the common law, and there is no minimum lot size for a shorefront lot providing access for less than five backlots. Thus, an existing shorefront lot with a width of 50 feet could provide deeded access to a lake for four backlots.

Moreover, there is no express restriction or regulation on whether the shorefront lot is improved or vacant, so hypothetically a 50 foot shorefront lot on which there is a residence could serve as an access lot to the lake for up to four backlots. By not regulating shoreline width when deeded access for less than five

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STATE OF NEW YORK
SUPREME COURT WASHINGTON COUNTY

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Hulett's-on-Lake-George
Hulett's Landing, New York 12841,

Petitioner,

Index No. 6308D
Court Control No. 57-1-96-0268
(Justice Dier)

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- against -

DANIEL T. FITTS, EXECUTIVE DIRECTOR OF THE ADIRONDACK PARK AGENCY, and THE ADIRONDACK PARK AGENCY,

Respondents.

RESPONDENTS' MEMORANDUM OF LAW

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to its review jurisdiction over the entire subdivision without the submission of additional information with the Agency's ability to respond to the underlying statutory construction issue on the basis of the facts pertinent to the shorefront residential lot that petitioner already sold. As previously stated, that shorefront residential lot was sold with only 125 feet of shoreline, 60 feet of which was subject to a deed provision providing shoreline access to the approximately 70 non-shorefront back lots (Quist aff.,par 6; Ruling, page 3).

The facts concerning this lot, already known to the Agency, provide a sufficient basis upon which the Agency could issue the declaratory ruling pursuant to 9 NYCRR 588.2 and the State Administrative Procedure Act, § 204. See, Mtr. of the Power Authority of the State of New York [PASNY] v. New York State Department of Environmental Conservation, 58 NY2d 427, 434 (1983) (it is within the discretion of an agency to determine if it has sufficient basis to issue a declaratory ruling, and an agency may issue a ruling on assumed facts).

Accordingly, petitioner's "lack of sufficient information" argument fails to provide any basis for annulling the Agency's declaratory ruling.

b. Petitioner's argument, that the common law rule of construction of zoning provisions in favor of the landowner applies in this matter, is meritless and should be rejected.

Petitioner argues next (petition, par. 7) that because the Agency's construction of Executive Law §S 806(1)(a)(1) and 806(1)(a)(4) is not supported by any express regulation, these

provisions must be construed in his favor and for his benefit under the common law rule that any ambiguity in a zoning ordinance must be construed in favor of the landowner (see, generally, Mtr. of Allen v. Adami, 39 NY2d 275, 277 [1976]). This argument is likewise unavailing and provides no basis for annulling the Agency's declaratory ruling.

The common law rule of construction in favor of the landowner is not absolute. In Mtr. of Frishman v. Schmidt, 61 NY2d 823, 825 (1984); Mtr. of Town of Sullivan v. Strauss, 171 AD2d 980, 981 (3d Dept., 1991), the appellate courts held that the common law rule is not absolute and it subject to the limitation that where it is difficult or impractical to for a legislative body to set forth a zoning provision that is definitive and all encompassing, "a reasonable amount of discretion" in the interpretation may be delegated to the administrative body that administers that provision. Where such discretion is delegated to that administrative body, the specific application of the zoning provision is then governed by the body's interpretation of the provision, unless that interpretation is determined to be unreasonable or irrational.

The common law rule of construction asserted by petitioner does not apply to the construction of the Adirondack Park Agency Act. The provisions of the Act, though complex, are not all encompassing and often require interpretation in light of particular facts, as the Long, McCormick and Brown cases establish. Further, the Agency has clear authority to construe

the Adirondack Park Agency Act and its regulations in light of particular facts in a manner consistent with the legislative purpose of the Act of protecting the resources of the Adirondack Park. Executive Law § 804(9) (Agency is empowered to any and all things necessary or convenient to carry out the purposes and policies of the Adirondack Park Agency Act. SAPA § 204;9 NYCRR 588.2; PASNY (Agency empowered to issue declaratory rulings on a particular set of facts); Brown v. Glennon; 203 AD2d at 849 (Agency declaratory ruling construing the shoreline structural setback restrictions in light of a particular set of facts upheld against the petitioner).

In addition, petitioner's assertion of the common law rule would defeat the legislative intent of the shoreline lot width requirements that shorelines be protected by concentrating rather than dispersing the concentration of use at shorelines. Accordingly, the assertion of the common law rule to annul the Agency's construction of the Adirondack Park Agency Act and its regulations should be rejected. Long; McCormick; and Brown. See, also, Mtr. of Ryan v. Adirondack Park Agency, 186 AD2d at 924-925 (function of the Agency is preserve the environmental and scenic attributes of the Adirondack Park and not the economic success of developers).

Furthermore, the Legislature's enactment of SEQRA has partially abrogated the rule that ambiguities be construed in favor of the landowner when environmental concerns are affected by such a construction a zoning provision. As stated on pages 13

18.

and 14, supra, ECL 8-0103(6) and (7) and 8-0107, read together, expresses the legislative intent that all agencies interpret and administer their statutes and regulations in accordance with the purposes, policies and intent of SEQRA and "give appropriate weight" to the protection and enhancement of the environment and human and community resources. Further, ECL 8-0103(9) expresses the legislative intent that all agencies that have authority to regulate activities that affect the quality of the environment also give "due consideration *** to preventing environmental damage".

These provisions, read as a whole, "imbue[] SEQRA with a substantive mandate to mitigate environmental harm". Gerrard, Ruzow and Weinburg, Environmental Impact Review in New York, § 1.02; see, also, Mtr. of Friedman v. Adirondack Park Agency, 165 AD2d at 36 (the Agency's cumulative of project impacts consistent with its obligation to construe its authority consistent with the purposes, policies and intent of SEQRA); Mtr. of EFS Ventures, Corp. v. Foster, 71 NY2d 359, 371 (1988), (SEQRA imposes substantive duties on the agencies of government to protect the quality of the environment for the benefit of all the people of the State of New York, and the courts have given strong support to implementing this legislative policy).

Thus, where environmental concerns exist in the construction of a zoning ordinance, as in this matter, the common law rule of construction in favor of the landowner does not apply where it would defeat the legislative purposes, policies and objectives of

SEQRA. See, e.g., Mtr. of Putnam Lake Community Council Bathing Beaches v. Deputy Commissioner of Health of the State of New York, 90 AD2d 850, 851 (2d Dept., 1982) (statutes protecting public interest "will not be construed so as to advance a private interest at the expense of the public good".)

In light of the foregoing, the common law rule asserted by petitioner should be rejected because it is not applicable to the Agency's construction of Executive Law §§ 806(1)(a)(1) and (1)(a)(4).

c. Petitioner's argument that the Agency's declaratory ruling subjects preexisting land use and development to review is erroneous.

