

**DEPARTMENT OF ENVIRONMENTAL CONSERVATION
STATE OF NEW YORK**

In The Matter Of The Applications For Permits To Construct and Operate A Proposed Development To Be Known As The Belleayre Resort At Catskill Park, Located In The Town Of Shandaken In Ulster County, New York, and The Town Of Middletown In Delaware County, New York, Pursuant To Environmental Conservation Law Article 15, Titles 5 And 15, and Article 17, Titles 7 And 8, And Parts 601, 608 And 750 Through 758 of Title 6 of the Official Compilation Of Codes, Rules and Regulations of the State Of New York ("6 NYCRR"), and for a Water Quality Certification Pursuant to Section 401 of the Federal Water Pollution Control Act And 6 NYCRR Part 608,

-By-

Crossroads Ventures, LLC,

Applicant.

DEC Project Numbers: 0-9999-00096/00001; 0-9999-00096/00003; 0-9999-00096/00005; 0-9999-00096/00007; 0-9999-00096/00009; and 0-9999-00096/00010

**MEMORANDUM OF LAW IN SUPPORT OF STAFF'S MOTION TO CANCEL THE
ADJUDICATORY PROCEEDING AND TO DENY THE MOTION FOR
RECONSIDERATION OF THE INTERIM DECISION DATED DECEMBER 29, 2006
REGARDING COMMUNITY CHARACTER**

PRELIMINARY STATEMENT

The staff of the New York State Department of Environmental Conservation ("DEC") submits this memorandum of law in support of its motion to cancel the adjudicatory hearing, in the above referenced proceeding, pursuant to section 624.4(c) (5) of Title 6 of the Official

Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR"), and to deny the motion of the Catskill Park Coalition to the Commissioner, dated January 29, 2007, for reconsideration of the Deputy Commissioner's Interim Decision dated December 29, 2006 ("Interim Decision") on the community character ruling.

The present hearing has remained open for the past seven years. It concerns a large scale, four season project proposed by Crossroads Ventures LLC ("Crossroads" or the "applicant") to be developed adjacent to the State's Belleayre Mountain Ski Center.

At the time the hearing was convened, the project was significantly different than the project currently proposed. The current project, reflected in the Final Environmental Impact Statement that DEC staff submits with this motion, has been modified to reduce the environmental impacts that triggered the hearing referral years ago. Indeed, the vast majority of the issues that the Deputy Commissioner identified for adjudication have been altogether mooted by changes to the proposed project, and the potential impacts of the remaining issues have been mitigated or avoided.

For the past decade, this project has been the subject of numerous scoping sessions, rulings, public hearings, and public comment periods. Citizen comments have been reviewed and responded to, and the project has been altered over the years to reduce the potential environmental impacts. The SEQRA process has worked to avoid and reduce the impacts of a project that in its first iteration was unacceptable to many of the parties to the hearing. Further hearings and additional considerations of public comments would have no further bearing on the assessment of the modified project proposal. Accordingly, staff now takes the position that the modified project presents no substantive or significant issues that warrant adjudication. Therefore, the adjudicatory hearing should be cancelled and the entire matter should be remanded to DEC staff for acceptance of the Final Environmental Impact Statement, issuance of findings, and permit issuance.

Additionally, with respect to the pending motion to reconsider the Interim Decision, that undecided motion from seven years ago would be rendered moot by the cancellation of the present proceeding and, in any event, lacks merit. It should be denied.

STATEMENT OF FACTS

The factual background of this matter has been set forth in detail in prior decisions from the Office of Hearings and Mediation Services, including the Interim Decision, and the relevant facts are described in the accompanying affidavit of Daniel Whitehead, Regional Permit Administrator for Region 3. Thus, we provide only a brief summary of the relevant facts below.

On December 29, 2006, Deputy Commissioner Carl Johnson issued the Interim Decision. The Interim Decision addressed issues for adjudication and party status from an appeal of Administrative Law Judge (“ALJ”) Richard R. Wissler’s issues and party status ruling dated September 7, 2005 (Ruling No. 3). The Interim Decision narrowed Ruling No. 3 and identified the following issues for adjudication: (1) surface and ground water contamination; (2) certain wildlife impacts; and (3) certain visual impacts. The Interim Decision further directed the applicant to more fully evaluate a possible lower impact alternative such as eliminating the Big Indian Plateau portion of the project.

