The Developer Must Account for his own Approval Delay Costs

By Dave Gibson

One who participated or sat through the Adirondack Club and Resort adjudicatory public hearing in 2011 is hard pressed not to read with interest the recent articles about the status of ACR in the Adirondack Daily Enterprise. The articles appeared in the August 11-12, 2016 editions.

Michael Foxman, ACR lead developer, is quoted in the article as saying: “We’ve been bled dry for millions of dollars. We had about $10 million worth of lawyers and planners and engineering approval delay costs. I think that no one including me could’ve imagined the complexity of trying to develop in the Adirondacks with objections from the preservation groups.”

Let’s review the history of this development. As I was involved with two organizations, one before the ACR hearing (Association for the Protection of the Adirondacks) and one during the hearing (Adirondack Wild) I recall that it was Mr. Foxman – not preservation groups - who failed to deliver a complete application to the APA during the two years from the first meeting in Tupper Lake in 2004 to the APA’s decision of application completeness in late 2006. Mr. Foxman met with APA staff on several occasions. He was issued two notices of incompleteness. He knew the law and what he had to do to complete the application.

From Mt. Morris looking at Sugarloaf Mtn in foreground to be ringed by subdivision. Tupper Lake and Village of Tupper Lake in background.
My organizations had and still has many criticisms of the way APA reviewed the application, conducted the hearing, and reached its conclusions, but any claim that APA delayed Mr. Foxman or failed to follow the clock required by the APA’s statute is specious.

Once the APA declared in the winter of 2007 that it would sponsor a full public hearing, it was Mr. Foxman – not preservation groups - who asked that the hearing be delayed. Pre-hearing meetings resulted.

One year later, as the grip of the great recession tightened Mr. Foxman asked for “mediation” ostensibly to seek a middle way forward most could agree with. Over many meetings and months we and others brought information to Mr. Foxman about how the project could be designed differently to avoid major impacts and meet legal standards. He appeared uninterested in these ideas. He said he knew how to build ACR and what would sell. APA staff convinced him to make relatively minor changes. DEC brought forward issues with sewage treatment, water supply and other infrastructure. All those matters would be ironed out in subsequent DEC permits, Foxman said. The meetings went on and several years passed. The three or four permit applications he needed to submit to DEC were never completed throughout this period.

As the country began to come out of the recession, Mr. Foxman finally called an end to “mediation” meetings in 2010. The APA public hearing began in March 2011.

The hearing evidence was presented from March, 2011 through the summer. The hearing concluded in November. The APA permit decision was issued in January, 2012.

To review, for two years (2005-2006) his so-called “approval delay costs” were the result of an incomplete APA application. For the next four years, (2007-2011) these costs resulted from his own decisions to postpone the start of the hearing.

In my view APA reached its application completeness decision in 2006 due to political pressure, not because the application was truly complete. The result was that much of the hearing was spent attempting to fill in big gaps in the information rather than analyzing good information.

As an observer of the subsequent lawsuit, I feel that it was driven in part by ACR’s failings to submit substantive hearing evidence about everything from wildlife to tax and sales projections that would meet the legal standards for permit issuance. One example from the hearing record will suffice here. The applicant’s market
research, wrote ski resort market expert David Norden, “fails to give an investor the tools required to determine the marketability of the project, primarily because the data is outdated and inadequate to analyzes sales price-point, sales volume, product positioning...This is a major shortcoming of the due diligence work performed by the development team.”

The glaring absence of substantive information was Mr. Foxman’s responsibility, one that should have resulted (but didn’t) in APA turning down his version of ACR for, without substantive information, how could the APA deem the project not to have undue adverse impacts. The courts ruled otherwise.

The Enterprise article states that the project has “stretched more than a decade beyond developers’ expectations.” The history and record shows that in most instances the lead developer has largely himself to account for “approval delay costs.”