Petitioner argues (petition, par. 8) that the Agency has no jurisdiction to require him to comply with shoreline access lot width requirements of Executive Law § 806(1)(a)(4) for the approximately 70 non-shorefront back lots because the deeded access provisions that burdens his parcel are "preexisting" and are not subject to review under Executive Law §§ 811(2) and 819(3). This argument is meritless because petitioner again misconstrues the ruling.

As stated in par. 8 of the Quist affidavit, the focus of the ruling's interpretation and application of the shoreline lot width restrictions is upon the creation of the lot which petitioners sold in August, 1995, not on the creation of the deeded access rights themselves. In issuing the ruling, the Agency is neither reviewing nor regulating the preexisting deeded shorefront access rights.

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- against -

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Respondents.

RESPONDENTS' SUPPLEMENTAL MEMORANDUM OF LAW

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not allow these minimal residential lot widths to be used at the same time for deeded shoreline access, even for less than five such backlots (Quist answering petition; Exhibit A; June 20, 1985 Report of the Legal Affairs Committee).

The Agency's rationale was premised upon the plain language of Executive Law § 806(1)(a)(1), which sets forth the minimum lot widths that each new shoreline residential lot must contain, and the plain language of § 806(1)(a)(4), which sets forth the minimal requirements for a shoreline access lot. There being no language in § 806 allowing the minimal amount of shorefront necessary for a residential lot to also be used for access for non-shorefront lots where the lot was intended to serve both functions, the Agency determined not to read such language into § 806.

The Agency's construction in 1985 as well as in the declaratory ruling effectuates the legislative "scheme" of § 806 in a manner that is consistent with the language of that section. Mtr. of Long v. Adirondack Park Agency, 76 NY2d 416, 420-422 (1990). Thus, petitioner's arguments that the Agency's 1985 construction constituted wrongful "legislating" with respect to "less than five backlots" must be rejected.

B. Petitioner's arguments that the Agency is bound by the common law rule of construction in favor of the landowner are meritless.

Petitioner is wrong in arguing in Point I of his memorandum that the Agency is bound by the common rule of construction that land use ordinances must be construed in favor of a landowner.

7.

His primary rationale is the caselaw that has described the Adirondack Park Agency Act as a comprehensive zoning and planning law and the powers of the Agency as being similar to those of a local zoning board. Petitioner then concludes that the Agency must always construe the provisions it administers in favor of the landowner and is powerless to construe these provisions in any other way. This argument is unavailing.

While the cases cited by petitioner, Wambat Realty Co. v. State of New York, 41 NY2d 490, 491 (1977), Mtr. of Hunt Brothers Contractors, Inc. v. Glennon, 180 AD2d 157, 163 (dissenting opinion of Justice Weiss) (3d Dept., 1992), reversed, 81 NY2d 906, 909 (1993); Mtr. of Carter v. Adirondack Park Agency, 203 AD2d 788, 789 (3d Dept., 1994), recognize that the Agency's powers are similar to those of zoning and planning boards, these cases do not subject the Agency to the common law rule of construction in its construction of the statutes and regulations it administers.[2]

Further, as stated on page 16 of the Agency's answering memorandum, the common law rule of construction in favor of a landowner is not absolute and is inapplicable where a zoning or planning board has been delegated discretion to interpret the provisions which it administers. Mtr. of Frishman v. Schmidt 61

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[2]In addition to the Adirondack Park Agency Act, Executive Law Article 27, the Agency also administers the Freshwater Wetlands Act for jurisdictional wetlands located within the Adirondack Park, ECL Article 24, Titles 7 and 8, and the Wild, Scenic and Recreational Rivers System Act for those designated rivers or portions thereof located within the Park, ECL Article 15, Title 27.

NY2d 823, 825 (1984); Town of Sullivan v. Strauss, 171 AD2d 980, 981 (3d Dept., 1991).

The declaratory ruling provisions of SAPA § 204 and 9 NYCRR 588.2 confer the Agency with discretion to construe the provisions it administers. The appellate courts have recognized that the Agency has been delegated this discretion by upholding the Agency's construction of several provisions administered by it. See, e.g.:

a. Mtr. of Long, 76 NY2d at 421, affirming, 151 AD2d 189 (1989) (upholding the Agency's construction that, under Executive Law § 808[3], its time to review a variance from the provisions of an Agency-approved local land use program commences 30 days after receipt of the variance record);

b. Mtr of Crater Club, Inc. v. Adirondack Park Agency, 86 AD2d 714, 715 (3d Dept., 1982), affirmed on opinion below, 57 NY2d 990 (1982) (upholding the Agency's construction that there must be a "formalized" or "coherently articulated" plan of subdivision in existence prior to the effective date of the 1973 amendments to the Adirondack Park Agency Act in order for the subdivision to qualify as a "preexisting subdivision" under Executive Law § 811(3);

c. Mtr. of Campion v. New York State Adirondack Park Agency, 188 AD2d 877, 878-879 (3d Dept., 1992) (upholding the Agency's construction under the Rivers System Act [ECL Article 15, Title 27 and the implementing regulations, 9

NYCRR Part 577] that the jurisdictional "river area" with respect to a lake which is part of a designated river includes the islands within the lake); and

d. Brown v. Glennon, 203 AD2d 846, 848, 849 (3d Dept., 1994) (upholding the Agency's construction that a preexisting dwelling located on a peninsula on Lake George in lawful non-compliance with the shoreline structural setback restrictions of Executive Law § 806 cannot be relocated closer to any portion of the shoreline in a manner that increases the amount of non-compliance with the setback restrictions).

Because the Agency has such discretion to construe the provisions it administers, as evidenced in the decisions cited above, the Agency is not subject to the common law rule of construction asserted by petitioner.

Petitioner also contends in Point I, page 8 of his memorandum that by virtue of 9 NYCRR 588.4(c), the Agency has subjected itself to follow the common law rule of construction as expressed in Statutes, Book 1 of McKinney's Consolidated Laws of New York, § 153. Petitioner misconstrues the reference to Statutes in § 588.4(c). This section states:

> The language of these rules and regulations shall be construed according to its most obvious and commonly used sense. Where required, construction shall accord with the provisions of "Construction and Interpretation," Chapter 6, Statutes, Book 1 of McKinney's Consolidated Laws of New York.

Clearly, the reference to Chapter 6 of Statutes in § 588.4(c) is to the chapter in its entirety, not just § 153. Indeed, Statutes, Chapter 6, § 92 mandates that statutory provisions be construed to effectuate their legislative intent, the very point expressed with respect to the construction of the provisions of the Adirondack Park Agency act at issue in Long, 76 NY2d at 420-422, and in Brown, 203 AD2d at 849. Statutes, Chapter 6, § 94, requires that statutory provisions be construed according to their natural and obvious meaning, giving effect to each word in the provisions. The Agency's declaratory ruling is consistent with the rules of construction set forth in Statutes, §§ 92 and 94.