In response to the Interim Decision, on or about September 7, 2007, the majority of parties to the hearing agreed on a conceptual plan, which became known as the Agreement in Principle (“AIP”). The AIP described the broad parameters of a lower impact alternative to the initial project design. Under the AIP, the applicant agreed to transfer the development that was proposed for the Big Indian Plateau to an area roughly west of the State-run Belleayre Mountain Ski Center and then to convey the Big Indian Plateau to the State for inclusion in the State Forest Preserve. That conveyance has since occurred. The applicant — also pursuant to the AIP — reduced the project’s footprint and agreed to provide for enhanced sediment and storm water control measures responsive to the storm water-related issues ruling. The applicant further agreed to organically manage the proposed golf course.

Under the AIP, the applicant agreed to prepare a supplemental draft environmental impact statement (“SDEIS”) that would be resubmitted, with amended permit applications, to the Office of Hearings and Mediation Services. That SDEIS was prepared, along with a cumulative environmental impact analysis that evaluates the potential cumulative impacts of the Belleayre Resort at Catskill Park development with impacts of proposed modernization and expansion of the Belleayre Mountain Ski Center that is described in a unit management plan (“UMP”) for the Belleayre Mountain Ski Center.¹

The SDEIS has been subject to public hearing and an extended public comment period of approximately three months. The Department received approximately 3700 comments. All comments were reviewed and substantive comments have all been responded to in the responsiveness sections that constitute the Final Environmental Impact Statement for the Belleayre Resort.

In short, staff have taken the requisite hard look at this project, as required under the State Environmental Quality Review Act. The public’s comments and concerns have been considered and the issues previously identified for adjudication have been rendered moot or addressed by changes to the project such that the issues (identified in the Interim Decision) no longer warrant adjudication. For all of the reasons stated herein, and for the reasons set forth in the accompanying Affidavit of Daniel Whitehead, the present hearing should be cancelled.

¹The UMP and its Final Environmental Impact Statement has been provided to the Office of Hearings and to all parties to this action in electronic form for informational purposes only and to aid in the understanding of the Cumulative Impact Analysis. The UMP is not subject to this adjudication.

ARGUMENT

I. ISSUES DETERMINED TO BE SUBJECT TO ADJUDICATION HAVE BEEN ADDRESSED OR ARE NO LONGER RELEVANT BASED ON MODIFICATIONS TO THE ORIGINAL PROJECT

A. Standard of Review

The standard for adjudication under 6 NYCRR Part 624 is well known to this tribunal, and is restated in the Interim Decision. Staff must consider whether the project, as proposed, can meet statutory or regulatory criteria and whether there is an issue that could result in denial of the permit, major modification to the proposed project or imposition of significant permit conditions to a draft permit. In addition, where any comments received from members of the public or other interested parties raise substantive and significant issues relating to the application, and resolution of any such issue may result in denial of the permit application, or the imposition of significant conditions thereon, the Department shall hold an adjudicatory public hearing on the application. In situations where the Department staff has reviewed an application and finds that a component of the applicant's project, as proposed or as conditioned by the draft permit, conforms to all applicable requirements of statute and regulation, the burden of persuasion is on the potential party proposing any issue related to that component to demonstrate that it is both substantive and significant.

B. All Issues Relating to the Rosenthal Wells and the Big Indian Plateau Are Moot Because Those Areas Will No Longer Be Part of the Project

In the Interim Decision, Deputy Commissioner Johnson enumerated issues 6, 8, 9, 10, 12, 14, and 18 for adjudication. Issues 6 and 8 are moot as they relate to the use of the Rosenthal wells for water supply and the portion of the development proposed for the Big Indian Plateau.

The Big Indian Plateau portion of the development has been conveyed to the State and the Rosenthal wells are no longer a proposed water supply.

