

Adjudicatory Hearings Pursuant to Section 809 of the Adirondack Park Agency Act



Introduction

This pamphlet describes the procedures for an “adjudicatory hearing” on an Adirondack Park Agency permit application. An adjudicatory hearing involves sworn testimony about the proposed project and is more formal than the typical local Planning Board hearing. The adjudicatory hearing provides the permit applicant, the public, neighbors, local government, other involved state agencies and Agency staff an opportunity to present evidence and to argue contested issues before an impartial hearing officer. The resulting record of an adjudicatory hearing, including the permit application, public comment, exhibits and testimony, and written submissions from participants in the hearing, provides the sole basis for the Agency Board’s final determination on the permit application.

The Agency conducts other types of hearings; this brochure only explains the adjudicatory hearing on a permit application. The procedures for this type of hearing are set forth in detail in Part 580 of the Agency Rules and Regulations, found in Title 9 of the *Official Compilation of Codes, Rules and Regulations of the State of New York*, and the language of those regulations controls over this plain language summary. The text of Part 580 can be found on the Adirondack Park Agency website, www.apa.state.ny.us. The authority for the adjudicatory hearing is found in Sections 809 and 812 of the Adirondack Park Agency Act (APA Act) which may also be found on the website. Agency decisions under the Freshwater Wetlands Act and/or the Wild, Scenic and Recreational Rivers System Act follow the same adjudicatory hearing procedure.

Permit Application, Initial Review of Proposed Project

After a permit application is received and Agency staff has determined it is complete, the public is notified through the weekly Environmental Notice Bulletin (ENB)¹ of the nature and location of the proposed project and of the deadline for comments. For all major projects,² the Agency also notifies certain public officials and adjoining landowners by individual mailed notice. Permit application materials are available for public review at the Agency’s office in Ray Brook and, in some cases, also at a municipal office for the locality in which the proposed project would be located. Any member of the public may submit comments on, or a statement regarding, a proposed project by the deadline stated in the notice, and if an adjudicatory hearing is requested, the issues and reasons should be set forth in the comment. Access to permit application documents may be arranged with the Agency Freedom of Information Act (FOIL) Records Access Officer in Ray Brook.

¹ The Environmental Notice Bulletin is published by NYS Department of Environmental Conservation and can be found in many libraries and on their www site, www.dec.ny.gov.

² A “major project” is any project which is not a “minor project;” that is, any project which is not a two lot subdivision or construction of one single family dwelling.

Decision to Hold an Adjudicatory Hearing

Every permit application is evaluated to determine if the staff can recommend that the proposed project will meet the statutory and regulatory criteria of the APA Act, including whether the proposed project will result in an “undue adverse impact” on the resources of the Adirondack Park or upon the ability of municipalities to provide necessary supporting services. Staff also evaluates all public comments. Larger projects (by rule, all projects involving more than 50 dwellings), or those which in the opinion of Agency staff pose significant issues, are presented to the Agency Board at its regular monthly meeting in Ray Brook with a supporting staff analysis and all public comment documents.

The Agency makes decisions on most permit applications without holding an adjudicatory hearing. In deciding to hold an adjudicatory hearing, the Agency must determine whether there are “substantive and significant issues” about the permit application, including the likelihood that the application should be denied or should be approved only with major modifications.

In reaching a determination to send a proposed project to an adjudicatory hearing, the Agency Board must consider eight factors:³

- the size and complexity of the project;
- the degree of public interest in the project;
- the presence of significant issues relating to the criteria for approval of the project;
- the possibility that the project can only be approved if major modifications are made or substantial conditions imposed;
- the possibility that information presented at the adjudicatory hearing would be of assistance to the agency in its review;
- the extent of public involvement achieved by other means;
- whether an environmental impact statement will be prepared pursuant to the State Environmental Quality Review Act;
- the statutory finding required by section 814(2) of the APA Act in the case of State agency projects.

The Agency determination may limit the issues on which evidence will be presented at the adjudicatory hearing. A decision to refer an application to an adjudicatory hearing must be made within 60 days of the notification of a complete major permit application (45 days for a minor project).

Notice of Adjudicatory Hearing

Notices of future adjudicatory hearings are published both in the ENB and in a local newspaper; individual notices are also sent at least 15 days in advance to the permit applicant, to certain public officials and to owners of land within 500 feet of the proposed project site boundaries. These notices include the time and place of the adjudicatory hearing, the name of the applicant, referred to as the “project sponsor,” a brief description of the proposed project, the issues likely to be considered, and the location of application materials available for review.