Consequently, petitioner's arguments premised on 9 NYCRR 588.4(c) do not establish that the Agency must construe the provisions it administers in accordance with the common law rule of construction in favor of the landowner.

CONCLUSION

THE PETITION SHOULD BE DENIED AND THE PROCEEDING SHOULD BE DISMISSED.

Dated: JuLY 15, 1996

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FINA

MEMORANDUM OF UNDERSTANDING BETWEEN THE NEW YORK STATE ADIRONDACK PARK AGENCY AND THE NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION (DEC) REGARDING THE USE OF DEC ADMINISTRATIVE LAW JUDGES IN FORMAL ADIRONDACK PARK AGENCY HEARINGS

WHEREAS, the Adirondack Park Agency (Agency) Rules and Regulations, and its practice, provide for formal administrative hearings in the context of permit applications and, when requested, enforcement matters, and

WHEREAS, a hearing officer is needed for such hearings, and

WHEREAS, the Agency has often obtained a member of the local private bar to serve as a hearing officer, but such individuals may not always be willing or able to serve, or circumstances may render the use of such individuals inappropriate or unadvisable, and

WHEREAS, the DEC has an Office of Hearings, with a staff of Administrative Law Judges (ALJ) which DEC is willing to make available to the Agency for its hearings when appropriate, and

WHEREAS the use of DEC hearing officers in Agency formal hearings will aid the efficient use of limited state resources, will address the needs of the Agency for hearing officers for certain formal Agency hearings,

NOW THEREFORE BE IT RESOLVED the Agency and DEC do hereby agree as follows:

REQUEST FOR HEARING OFFICER

The Agency shall make a written request for a DEC hearing officer no less than thirty days prior to the anticipated hearing date. The Department will make reasonable efforts to make one of its ALJs available within the appropriate time period. If a DEC ALJ will not be available, DEC will so advise the Agency within five business days, and will advise the Agency when an ALJ may be available.

HEARING PREPARATIONS

The Agency will provide the assigned ALJ with hearing materials, including but not limited to anticipated Agency exhibits and related correspondence or other materials, as soon as possible following the assignment and as far in advance of the first hearing date as practicable.

EXPENSES

The DEC ALJ will be considered a DEC employee during the pendency of the hearing. DEC will be responsible for the customary employee costs, including but not limited to salary and employee benefits. The Agency will assume the costs of reimbursable travel, food, lodging, and reimbursable miscellaneous expenses related to the administration of the hearing incurred while in travel status. Travel and lodging arrangements will be made by the DEC ALJ, consistent with State guidelines for travel, meals and lodging. The ALJ shall make timely request to Judy Smith at the Agency for reimbursement of expenses, no later than 30 days from the date the expenses were incurred, and shall advise the Agency before incurring expenses other than lodging, meal, or incidental travel expenses.

ALJ DUTIES

The assigned ALJ shall be responsible for conducting a fair and impartial hearing, guided by 9 NYCRR Part 580 and written Agency guidance, the State Administrative Procedures Act, Executive Order 131, and any agreement of the parties as to the limitation of issues or other matters to be considered at the hearing. If scoping is necessary, but the parties have not agreed as to the limitation of issues or other matters to be considered at the hearing, the hearing officer shall be responsible for presiding at the scoping session, which shall be considered the first hearing day. The ALJ shall avoid actual or apparent bias in the performance of the role of hearing officer. Unless the Agency has specifically requested otherwise in advance, the ALJ will not be required to render an advisory decision or any other form of recommendation, or to prepare other post-hearing documentation. However, the ALJ may be called upon to address post-hearing motions, if made.

SUPERVISION OF IMPLEMENTATION

A. Routine Administration

Day-to-day responsibility for supervision of implementation of this Memorandum will rest with the Agency's Associate Counsel and the DEC's Chief Administrative Law Judge.

B. Standing Policy Committee

The Agency's Executive Director and the DEC's Assistant Commissioner for Hearings (in their absence, the Agency's Associate Counsel and the DEC Chief Administrative Law Judge) are designated to act as a committee on behalf of the Commissioners of the DEC and the Agency to consider issues relevant to the continuing effectiveness of this agreement and to develop appropriate policy positions. This committee shall provide long-term overview of the implementation of this agreement, and may appoint subcommittees, alternates, or delegations of authority as appropriate.

AMENDMENT OF MEMORANDUM

It may be necessary from time to time to review this Memorandum with regards to its effectiveness and to consider amendments hereto. It shall be the responsibility of the respective staff members previously named to bring recommendations for amendment to the Agency and the DEC upon a consensus that such a referral is in order.

This Memorandum will be revised as necessary after amendments to statutes, regulations, or other legal requirements take effect, and may be altered or terminated by mutual agreement upon 60 day's written notice by either party to the other.

EFFECTIVE DATE

This Memorandum has been in full force and effect since the later of the execution dates indicated below.

Gregory B. Campbell, Chairman
Adirondack Park Agency
DATE: Sept. 21, 1995

Michael D. Zagata, Commissioner
New York State Department of Environmental Conservation
DATE: September 29, 1995

Answer to Counterclaim
(R123-R24)

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF FRANKLIN

----------x

In the Matter of the Application of

TIMOTHY P. JONES,

Petitioner,

for a judgment Under Article 78 of the Civil Practice Law and Rules annulling a determination of the Adirondack Park Agency.

----------x

ANSWER TO COUNTERCLAIM

Index No. 97-60
RJI No.16-1-97-0041

Petitioner, Timothy P. Jones, by his attorneys Edwards & Bracy, answering the counterclaim of Respondent Adirondack Park Agency, states as follows:

1. Petitioner admits the allegations contained in numbered paragraphs "13," "20," "21," "22," "23," "25," "27," "29," and "31" of said counterclaim.

2. Petitioner denies knowledge and information sufficient to form a belief as to the allegations contained in numbered paragraphs "14" and "24" of said counterclaim.

3. Petitioner denies the allegations contained in numbered paragraphs "15," "16," "26," "28," "30," and "32" of said counterclaim.

4. Petitioner asks the Court to take judicial notice of the full statutory text referred to in numbered paragraphs "17-19" of said counterclaim.

WHEREFORE Petitioner requests an order and judgment: denying Respondents counterclaim and dismissing same in its entirety; and for such other and further relief which this Court deems just and proper, together with costs and disbursements.

