

Adirondack LANDOWNERS ASSOCIATION

ALA NEWS • VOLUME XIX ISSUE I • WINTER 2011
512 South 2nd Street, Fulton, New York 13069 • Telephone: (315) 592-2567

PRESIDENT'S COMMENTS



The December meeting of the Adirondack Landowners Association on December 3 and 4 was the liveliest and best in memory! Kudos to our host, The Adirondack League Club, and their representatives, Peter Bertine and Brad Gentry, as well as our own Ross Whaley and Ingrid Smith, for this success.

Friday evening saw a lively cocktail hour and dinner followed by a brief but meaningful talk by Fred Monroe, supervisor of the Town of Chester and Executive Director of the Local Government Review Board. In clear and rational terms, he spoke for the needs and concerns of the residents of the towns and villages within the Blue Line, especially as those needs and concerns conflicted with regulations of the APA and DEC. This was followed by the silent and “not so silent” auction which was not only fun but produced near record proceeds to the coffers of the ALA. Kudos here to Tom Williams and all who contributed, bid and helped on that annual event.

The highlight of the weekend was a talk by Brian Mann of North Country Public Radio, who gave what will most likely go down in history as the most riveting and game-changing talk ever made to an ALA audience. He characterized the creation of the APA as resulting from a “social contract” whereby, in exchange for the APA and its zoning and other regulations, the North Country received the promise of financial support in the form of taxes on forest preserve land and other aid. This implied contract is being broken before our eyes as the state becomes “bankrupt” and can no longer afford its payments, while at the same time the traditional industries such as forestry, etc. are dying. The young keep leaving and the median age keeps rising. He predicts there soon will be no one available for essential services for those who remain, not to mention for seasonal residents such as many ALA families. All landowners, whether they be seasonal or permanent residents, have an obligation to make our communities more sustainable. A summary of Brian’s talk appears elsewhere in this newsletter. I would urge all, including those who already heard the talk in

person, to “read, mark, learn and inwardly digest” these remarks as the ALA, and indeed the entire Adirondack community, moves forward.

Brian’s talk was followed by brief remarks from Sally Bogdanovich of Bay Pond, Wilbur Rice of the League Club, and Colin Bradford of Brandreth Park, who spoke of how they were coping with the changing realities. This led to a lively and spirited discussion regarding the future of the ALA. Heretofore, the ALA approach has been to act below the radar on most issues and to go public on only a limited number of issues at a time, such as the willing buyer/willing seller issue and the navigable waterways issue. Our meetings have been a mixture of informal socializing and formal presentations. While this has served us well so far, many members voiced preference for the ALA’s being more public on more issues.

The Board will be taking these comments to heart. While the ALA cannot be all things to all people, and has limited staff and resources, it is nevertheless crucial that our members receive value for their dues. The Board will be discussing this issue at its February meeting. The next meeting of members will be our Annual Meeting to be held at the Copperfield Inn in North Creek on Friday, May 6th and Saturday, May 7th. I look forward to seeing you there.
—T.S.W.



INSIDE THIS ISSUE

Adirondack Park 3.0.....	2
Navigable Waters & Private Property Rights.....	2
ALA Communications	3
News Notes.....	4
Membership and Organizational Information	5

ADIRONDACK PARK 3.0

One of the highlights of the winter meeting was Brian Mann's (the Adirondack Bureau Chief for North Country Public Radio) presentation on the current state of the Adirondack Park. His comments were thought provoking, sobering and challenging, and set the stage for a conversation amongst the membership regarding the role of ALA in this new era of the Park. This summary of Brian's comments will inadequately capture the interest that he generated on December 4.

Brian was careful to explain that he was stepping outside his role as reporter in which he present facts in a way that the listener draws their own conclusions. In this presentation he was going to present analysis and some of his own conclusions.

He reminded us that we sometimes forget that this incredible forested landscape is largely a man-made landscape. That is, it is a human design shaped by the creation of the Forest Preserve, the Adirondack park and a constitutional amendment that declared the Forest Preserve as "forever wild. Brian labels the creation of the Adirondack park and passage of the constitutional amendment Adirondack Park 1.0

Adirondack Park 2.0 was started through recognition that there would be increasing demand for development of private lands as the era of the big timber companies came to an end, and their lands would be ripe for development. This, accompanied by an increasing demand for second homes, called for the regulation of private land development, and resulted in legislation creating the Adirondack Park Agency.