C. The Storm Water Impacts Have Been Addressed in the SWPPP (which is enforceable through the permit)and the SEIS and Do Not Warrant Adjudication

The storm water issues, which have featured prominently in this hearing and that have previously been of great concern the staff and the other parties to the hearing. These issues have been either rendered moot by changes to the project or adequately addressed in the draft SEIS. The Interim Ruling provided that the adjudicable storm water issues included: (a) the adequacy of the HydroCAD model and its assumed inputs and design points; (b) the adequacy of the Big Indian SWPPP and the design of its various storm water management controls; (c) the identification of the storm water flow paths on the project site; (d) the level of pre- and post-development storm water flows; and (e) the basis for the waiver of the requirement to have no more than five-acres exposed during construction at any one time.

As recounted in Regional Permit Administrator Whitehead's affidavit, in the AIP, the parties developed a protocol to address "a", "c", and "d", which has been carried over into the applicant's modified storm water pollution prevention plan ("SWPPP") and was evaluated in the environmental impact statement process. The staff have reviewed that SWPPP and have determined that it meets permitting standards. Upon issuance of an individual SPDES Permit, the applicant would be required to comply with the terms and conditions of the permit, including all provisions of the SWPPP. Item "b" is moot since no development is proposed on the Big Indian Plateau.

With regard to item "e", as mentioned in the Interim Decision, the Department does allow more than five acres to be disturbed at any one time with Department approval and enhanced erosion and sediment control measures that would be included in the SWPPP. (The request to open more than five acres is typical of similar construction projects.). The individual SPDES permit for the Modified Belleayre Resort requires compliance with the SWPPP, and the SWPPP

in this case specifically includes enhanced requirements such as the hiring of a dedicated erosion and sediment control contractor, extensive use of rolled erosion control products, and a detailed phasing plan that limits the amount of disturbance in any one area thereby minimizing impacts. In staff's opinion, the foregoing completely addresses item "e". Staff are now using aspects of the Belleayre SWPPP as a model for other construction projects on steep slopes.

D. The Noise Impacts Have Been Addressed Through an Operational Noise Impact Analysis

The Deputy Commissioner directed Crossroads to undertake a noise study on operational noise from the Big Indian and Wildacres and the impact on wilderness and wild forest areas in close proximity to the project. The study was to be considered during any subsequent adjudication. This issue is moot or satisfied since the Big Indian portion of the resort is now in State ownership and an adequate operational noise study has been conducted for the balance of the resort.

Unlike its predecessor draft EIS for the Belleayre Resort, the draft, FEIS contains an operational noise impact analysis at section 3.9. The underlying analysis is set out in Appendix 20 of the FEIS (SDEIS volume). That analysis concludes that operational sound levels, after incorporation of proposed mitigation, will result in no increase to the ambient sound level from operational noise on the wilderness and wild forest areas. Accordingly, the operational noise issue from the Belleayre Resort has been satisfied.

a. *The Visual Impacts Associated With Big Indian Are Moot and Light Pollution in the Wilderness and Wild Forest Has Been Addressed in the SEIS*

The visual issues for adjudication are:

- i. Visual impacts from development on the Big Indian Plateau during wintertime or leaf-off conditions; and

ii. the extent to which the area in the vicinity of the Big Indian Plateau would be impacted by visible lights and —night glow, particularly from higher elevations and during winter months.

As an initial matter, potential visual impacts received a great deal of attention from the staff. Visual issues identified in the Interim Decision for adjudication are now moot since the Big Indian Plateau is now part of the Forest Preserve. Additionally, an analysis of leaf-off visual impacts has been prepared with respect to the Modified Belleayre Resort. *See* pages 3-61 to 3-66 of the draft, Final EIS and in the Visual Impact Analysis, Appendix 25 (which was prepared by the Lighting Research Center at RPI). Staff have determined that the mitigations offered as part of the Visual Impact Analysis are sufficient and public comment has not raised any substantive and significant issues to alter that conclusion.

E. The Modified Belleayre Resort Presents a Lower-Impact Alternative to the Earlier Version of the Project

In issues ruling 18, the Deputy Commissioner stated as follows:

I would direct applicant to include an environmental evaluation of impacts with respect to the two alternatives already referenced in the DEIS (the one golf course and one hotel complex alternative and the east resort/west resort alternative) and such additional smaller scale alternatives that would ensure that a reasonable range is considered... [and that] the primary focus of the adjudicatory hearing on this issue should be the environmental impacts associated with the alternative layouts rather than the economic feasibility of the alternatives.