EDWARDS & BRACY
ATTORNEYS AT LAW
16 BRINKERHOFF STREET
PLATTSBURGH, NY 12901

Dated: March 12, 1997

Evan F. Bracy
EDWARDS & BRACY
Attorneys for Petitioner
16 Brinkerhoff Street
Plattsburgh, NY 12901
(518) 562-2600

Reply Affidavit of Barbara Rottier
(R125-R149)

STATE OF NEW YORK
SUPREME COURT : COUNTY OF FRANKLIN

ADIRONDACK PARK AGENCY,

Plaintiff,

-against-

TIMOTHY P. JONES,

Defendant.

Index No. 92-0309
RJI No. 92-0077
Justice Demarest

REPLY AFFIDAVIT

STATE OF NEW YORK
SUPREME COURT : COUNTY OF FRANKLIN

In the Matter of the Application of TIMOTHY P. JONES,

Petitioner,

For a Judgment Under Article 78 of the Civil Practice Law and Rules annulling a determination of the Adirondack Park Agency

Index No. 97-60
RJI No. 16-1-97-0041
Justice Demarest

State of New York :
: ss.:
County of Essex :

Barbara A. Rottier, being duly sworn, deposes and says:

1. As I stated in my answering affidavit, I am a employed by the Adirondack Park Agency (the "Agency") as its Associate Counsel and am familiar with the facts and circumstances of both the Agency's enforcement action against petitioner, Adirondack Park Agency v. Jones (Jones I) and petitioner's subsequent Article 78 proceeding, Mtr. of Jones (Adirondack Park Agency) (Jones II), commenced to annul an Agency's August 8, 1996 administrative enforcement determination regarding his violation. I submit this reply affidavit in response to petitioner's

arguments in the affidavit of Evan F. Bracy, Esq., sworn to March 13, 1997 ("Bracy affidavit"). His arguments are incorrect for the reasons stated below, in the Agency's reply memorandum of law and in the Agency's answering papers. I address the arguments in the same sequence as presented in the affidavit.

2. In brief summary, petitioner's arguments raise issues which are not germane to the finding by the Agency that his construction of the dwelling on his lot without an Agency permit was a violation which it is entitled to enforce. His claim that his construction, commenced in August, 1991, should be treated in the same manner as the construction in the LaMora matter in 1982 is unavailing.

The record shows that the 1982 LaMora permit was drafted in error and that the Agency did not follow the LaMora permit when it subsequently asserted review jurisdiction over the construction or placement of a dwelling in both the Beaulieu permit issued in 1986 and the Daniels permit issued in 1990. The record also shows that there was no unreasonable delay in the holding of his enforcement hearing and that he suffered no prejudice as a result of the time elapsed between April, 1992 and November 15, 1995. The record also shows that in this period the Agency afforded petitioner every opportunity to settle this matter, which petitioner rejected. Moreover, the record shows that the hearing held by the Agency neither violated petitioner's rights to due process or the requirements of the State Administrative Procedure Act ("SAPA"), Article 3. Therefore, as

more fully stated below, petitioner's arguments as re-asserted in the Bracy affidavit should be rejected.

3. Before addressing petitioner's specific arguments, I note that he fails to address the overwhelming evidence in the hearing record that supports the Agency's determination that:

a. there are jurisdictional wetlands on petitioner's lot at issue;

b. petitioner undertook the construction of a single family dwelling in the wetlands on his lot, located within the jurisdictional "river area" of the Raquette River, without a permit as required by:

i. the Adirondack Park Agency Act ("APA Act"), Executive Law Article 27;

ii. the Freshwater Wetlands Act, ECL Article 24, Titles 7 and 9 and 9 NYCRR Part 578; and

iii. the Wild, Scenic and Recreational Rivers System Act ("Rivers System Act"), ECL Article 15, Title 27 and 9 NYCRR Part 577; and

c. the subdivision creating petitioner's lot did not receive approval from the New York State Department of Health ("DOH") prior to August 1, 1973, the effective date of the APA Act, since that date.

Petitioner's construction of the dwelling on his lot remains subject to Agency review under the APA and Rivers System Act because the subdivision creating petitioner's lot did not receive DOH approval before August 1, 1973.

4. In pars. 4 through 14 of the Bracy affidavit, petitioner continues to contend that Executive Law § 811(3) is ambiguous and that the construction of his single family dwelling is exempt from the Agency's review since his lot is part of a "preexisting subdivision" that did not require DOH approval. His contention remains erroneous.

5. At the outset, petitioner's construction of his dwelling remains subject to Agency review under the Freshwater Wetlands Act, regardless of the disposition of his incorrect argument that his lot did not require DOH approval under the APA or the Rivers System Acts. There is no comparable exemption involving DOH approval in 9 NYCRR Part 578, the Agency's regulations implementing its Freshwater Wetlands Act jurisdiction. Section 578.1(b) only exempts those "regulated activities", including the construction of a dwelling, for which an Agency permit or DEC "stream protection" permit was issued prior to May 1, 1983, the effective date of the Agency's Freshwater Wetlands Act jurisdiction.

6. Petitioner's argument that Executive Law § 811(3)(c) is ambiguous is negated by the very language of that section, which plainly limits the review exemption for the construction of a dwelling to only those lots in a DOH-approved "preexisting

subdivision."[1] This language presupposes two types of "preexisting subdivisions" under the APA Act - those lawful subdivisions "in existence" that did not required DOH approval and those lawful subdivisions "in existence" that did. Petitioner concedes (Bracy aff., par. 8) that not all subdivisions require DOH approval. The § 811(3)(c) exemption plainly applies only to the latter - the "preexisting subdivisions" that actually obtained DOH approval prior to August 1, 1973. [2]

7. Petitioner also continues to misconstrue the Agency staff stipulation on the record that it would treat his lot as if it were a lot in a "preexisting subdivision". The Agency staff specifically stated on the record that it was not stipulating that the subdivision creating petitioner's lot received DOH approval (Tr. pp. 49-54, 227, 230). The Agency staff made its

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[1]Executive Law § 811(3)(a) exempts "preexisting subdivisions", i.e. a subdivision lawfully "in existence" prior to August 1, 1973 (see, Executive Law s 802[49]) from Agency review.

The review exemption for construction of a dwelling under Executive Law § 811(3)(c) also applies to those lots in a subdivision receiving DOH approval in the interim period between July 1, 1971 and July 31, 1973, referred to in § 811(3)(b), provided that the "interim" subdivision is lawfully "in existence" as of August 1, 1974.