Adjudicatory Hearing Location/Services Provided

Adjudicatory hearings are held in an appropriate location that is universally accessible. Interpreter services are available to the hearing impaired, at no charge, upon advance written request to the hearing officer listed in the hearing notice. All adjudicatory hearings are open to the public.

³ 9 NYCRR 580.2

The Hearing Officer

The Agency appoints a hearing officer to conduct the adjudicatory hearing and all matters related to it. This person may be a state administrative law judge, an Agency Member or employee, or an attorney in private practice. The hearing officer must not have a financial or other interest in the proposed project. Any issue relating to the qualifications of the hearing officer must be resolved in the pre-hearing conference which begins the adjudicatory hearing, or can be challenged under procedures set forth in the State Administrative Procedure Act.

The hearing officer has broad authority to conduct the adjudicatory hearing in a fair and impartial, and also efficient and orderly manner. Specifically, the hearing officer may do the following:

- initiate the hearing with a conference to establish parties, issues and an initial hearing schedule (typically in conjunction with a session to accept unsworn public comment for the hearing record);
- administer oaths or affirmations;
- set and adjourn hearing dates beyond the initial date, and schedules for testimony and argument;
- rule on all motions and requests until the close of the hearing record;
- issue, quash, or modify subpoenas for the appearance of persons or the production of documents;
- admit or exclude evidence offered for the record;
- limit the number of witnesses and cross-examination;
- examine witnesses to fully develop the hearing record; and
- preclude immaterial, irrelevant or unduly repetitious evidence or cross-examination.

The Agency may request that the hearing officer prepare findings of fact and conclusions of law for the Agency's consideration. However, typically the hearing officer presides over the hearing from the first day specified in the notice until the close of the hearing record. At that point the hearing officer forwards the record to the Agency and his/her responsibilities end.

Components of the Adjudicatory Hearing Process

The adjudicatory hearing process typically includes four components: 1) the pre-hearing conference which initiates the adjudicatory hearing; 2) a legislative session for unsworn public comment on the record; 3) the adjudicatory session at which evidence is advanced and testimony accepted for the record; and 4) the closing argument and/or briefs. The pre-hearing conference provides an opportunity to identify "parties" to the hearing, issues to be adjudicated and other procedural matters.

(1) The Pre-hearing Conference

A pre-hearing conference, sometimes called an "issues conference," is usually held before the adjudicatory portion of the hearing commences; the time and location are described in the adjudicatory hearing notice. Scheduled during normal business hours and presided over by the hearing officer, the pre-hearing conference has several purposes:

- to hear arguments on whether party status should be granted to persons or organizations;
- to identify, further define and resolve factual and procedural issues by agreement ("stipulation") and/or as directed by the Agency;
- to decide on hearing procedures not addressed in the Agency's rules such as whether pre-filed testimony is necessary; schedules for discovery, witness testimony and briefs; and
- to decide any pending motions.

The pre-hearing conference is essential to an orderly proceeding and should be attended by all parties and petitioners seeking party status. At that time, parties who cannot attend all the adjudicatory hearing days should request scheduling accommodations to allow for their testimony. Parties or other persons who wish only to be kept informed of the progress of the adjudicatory hearing should make that request at this time as well.

(2) The Legislative Session

A legislative hearing session at which any member of the public may speak or contribute an unsworn statement regarding the permit application is normally noted in the Notice of Hearing.⁴ The legislative hearing is usually held before the adjudicatory hearing often preceding, or immediately following the pre-hearing conference. These unsworn comments, however, are deemed to be argument not evidence,⁵ and the commentators are not “parties” to the hearing unless otherwise accorded that status (see above).

(3) The Adjudicatory Session

The adjudicatory hearing session at which evidence and sworn testimony are presented is conducted according to a schedule and detailed procedures that may be set by the hearing officer after the pre-hearing conference. For a complex hearing, this usually includes preparation of “pre-filed” testimony consisting of a written statement prepared by a witness to facilitate the adjudicatory hearing process, as well as exhibits and materials from the application and public comment, also organized to facilitate the initiation of the hearing process. Instead of testimony, the parties may agree (“stipulate”) to certain facts, a procedure which also facilitates the timely conduct of the adjudicatory hearing. Stipulations, however, cannot preclude the Agency’s authority and duty to make the ultimate findings and conclusions required under the law for approval, denial or approval with conditions of the permit application.

In an adjudicatory hearing, the applicant is generally the first to present evidence through exhibits and witnesses who may include the developer and consulting engineers, biologists, or other technical experts. The applicant’s representative (most often an attorney) will question each sworn witness (called “direct examination”) unless the testimony has been pre-filed. The direct examination usually relates to the role the witness had in the preparation of the permit application. Site plans, environmental assessments or an environmental impact statement, and similar documentation are usually presented as exhibits to accompany related testimony.