The APA, however, was hardly the end to the control of development. Brian emphasized a new, and perhaps unanticipated, era-- Governor Pataki's acquisition of both additional acreage for the Forest Preserve, and even more interesting the control of development through conservation easements. To the legacy of Nelson Rockefeller and Harold Hochschild who were instrumental in legislation forming the the Adirondack Park Agency, one should add Governor George Pataki and Michael Carr, Executive Director of the Adirondack Nature Conservancy, for increases in the Forest Preserve and the protection of land through conservation easements.

But the story isn't over. Brian introduced us to Adirondack 3.0. This is the era of the twin environmental threats of invasive species and climate change. With climate change the Park may be undergoing change that is out of our control. Unlike acid rain in which legislative action substantially reduced the impact, it may be too late to substantially reduce climate change impacts on

the ecosystems that we have become familiar with in the Adirondack Park.

But there is another threat to the Park which we haven't adequately addressed, the failure of our communities. While the economy has partially prospered through the billions of dollars spent on second homes and the investment of the state in prisons, schools and other institutions, it has not resulted in sustainable communities. A drive down the main street of many of our villages clearly shows there is no vital retail economy. A critical component of this great experiment of a park in which there are 103 towns and villages has been the implicit contract between the state and the people of the Park. That contract was based on the premise that if the citizens of the Park would forgo some of the benefits of development in order to conserve the wild land gem, the state would support the Park though the payment of property taxes on the forest preserve and invest in the institutions of the Park. Brian warned that this contract is coming to an end. There is no advocate with the power that Senator Stafford had during his years in the state senate, and simply the state is broke. Part of the solution to the state's fiscal problems will come out of the hide of the Park.

The solution according to Brian will rest with big thinking on part of local citizens and their local government. He is encouraged by an emerging leadership coming from local government. It is time, however, for them to play a more significant role in their own planning and zoning. It is time for the APA to develop a vocabulary and standards for sustainable communities as they have for sustainable ecosystems. What is the community equivalent to "no adverse impact" or "substantially invisible".

Brian didn't end there. He reminded the ALA members of their responsibility to the long term sustainability of Adirondack communities. As we benefit from the Park we also have a responsibility to invest our intellect, our money, our time and our commitment to sustaining this special place.

NAVIGABLE WATERS AND PRIVATE PROPERTY RIGHTS

This article, written by the Legal Committee Chair and Senior Advisor appeared in the September issue of the Adirondack Explorer under the title Respect Landowner's Rights. It was written in response to a series of articles published by the Explorer promoting paddlers rights.

Allowing paddlers to use streams and rivers in the Adirondacks that are bounded on both sides by private property raises important issues for canoeing enthusiasts, for the owners of the land, and for the public at large.

New York's highest court, the Court of Appeals, answered one important question in 1998 when it decided that recreation was a form of commerce that justified public use of bodies of water that were "navigable in fact." The decision in *Adirondack League Club v. Sierra Club* is one of a series of New York cases going back many decades dealing with the permissible uses of the state's non-tidal streams and rivers.

Reaching a conclusion that paddlers are allowed to use a specific waterway requires a determination that the waterway meets the legal requirements of being "navigable in fact"—a concept with long roots in the common law. *Morgan v. King*, a critical 1866 Court of Appeals decision, established that, to be navigable in fact, a stream "in its natural state and ordinary volume" must be capable of allowing transportation for a "sufficient length of time" so as to make it useful as a highway.

Other cases have established that the right of navigation over qualifying rivers carries with it the right to make use of the adjoining banks for activities such as portaging and scouting, but only to the absolutely minimum extent required to allow passage. The incidental use of the land does not include anything not directly related to passage and thus excludes camping, hunting, fishing, picnicking, etc. Further, the public right of navigation does not include a right to cross private land in order to gain access to a stream, nor does it extend to so called "keyhole" situations, where there is no legal egress at the end of the waterborne journey.

It clearly requires a fair amount of detailed legal scholarship to sort through all the cases that have defined the right of navigation.

For a number of years prior to the *Adirondack League Club* decision, legislative proposals were made on behalf of the paddling community to establish recreational paddling as a permitted use of bodies of water that are otherwise navigable in fact. The decision in the ALC case made that aspect of the legislation unnecessary. But it continues to be suggested that all the legal principles affecting navigability as expressed in the relevant cases should be gathered together and codified in a single statute.