[2]Similarly, 9 NYCRR 577.7(b)(2) of the Agency's River System regulations exempts the construction of a single family dwelling on a lot in subdivision lawfully in existence which has been approved by DOH.

limited stipulation because it was not contesting the creation of the petitioner's lot in the first instance.[3]

8. Petitioner is also wrong in arguing (Bracy aff., pars. 6-8, 10-12) that a subdivider is not required to file a subdivision map with DOH in order to receive DOH approval. Petitioner overlooks Public Health Law § 1116, which plainly states in pertinent part that no subdivision or portion thereof shall be sold and no permanent buildings be erected thereon "until a plan or map of such subdivision shall be filed with and approved by" State DOH or the city, county or part-county department of health having jurisdiction over the subdivisions defined in Public Health Law § 1115 (emphasis added).[4] Petitioner's "no map requirement" argument should therefore be rejected.

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[3]In par. 13 of the Bracy March 13, 1997 affidavit, petitioner wrongly lifts out of context a quote of mine at page 409 of the transcript in which I appear to state that it did not matter whether the Madore subdivision received DOH approval. As that entire quote as well as the rest of my statements on page 409 show, I mis-spoke in responding to arguments made by Mr. Aubin and immediately corrected myself by stating that it was irrelevant whether the subdivision creating petitioner's lot required DOH approval. If the subdivision did not receive DOH approval, the petitioner's construction of his home in the wetland and river area remains subject to Agency review.

[4]William Amberman, the District Director of the DOH Saranac Lake District Office, testified at the hearing that Franklin County does not have its own department of health and the State DOH has the sole authority to approve subdivisions in Franklin County for so long as Public Health Law § 1115 has been in effect [Tr., p. 85]).

9. Petitioner is also wrong in claiming (Bracy aff., pars. 6, 9, 11-12) that he is entitled to the review exemption of Executive Law § 811(3)(c) because his Town of Altamont building permit (Hearing Exh. No. 10) satisfied the requirements of Public Health Law § 1115(a). Public Health Law § 1115(a) provides for local health or State DOH approval of a single lot that is not otherwise subject to DOH review under Public Health Law § 1115. This argument should be rejected because:

a. Under Executive Law § 811(3)(c), it is the subdivision, not an individual lot, that requires DOH approval;

b. Even if Public Health Law § 1115(a) could apply in construing Executive Law § 811(3)(c) [and it should not], evidence in the record establishes that any such approval under Public Health Law § 1115(a) was never made with respect to petitioner's lot. As stated above, Mr. Amberman testified that the State DOH alone administers the Public Health Law in Franklin County (Tr. p. 85). He further testified that in a search of the record on file in his office he did not find any record showing that petitioner's lot or any subdivision of lots along the portion of the Raquette River as depicted on Hearing Exhibit No. 14 received DOH approval (Tr., pp. 86-87). (Henry Savarie, the Agency's cartographer, testified that Exhibit No. 14 depicts the location of petitioner's lot with respect to the Agency's land use boundaries and the Town tax maps [Tr., pp.

67-70, 74-76]);

c. Petitioner's Town of Altamont building permit is totally irrelevant with respect to petitioner's Public Health Law § 1115(a) argument since the permit was issued on August 9, 1991 (Hearing Exh. No. 10), 18 years after August 1, 1973. The permit is therefore neither "preexisting" under Executive Law § 811(3)(a), i.e., issued prior to August 1, 1973, nor does it come within the exemption provided by Executive Law § 811(3)(b) because it was issued after July 31, 1973.[5] Petitioner's reliance on the building permit as part of his erroneous "Public Health Law § 1115(a)" argument is therefore baseless.

10. Accordingly, petitioner's arguments in the Bracy March 13, 1997 affidavit that the construction of his dwelling is exempt from review under Executive Law § 811(3)(c) as a lot in a "preexisting subdivision" should be rejected.

The jurisdictional conclusion in the LaMora permit does not estop the Agency from requiring petitioner to obtain a permit for the construction of his dwelling.

11. Petitioner has based his collateral estoppel argument on the jurisdictional conclusion in the LaMora permit, Hearing Exh. No. 28, in which the Agency apparently determined to assert

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[5]Further, the construction of the dwelling as authorized by the permit was not "in existence" as of August 1, 1974 under Executive Law § 811(3)(b) - Richard Garrelts, the Town Code Enforcement Officer, testified that the petitioner's property was undeveloped when he issued the permit in August, 1991 [Tr., pp. 171-172]).

review jurisdiction over the fill in a wetland on a lot in a "preexisting subdivision" but not over the construction of the dwelling on that fill. As explained in pars. 48-52 of my answering affidavit and on pages 40-44 of the Agency's answering memorandum, the Agency is not estopped from determining that this prior jurisdictional conclusion was erroneous and that the Agency is not bound to follow it in this matter.

12. Petitioner now claims (Bracy aff., par. 17) that there is no evidence in the record that the LaMora permit was drafted erroneously. He is wrong. I refer again to the December 9, 1981 memorandum by Agency counsel Robert C. Glennon to the Agency's Legal Affairs Committee, Hearing Exhibit No. 26, which is specifically referred to in Finding of Fact No. 14 of the LaMora permit; the language of the conditions of the LaMora permit, Hearing Exhibit No. 28, which imposes requirements on the construction of the dwelling; and the subsequently issued Beaulieu and Daniels permits, Hearing Exhibits Nos. 83 and 84, in which the Agency did not follow the erroneous conclusion made in the LaMora permit. These exhibits, considered together, provide a proper basis for the Agency to find that the conclusion made in the LaMora permit was drafted in error and should not be followed.

13. Petitioner is also wrong in arguing (Bracy aff., par. 17) that the Agency improperly considered the Glennon December 9, 1981 memorandum in considering the jurisdictional conclusion of

the LaMora permit. Indeed, the Glennon memorandum highlights the error in the LaMora permit. In his memorandum, Mr. Glennon specifically determined "if DOH hasn't reviewed the subdivision, for whatever reason, the single family dwelling does not partake of the review exemption (emphasis in the original)." While Finding of Fact No. 14 of the LaMora permit refers to Mr. Glennon's determination to treat the LaMora lot as one in a "preexisting subdivision" which has not received DOH approval, both the Finding and the jurisdictional conclusion mis-state Mr. Glennon's jurisdictional determination with respect to the construction of the dwelling on the lot.

14. Moreover, contrary to petitioner's allegations in par. 17, Mr. Glennon was authorized to make the jurisdictional determination on the LaMora matter. Executive Law § 804(4) authorizes the Agency to appoint officers and prescribe their duties. The Agency appointed Mr. Glennon as counsel to the Agency. It is therefore entirely proper for Mr. Glennon to make jurisdictional and other legal determinations on behalf of the Agency. The December 9, 1981 memorandum shows that Mr. Glennon was acting in his appointed capacity when he made his LaMora jurisdictional determination.