The Deputy Commissioner also stated, “[w]ith respect to the questions posed by the ALJ on alternatives (see Ruling, at 150 environmental questions # 1-6)), applicant should address the initial two questions in its supplemental analysis of the east resort/west resort alternative. I do not

see any need for applicant to address the remaining four questions that were posed unless they relate specifically to an alternative layout that applicant presents in the supplemental alternatives analysis:

The two questions are as follows:

- i. What are the physical environmental impacts that would result from the development of the Big Indian site only?
- ii. What are the physical environmental impacts that would result from the development of the Wildacres site only?

The first question is moot as the Big Indian site has since been conveyed to the State of New York. Crossroads has addressed the second question in the draft, Final EIS, Section 5 (Alternatives), pages 5-5 to 5-6, which shows a comparative analysis if Wildacres were developed and the Highmount Spa was not developed. The analysis indicates that the alternative would result in approximately 42 acres less project site disturbance; approximately 2 acres less project site impervious area; and approximately 328,000 cubic yards less of project site earthwork.

The Modified Belleayre Resort project is itself, with the removal of the project from the Big Indian Plateau to Highmount, a lower impact alternative to the alternatives that were before the Deputy Commissioner on December 29, 2006. The currently proposed Highmount Spa development would not have the attendant storm and waste water impacts associated with the development that Crossroads had previously proposed for the Big Indian Plateau.

The social and economic questions from the ALJ's ruling are addressed in the Final EIS. To the extent that the Office of Hearings and Mediation Services believes that these questions are relevant, staff refer to the FEIS (draft volume and response to comments).

**POINT II – THERE ARE NO SUBSTANTIVE AND SIGNIFICANT ISSUES
REQUIRING ADJUDICATION FOR THE MODIFIED BELLEAYRE RESORT AT
CATSKILL PARK**

Staff has not otherwise identified any other substantive and significant issue with the Modified Belleayre Resort. In making the substantive and significant determination under 6 NYCRR Part 621, staff relies, in part, on the public comment it receives on an application in evaluating whether there may be substantive and significant issues with a particular project. Staff has reviewed thousands of comments, and none have revealed a concern that would meet the Department's standard for raising a substantive and significant issue.

CONCLUSION

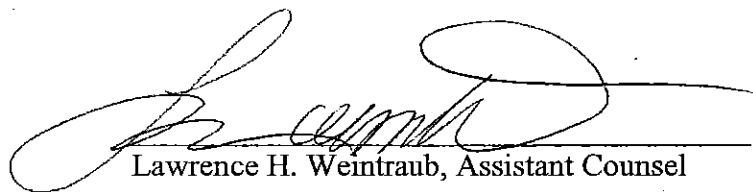
Staff respectfully requests that the Office of Hearings and Mediation cancel the adjudicatory hearing and remand the proceeding to complete the EIS process and issue findings. Staff contends that the issues set out in the Interim decision are either moot or satisfied through the subsequent EIS process.

If the Office of Hearings and Mediation Services were to grant this motion it would end the adjudicatory process. However, it does not end the decision making process since staff would then be called upon to make findings (which would set out the impacts, avoidance measures, alternatives and mitigation measures including those that have already been identified in the EIS), draft permits and potential conditions that were developed in the process thus far.

The Department is not the only involved agency with decisions to make on the Belleayre Resort at Catskill Park project. These other agencies include two towns, which possess broad land use jurisdiction under Article 16 of the Town Law — including, through their respective planning boards, site plan review powers. Completing the EISs would also enable the other involved agencies to engage in their decision making processes — offering conditions related to their jurisdictions and that they reasonably believe would be appropriate based on the record and utilizing their local knowledge and special expertise.

As SEQR requires, the Department's responsibility here, as lead agency, was to prepare an environmental impact record upon which it and all the other involved agencies, including the Department, could reasonably base their decisions on. The staff respectfully submit that they have accomplished this mission and satisfied the issues set out in the Interim Decision. The staff have not identified any other issues, related to the Modified Belleayre Resort, that warrant adjudication.

Dated this 10th of September, 2014.



Lawrence H. Weintraub, Assistant Counsel



Kelly Turturro, Assistant Regional Attorney