After the direct examination of each of the applicant’s witnesses, the Agency’s staff attorney and then each party (unless his/her participation is limited) have an opportunity to question the witness (called “cross examination”). The parties seek to clarify information about the project, to elicit information not discussed in the direct testimony, to test the credibility, accuracy and reliability of the witness and to probe the basis of expert opinion.

After the applicant’s witnesses have testified, the other parties may present their positions through testimony. Each party including the applicant also has an opportunity to counter the presentations of the others (called “rebuttal testimony”).

At any time during the adjudicatory hearing, the project sponsor may propose revisions to the project to avoid or mitigate potential adverse environmental or public service impacts. Unless the Agency staff assigned to the hearing agree to accept the revisions, however, a significant change may result in a “new application” such that the statutory review periods are re-commenced. In other words, a substantial change to the project requires a new evaluation of the application to determine whether the application is complete, followed by a new determination regarding whether there are grounds for an adjudicatory hearing.

⁴ 9 NYCRR 580.4(a)(8)

⁵ 9 NYCRR 580.15(e)

(4) Briefs and/or Closing Arguments

After all parties have concluded their testimony and cross-examination, the hearing officer will invite oral closing arguments or set a deadline for submitting written arguments or “briefs.” These procedures are often discussed and decided at the initial issues conference. Briefs are the typical procedure because they allow the parties to summarize the record and to make specific recommendations to the Agency as to appropriate findings of fact, final decision and any conditions of approval. The Agency adjudicatory hearing staff also typically makes such recommendations to the Agency.

The length of the adjudicatory hearing depends upon the number and complexity of the environmental and legal issues, the number of witnesses, any pre-hearing direction from the Agency Board, and direction from the hearing officer at the pre-hearing conference. While an adjudicatory hearing generally runs on consecutive days, with several hearing days during a week, there may be adjournments to accommodate the schedules of the parties and their witnesses.

Parties to the Adjudicatory Hearing

The parties to an adjudicatory hearing process include both the statutory parties (“parties by right”) and such other persons or organizations who are accorded party (“intervenor”) status by decision of the Agency Board or the hearing officer. Parties “by right” include the project sponsor (applicant) and all persons or agencies entitled to receive individual notice, including the Adirondack Park Local Government Review Board, the chairman of the county or regional planning board (if any), the chief elected officer, clerk and planning board chairman of the municipality where the project is proposed to be located, any state agency, and property owners within 500 feet of the boundary lines of the project site.

An individual or organization that seeks party status as an intervenor must file a petition with the Agency or at the initial conference, before the start of the adjudicatory hearing. The petition must include the following information:⁶

1. a demonstration of capacity to participate in the adjudicatory hearing and to supply information or expertise relating to the issues likely to be considered;
2. a statement whether that petitioner has previously participated in any similar legal or administrative proceedings;
3. a statement of the petitioner’s relationship to the matters involved, the nature of the evidence or argument the petition seeks to present and any other matter the petitioner believes is relevant; and
4. a demonstration that the petitioner has a material social, economic or environmental interest which is likely to be affected by the Agency’s decision on the project application.

In addition any organization which seeks party status must provide a description of the nature and purpose of the organization, structure, history and legal nature and a copy of any charter, certificate of incorporation, bylaws, constitution or the like.

The Agency’s executive director or the hearing officer (once appointed) will decide on any petition for intervention as a party. Either may require additional information from the petitioner and allow other parties to be heard with respect to the petition. A final decision is to be made promptly. The decision on party status may limit the participation of any petitioner to areas in which the petitioner’s expertise would prove beneficial or in which the petitioner’s interests may be affected.

⁶ 9 NYCRR 580.7

Any decision on a petition may be appealed to the full Agency Board if filed within five days of receipt. The hearing officer may accept a petition for intervenor status after the first day of the adjudicatory hearing if it is shown that reasonable cause exists for the delay in filing, no party will be prejudiced by the delay and that participation by the petitioner is essential to an informed decision by the Agency.

A Party's Rights and Obligations

A party may appear in person or through a representative who can demonstrate that he/she has been designated by the party. A party may select an attorney as its representative, but this is not necessary.