15. Petitioner wrongly asserts (Bracy aff., par 19) the Agency could not consider the Beaulieu and Daniels permits in its reconsideration of the LaMora jurisdictional conclusion because the Beaulieu and Daniels lots were not lots in a "preexisting

subdivision". Petitioner overlooks the fact that the Agency had determined to treat all the lots in the vicinity of petitioner's lot along Dugal Road/River Road, including his lot, as if they were part of a "preexisting subdivision". To elaborate on my statement in footnote 2 of par. 8 of my answering affidavit:

a. In 1981,[6] the Agency made a determination on the basis of the information that it had, that certain lots sold by the Madores in the vicinity of petitioner's lot were part of a "preexisting subdivision".

b. Before making this determination, in June, 1981, the Agency requested additional information from the Madores (Richard R. Terry June 16, 1981 letter, Hearing Exh. No. 58), but the Madores rejected the Agency's request (Charles F. Murray June 25, 1981 letter, Hearing Exh. No. 57).

c. Since at least 1981, the Agency has not been able to locate the Madore subdivision map and has not been able to obtain another copy. Without the map, the Agency has not been able to confirm those lots which are in the "preexisting subdivision".

d. Therefore, as a practical and rational decision, the Agency chose to consider the Madores' sale of lots along Dugal Road/River Road after August 1, 1973, including the sale of petitioner's lot in 1978 together with those lots sold before August 1, 1973 as if they were all part of a

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[6]This date is inadvertently stated as "1980" in footnote 2 of my prior affidavit.

"preexisting subdivision", which subdivision, however, did not receive DOH approval.

16. Finding of Fact No. 2 of the Beaulieu permit, Hearing Exh. No. 83, and the Terry June 16, 1981 letter, Hearing Exh. No. 58, establish that the Beaulieu lot was also treated as if it were part of a "preexisting subdivision", as discussed above. The Beaulieu lot is contiguous to the east side of petitioner's lot (Tr., p. 574). Finding of Fact No. 2 of the Beaulieu permit refers to lot's description first contained in a deed dated July 17, 1952 and recorded in the Franklin County Clerk's Office, in Book 324 of Deeds at page 459. This same deed was cited in Mr. Terry's June 16, 1981 letter as one of three lots in existence prior to August 1, 1973 as part of the Agency's inquiry whether the Madore lots sold before and after August 1, 1973 were all part of a "preexisting subdivision". Thus, it was proper for the Agency to consider the Beaulieu permit in determining that the LaMora permit was drafted in error.

17. Petitioner also claims (Bracy aff., pars. 20-21) that the Agency's consideration of the Beaulieu and Daniels permits in its reconsideration of the LaMora jurisdictional conclusion was improper because its review was limited to the record, which did not include the parties post-hearing memoranda (Items D 1-4 of the return), and because the Enforcement Committee did not address the Agency staff's appeal of the ALJ's evidentiary ruling that limited the Agency's consideration of these permits,

presented in the Agency staff's initial post-hearing memorandum, Item D-1, pp. 8-9. Both arguments are incorrect.

18. The record submitted to the Enforcement Committee and to the Agency on the appeal in fact included the post-hearing memoranda. On March 19, 1996, I sent the parties' initial post-hearing memoranda, Items D 1 and 2, to the Agency members. See Item D 5 attached hereto. Shortly thereafter, I sent the members the reply memoranda. On July 24, 1996, I re-sent these memoranda to the Agency members with respect to petitioner's appeal. See, Item F-2 of the return. Clearly, therefore, the post-hearing memoranda were part of the record that was before the Agency members.

19. In addition, in finding the facts as stated in the Notice of Apparent Violation and that a violation had occurred (see, Item E), the Enforcement Committee necessarily rejected petitioner's collateral estoppel, delay and other arguments. Further, as stated in pars. 57-58 of my answering affidavit, the Enforcement Committee's determination was not final on account of petitioner's appeal. The Agency was clearly empowered to make the specific findings as part of its disposition of petitioner's appeal. In finding that it could consider the Beaulieu and Daniels permit in determining that the LaMora permit was drafted erroneously, the Agency necessarily granted the staff appeal and overruled the ALJ's evidentiary ruling that precluded

consideration of these permits in rejecting petitioner's collateral estoppel argument.

20. Petitioner's collateral estoppel arguments are therefor meritless.

There was no undue delay in the commencement of the enforcement proceeding.

21. Petitioner continues to assert (Bracy aff., pars. 23-37) that the Agency unreasonably delayed the commencement of the enforcement hearing and that he was prejudiced as a result. His arguments on this point are also incorrect.

22. As I state in par. 37 of my answering affidavit, the Agency was not required to commence an enforcement hearing until Justice Ryan issued his April 7, 1995 order. In his earlier January 7, 1993 order, Justice Ryan stated that the Agency's motion for a preliminary injunction was granted and that "if defendant fails to apply for the necessary permits and/or comply to the agency enforcement process as outlined in Part 581 of the regulations", the Agency could apply for further judicial relief (Hearing Exh. No. 33, pp. 6-7).

23. In response to the January 7, 1993 order, and as more fully stated in my answering affidavit, the Agency staff chose to seek petitioner's cooperation in applying for a permit in order to settle the violation. While it is not germane to the issue of delay, petitioner now claims (Bracy aff., pars. 23-25) that this

continuing attempt to settle purportedly deviates from Agency "policy". He is wrong. I stated in par. 35 of my answering affidavit that the purpose, focus and intent of the Agency's administrative enforcement process is the settlement of violations without referral to the Attorney General. When it is clear that this process would be futile, the Agency has no other recourse but to commence litigation. However, after litigation commences, and like any other litigation, the Agency and the Attorney General may attempt settlement negotiations. That seemed appropriate here after Justice Ryan granted the preliminary injunction against petitioner. Indeed, the Agency remains willing to settle this litigation on the terms offered in its enforcement determination.

24. Further, as I state in par. 37-38 of my answering affidavit, petitioner refused to respond to the Agency's three requests to discuss possible settlement between January 13, 1993 and August, 1994, when the Agency moved for contempt and summary judgment. Petitioner now claims (Bracy aff., par. 27) that although he informed the Agency that he had designated Howard Aubin to be his representative, the Agency never informed him that it would not discuss his violation with Mr. Aubin until May 25, 1995. However, by letter dated October 20, 1993 (Hearing Exh. No. 41), Maria Semidei-Otero, the Assistant Attorney General who was then the attorney of record for the Agency in Jones I, informed petitioner on behalf of the Agency that she had received Mr. Aubin's October 2, 1993 letter (Hearing Exh. No. 38) and

advised petitioner that she was assuming that he was representing himself and that he should contact her if he wished to discuss settlement of his violation with the Agency. This letter clearly gave notice to petitioner that the Agency would not discuss his violation with Mr. Aubin. Yet, petitioner refused to contact the Agency.

25. Petitioner also fails to show that the five months between the Agency's June 7, 1995 receipt of his request for a formal hearing and the commencement of the hearing on November 15, 1995, was unreasonable.[6] As I explain in par. 41 of my prior affidavit, before scheduling the hearing, the Agency determined that it should obtain a DEC ALJ to preside at the hearing, but DEC required the preparation of the memorandum of understanding ("MOU") before it would assign an DEC ALJ to preside. Petitioner now asserts that there is no evidence that DEC was requiring the MOU. I therefore submit as Exhibit D (lettered consecutively with the exhibits attached to the Agency's answering pleadings) a

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[6]Petitioner is wrong in complaining in par. 30 that the Notice of Apparent Violation did not give him clear notice of his right to request a formal hearing. Page 4 of the Notice clearly states that "If you wish, you may request a formal hearing ***".

Petitioner's complaint that the Notice did not comply with 9 NYCRR 580.4(c) was not raised at the hearing. In any event, his complaint is beside the point because the Notice is governed by 9 NYCRR 581.2 and it is not a notice of public hearing on a permit application governed by 9 NYCRR 580.4(c).

Petitioner's complaint in pars. 30-31, that the June 1, 1995 Notice gave him too little time to prepare for the June 8, 1995 Enforcement Committee meeting is not persuasive since he in fact had sufficient time to request the formal hearing.

letter dated June 30, 1995 from Mr. Glennon addressed to Chief Administrative Law Judge Daniel E. Louis. In this letter, which follows the Agency staff request to Mr. Louis for a DEC ALJ, Mr. Glennon acknowledges the DEC request to develop the MOU between the two agencies. This letter refutes petitioner's assertion.

26. Furthermore, petitioner's claim of prejudice as a result of the delay and deaths of the Madores and Mr. LaMora (Bracy aff, pars. 34-36) remains meritless. I point out in par. 43 of my answering affidavit that the testimony which petitioner sought from them - that the LaMora lot and petitioner's lot were in the same "preexisting subdivision", was irrelevant to the issues before the Agency. Such testimony would pertain only to the lawfulness of the creation of petitioner's lot, which was never an issue since the Agency staff had stipulated to treat petitioner's lot as if it were a lot in a "preexisting subdivision", like the LaMora lot.

27. Petitioner claims again that (Bracy aff., par. 36) that Mr. Madore could have testified "regarding any DOH approval" for his subdivision in light of the lack of a subdivision map on file at the Agency regarding the Madore subdivision. However, such testimony would remain irrelevant in light of Mr. Amberman's testimony that there was no record in the DOH district office of any DOH approval for any subdivision in the vicinity of petitioner's lot. For this reason, the deaths of the Madores and Mr. LaMora prior to the commencement of the hearing did not

prejudice petitioner with respect to the lack of DOH approval issue.

28. Further, in claiming that Mr. Madore could have testified with respect to the issue of DOH approval, petitioner confuses the subdivision map which the Agency could not locate with the lack of an approved map on file with DOH. As explained above, the map which the Agency could not locate pertains to the Agency's 1981 determination that certain lots sold by Mr. Madore constituted a "preexisting subdivision", and the map would have identified the lots in this determination. The map required by DOH was for a different purpose. As explained above, DOH could not approve a subdivision under Public Health Law § 1115 in the absence of a map required by DOH under Public Health Law § 1116 since the filed map would show the subdivision being approved.

29. In his argument, petitioner also confuses the Agency's request for more information regarding the Madore subdivision (the Terry June 16, 1981 letter, Hearing Exh. No. 58) with the examination of Mr. Madore at the LaMora variance hearing (Hearing Exh. No. 82) as to whether he was aware of the need to obtain DOH approval for his sales of lots. In the Terry letter, the Agency sought information as to whether the Madore subdivision was a "preexisting subdivision" in existence as of August 1, 1973 despite the lack of any record of DOH approval before that date. In his testimony (Hearing Exh. No. 82), Mr. Madore stated that he was not aware of the need to obtain any DOH approval for the sale

of his lots, which clearly indicates that no DOH approval was obtained.

30. Petitioner's argument (Bracy aff., par. 37) that he should not be charged with a lack of due diligence misses the point which the Agency is making. As I note in par. 45 of my answering affidavit, petitioner could have obtained affidavits or other documents from the Madores and Mr. LaMora prior to their deaths. Particularly, petitioner could have obtained an affidavit from Mr. Madore in response to the 1992 Agency motion for the preliminary injunction and the Agency's 1994 motion for contempt and summary judgment, since, as Mr. Aubin states in par. 12 of his affidavit, he (Mr. Aubin) spoke to Mr. Madore in the summer of 1992. However, he did not do so.

31. Accordingly, petitioner's arguments of delay and prejudice in the Bracy affidavit are meritless.

The claim that the Agency is enforcing its authority in a discriminatory manner against petitioner is baseless.

32. Petitioner again claims (Bracy aff., par. 39 and par. 28 of the Bracy Jones II affidavit) that the Agency is discriminating against him because it failed to join the Madores for their alleged subdivision violation. This argument is baseless, as I point out in par. 61 of my answering affidavit. To reiterate, in 1981, the Agency staff determined to treat the Madores and the purchasers of the lots which Mr. Madore sold the same way; it has not charged the Madores or any of the

purchasers, including petitioner, with a subdivision violation. In addition, a subdivision violation would be distinct from petitioner's violation - his construction of a dwelling in wetlands on a non-DOH approved "preexisting subdivision" lot located in the jurisdictional "river area" without the required permit.

33. Furthermore, the Agency commenced Jones I in June 1992 to enjoin petitioner's unlawful construction of his dwelling. There was no subdivision violation to charge against petitioner or the Madores since the Agency had already determined to treat petitioner's lot as one in a "preexisting subdivision" that had not received DOH approval. Therefore, petitioner's argument (Bracy aff. par. 39) that the Agency could have charged the Madores with a violation under its enforcement guidelines is wrong and his reference to the enforcement guidelines is entirely irrelevant.

34. Petitioner's claim (Bracy aff., par. 38) that the Agency is treating him differently from LaMora is also incorrect. LaMora's construction was still subjected to the Agency's review. As explained in par. 50 of my answering affidavit, the LaMora permit in fact imposed requirements on the construction of the LaMora dwelling. In any event, as explained above, the Agency rightly determined that the LaMora jurisdictional conclusion was drafted in error and should not be followed in this matter.

35. Petitioner's discriminatory enforcement allegations are therefore baseless.

Petitioner's claim that the lack of specific regulations governing enforcement hearings violated his rights to due process and SAPA is baseless.