Parties have the right to present evidence (testimony and exhibits) at the adjudicatory hearing, to cross-examine other witnesses, and to argue regarding both factual and legal issues, although the hearing officer may limit unduly repetitious testimony and cross-examination. Parties who do not attend an adjudicatory hearing are deemed to have waived their right to participate actively in the hearing except for good cause shown and at the discretion of the hearing officer. While hearings are scheduled during normal working days, sessions may be extended to evening hours to allow for testimony by parties who cannot otherwise attend. Requests for such accommodation should be made during the initial conference.

Role of Agency Staff

Agency staff assigned to the adjudicatory hearing is not a "party" to the hearing, but they are charged with participating to ensure a full and complete record upon which the Members of the Agency Board can make an informed decision. They are required to state at the beginning of the hearing which of the "development considerations" and other required findings they consider relevant to the project and to briefly outline any evidence they intend to present. They are subject to *ex parte* prohibitions discussed below, and only communicate with the Agency Board through the hearing record.

"Ex parte" Contact Prohibition

No party to an adjudicatory hearing is allowed to communicate with the hearing officer, directly (for instance, correspondence or phone) or indirectly (for instance, by press release), in connection with any factual or legal issue related to the project except with notice and opportunity for all the parties to participate in the communication. Outside the pre-hearing conference and the adjudicatory hearing itself, this often requires communication, first by letter to the hearing officer copied to all the other parties, followed by a conference call which includes all parties for an informal conversation consistent with this rule.

The State Administrative Procedure Act prohibits any "*ex parte*" contact regarding the matters considered at the hearing between "any person or party" and Agency Board members who will make the decision on a permit application that has been directed to public hearing. Similarly, Agency regulations direct that no party (or representative) may communicate directly or indirectly with the Agency or any Agency Board member regarding any matter related to the adjudicatory hearing. Members who receive *ex parte* communications are required to report them and provide copies to all parties.

The Agency's adjudicatory hearing staff does not communicate with Agency board members regarding the project subject to hearing except through the staff exhibits, testimony and briefs in the hearing record. Agency Rules and Regulations allow "aid and advice" from staff not involved with the project hearing at the time the board reviews the complete hearing record and deliberates its decision.

Any question regarding *ex parte* communications will be addressed by the hearing officer during the adjudicatory hearing; any question involving *ex parte* and Agency Board members will be addressed by Agency Counsel and the Agency Board itself.

The Hearing Record

The hearing record includes the transcripts of the hearing, the application, all exhibits as admitted to the record by the hearing officer, any letters, petitions or comments, stipulations and the briefs filed by the parties and Agency hearing staff and any determinations of the hearing officer. The hearing record is “closed” upon the receipt at the Agency of the full transcript, and briefs or any documents the parties agreed to submit at the hearing, whichever occurs later. Unsworn statements or testimony will be considered argument, not evidence.⁷

Role of Agency Members

After the record is received by the Agency, it is transmitted to the eleven Agency Board members. Within 60 days of receipt of the record by the Agency (unless the parties stipulate to a longer period), the Agency Board members must mail a decision on the permit application based solely on the record. The decision must be made at a publicly-scheduled Agency meeting. At this meeting, typically, Executive staff, not part of the Agency hearing staff, may aid and advise the Board working with the record and may assist with draft decision documents. In adopting its ultimate decision, the members vote in public session, “all members voting having familiarized themselves with the record.” Six votes in the affirmative are required to reach a decision. The Agency may approve the project, approve the project subject to modifications and/or conditions or disapprove the project.

Before the final decision, upon a motion by any party or on its own motion, the Agency may vote to reopen the adjudicatory hearing to secure additional evidence. A copy of the final decision is mailed to each party.

Copies of the Agency’s decisions are available through the Freedom of Information Law (FOIL) by contacting the Agency’s Records Access Officer. Information regarding the status of any proposed project can be obtained by contacting the assigned project review officer identified in the application completion notice and project hearing notice.

Reconsideration, Appeal of an Agency Decision

The applicant (but no other party) may request the Agency to reconsider a decision it has made within 30 days of the decision only for demonstrated good cause. Six votes in the affirmative are necessary for the granting of reconsideration. Reconsideration may be granted if the Agency finds that the previous decision was based on materially erroneous findings of fact or conclusions of law. If reconsideration is granted, eight votes in the affirmative are necessary to act with respect to the merits of the request. At least 20 days prior to the date the request is to be considered, the Agency must give notice to all persons who received a notice of the application completion and to all parties to the hearing and invite a written response.

Additionally, most Agency decisions may be reviewed in State Supreme Court by proceedings brought under Article 78 of the Civil Practice Law and Rules, although some appeals must be taken to the Freshwater Wetlands Appeals Board. Appeals may be filed by the applicant or by any party or person determined to be adversely affected by the Agency decision.

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⁷ 580.15(e)