36. As explained in pars. 53-54 of my answering affidavit and on pages 57-60 of the Agency's memorandum of law, the lack of specific regulations governing enforcement hearings did not violate petitioner's rights to due process or SAPA, Article 3. I explained that the ALJ appointment letter, Hearing Exh. No. 6, stated that the enforcement hearing would be "guided" by the Agency's permit hearing regulations, which in fact occurred. Petitioner did not object to the application of Part 580 during the hearing. For this reason, his claim raised now (Bracy aff., pars. 40-41), that his rights were violated because it was unclear as to the extent to which Part 580 would apply to a Part 581 enforcement hearing, should not be heard. Further, petitioner wrongly submits letters as exhibits to the Bracy affidavit that are outside the record and concern an entirely different enforcement hearing.

37. Even if petitioner's argument based upon those letters is considered (and it should not), the letters do not show any violation of petitioner's rights. The letters demonstrate that, like at his hearing, it was the responsibility of the ALJ in both hearings to determine the extent to which the Part 580 permit hearing regulations would apply in the enforcement hearing. In

any event, the hearing transcript of petitioner's hearing shows that the ALJ required the Agency staff to submit its evidence that a violation occurred and afforded petitioner the opportunity to cross-examine the Agency staff's witnesses, to submit its answer to the evidence and to raise defenses for the rest of the hearing (ALJ rulings, page 1, Hearing Exh. No. 31; Tr. pp. 205-212). Accordingly, the lack of specific regulations governing enforcement hearings provides no basis for annulling the Agency's enforcement determination.

Petitioner's claim that the Enforcement Committee failed to make any findings is incorrect.

38. In pars. 55-59 of my answering affidavit, I explain that, contrary to petitioner's allegations, the Enforcement Committee made specific findings by stating in its determination that it found the "the facts and applicable law are as stated in the June 1, 1995 Notice of Apparent Violation and that the Jones structure was constructed in violation of the Agency's April 21, 1992 cease and desist order and without the necessary permits" (Item E, page 1). Petitioner now claims (Bracy aff., par. 43) that the Enforcement Committee cannot rely on the Notice to establish facts because the ALJ ruled that the Notice was a pleading and had no evidentiary effect (Tr., p. 190). However, petitioner misconstrues the ALJ's ruling. The ALJ simply stated that the pleading asserted facts that had to be proven with admissible evidence. The ALJ's ruling did not preclude the Enforcement Committee from concluding from the record that the

facts proven are those stated in the Notice. The Enforcement Committee's reference to the facts as asserted in the Notice gave petitioner sufficient basis to appeal the determination to the full Agency.

39. Petitioner's disagreement with the Agency's explanation that the Enforcement Committee determination was not final in nature (Bracy aff., par. 44) makes no sense. He premises his disagreement on an irrelevant and hypothetical one-line determination containing no reference to any facts. Here, the actual Enforcement Committee determination referred to specific facts and provided a basis to present an administrative appeal to the Agency.

Petitioner's argument that James M. Marrin, the Agency's Counsel, engaged in improper ex parte communications, is baseless.

40. In par. 46 of the Bracy affidavit, petitioner insinuates that by attempting to negotiate a settlement, James M. Marrin, the Agency's counsel, was part of the Agency staff that was responsible for pursuing the violation in this matter. However, Mr. Marrin's affidavit, clearly shows that this claim is wrong. Further, his affidavit shows that Mr. Marrin did not engage in any improper ex parte communications with the Agency members.[7]

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[7]Petitioner does not raise any new contentions with respect to his erroneous argument that I acted in a dual capacity with respect to the hearing.

Petitioner's argument that the MOU between the Agency and DEC is a rule is erroneous.

41. Petitioner's argument (Bracy aff. par. 47), that the Agency-DEC MOU regarding the appointment of a DEC ALJ to preside over an Agency hearing is a rule, fails to refute my explanation in pars. 23-27 of my answering affidavit that the MOU is not a rule. To reiterate, the MOU is not a rule because it is contractual in nature. The MOU does not require the Agency to obtain a DEC ALJ for its hearings. Nor does the MOU create policy or directly affect the rights, procedures and practices available to the public. Accordingly, petitioner's MOU argument should be rejected.

The bare assertions in the conclusion of the Bracy affidavit provide no basis for annulling the Agency's enforcement determination.

42. The grounds asserted in the conclusion of the Bracy affidavit for annulling the Agency's enforcement determination remain erroneous. While ignoring the unlawfulness of his construction, petitioner also asserts that he is entitled to relief on account of the time and resources consumed in this matter. However, as shown above and in the Agency's pleadings and memoranda, the Agency has acted rationally, lawfully and properly throughout and has given him ample opportunity to resolve this matter. Instead he has refused every attempt at settlement and has contested the Agency at every stage of its

enforcement effort. Accordingly, his claim of expended time and resources provides no basis for relief.

Barbara A. Rottier

BARBARA A. ROTTIER

Sworn to before me this

24th day of March, 1997.

Richard R. Terry

Notary Public

RICHARD R. TERRY
Notary Public, State of New York
Qualified in Essex County
No. 4697031
Commission Expires Dec. 31, 1997

STATE OF NEW YORK
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Barbara Rottier Memorandum
(R150)

M E M O R A N D U M

TO: Agency Members and Designees

FROM: Barbara A. Rottier, Associate Counsel BR

DATE: March 19, 1996

RE: Jones E92-053

Enclosed are the briefs of the parties and a copy of the index for and exhibits admitted into evidence (except the slides, Ex. 18).

Reply briefs are due April 1 and will be sent to you then.

The matter is on the Enforcement Committee agenda for April.

Please: all Members should retain these materials (including transcripts previously sent) through May, as this will likely involve an appeal to the full Agency.

BAR:kdt

Enclosures

cc: Judge Edward Buhrmaster (with briefs only)
Howard Aubin (without enclosures)
Timothy Jones (with briefs only)

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APA Letter to ALJ Louis
(R151)

June 30, 1995

Honorable Daniel E. Louis
Chief Administrative Law Judge
Office of Hearings
Department of Environmental Conservation
Room 409
50 Wolf Road
Albany, NY 12233

Dear Judge Louis:

This is to follow up on your conversation with David W. Quist of our legal staff, in which he inquired whether the Agency might request an ALJ to preside over what promises to be a strenuously contested enforcement hearing.

I understand that is a possibility, and I very much thank you for that. I understand that the Agency and the Department must develop a Memorandum of Understanding addressing the respective roles and responsibilities of the ALJ, the Department, and the Agency in such cases. Mr. Quist is working on a draft, as you had discussed with him, and will be contacting you shortly to pursue the development of that MOU.

We are very grateful to the Department, and to you, for your willingness to assist the Agency in this regard.

Sincerely,

Robert C. Glennon
Executive Director

RCG:dal

cc: David W. Quist, Esq.