Codification would have benefits to both paddlers and landowners in removing from them the burden of trying to master the entire body of case law before determining their right to paddle or the right to maintain the privacy of their land. It is important that the codification scrupulously reflect the existing case law and have due regard to all the competing interests involved.

Such legislation should promote preservation of the special values and environmental integrity of the Adiron-

dack waterways. The danger of importing invasive species, such as Eurasian milfoil, zebra mussels or didymo ("rock snot") into bodies of water heretofore free from them must be addressed. Some bodies of water are used for scientific research or in efforts to preserve heritage species. It would be a huge and irreversible error to let uncontrolled recreational use of navigable waters negate these valuable conservation and scientific efforts.

One of the principal benefits claimed for codification is that it would eliminate uncertainty in the mind of the paddling community and the landowners as to which streams fell within the definition of "navigable in fact." To get some clarification of that is a laudable goal, but the reality is somewhat more complicated. Each body of water presents many unique features that must be examined in light of the law. An intensive analysis of all the pertinent facts is required and can be done only on a case-by-case basis. The Court of Appeals itself, in the ALC case, observes that there may be experts in "geology, hydrology, economics, fluvial geomorphology, as well as expert canoers and river guides" that can provide relevant evidence, but the court confirmed that "the ultimate conclusion—navigability in fact" must be determined by the evidence presented at a trial.

If, because of the burdens and expense of litigation, a streamlined method of determining navigability is sought through the use of determinations by the Department of Environmental Conservation, all parties should be heard and all evidence collected for each river. And the DEC must have the financial and staffing capability to perform such a role.

It is now the settled law of New York that recreational paddling is permitted on bodies of water that are navigable in fact. No legislation is needed to achieve that result. If it is sought to codify the law and clarify its application, careful scrutiny needs to be given to reconciling the many legitimate concerns and interests that arise in determining that any one stream or river is open to the public for recreational transportation. Most of the bills that have been proposed to date are incomplete in some respects and too simplistic in others, but could be upgraded without undue difficulty to yield both the desired codification of the law and recognition of the other important interests affected.

Ross Whaley, a former chairman of the Adirondack Park Agency, is a senior adviser to the Adirondack Landowners Association.

ALA COMMUNICATIONS

Our members have made it clear that communications on important Adirondack issues and/or news, board actions

and alerts from the Senior Advisor need improvement. In response we will be upgrading our website and adding many new features to help improve communications with ALA members. News items will be updated every other week or so, and we will send "e-mail blasts" to our members when we have posted items on the website that are of particular concern to the ALA membership. **To accomplish this, it is vital that we have an accurate and up to date e-mail database of all regular and associate ALA members.** The new website will have an e-mail sign up feature...but until then, please send an e-mail to Ingrid if you wish to be added to the list: ingridsmithsecretary@gmail.com Additionally, we welcome input about events and/or news worthy information (with photos if possible) from individual ALA member organizations. This is your website...please contribute!

Our plan is to have the new website up and active by the February Board meeting.

NEWS NOTES

APA undergoes a review of its regulations

By letter of July 27, 2010, the Governor's office designated the APA to conduct a review of its regulations pursuant to Executive Order 25. The goal of EO25 is for agencies and the Governor's Office of Regulatory Reform "to seek opportunities to improve the State's economy by reducing the regulatory burden on the public, without compromising critical protections". As the first step in the EO25 process, the Agency offered a 60-day period for public comment on its regulations. The public comment period expired on October 18, 2010. According to APA staff substantive EO25 comments were received on the existing regulation pertaining to wetland subdivisions, the shoreline variance process and, the definition for "campground." Agency staff are considering additional opportunities for regulatory and administrative reform that are responsive to EO25 and that continue the Agency's existing regulatory reform process. The next step in the EO25 process is for APA to meet with the Governor's office and the Governor's Office of Regulatory Reform. At this time of transition to a new Governor, it is uncertain as to the future of APA regulatory change.

DEC revises regulations on endangered species

On November 3, 2010 revisions to the Department of Environmental Conservation (DEC) regulations for endangered and threatened wildlife went into effect. The revisions clarify the permit ("an incidental take permit") application and review process for projects that are likely

to adversely impact protected species or their habitat. The revisions clarify an existing permit program that has been in place for 30 years. For most landowners, the revisions will have no impact on current or future activities. If you have not had protected wildlife issues associated with your property before, you will likely have no issues under the revisions. The activities requiring a permit are likely to be larger projects that harm threatened and endangered species through the permanent conversion of occupied habitat. The revised regulations, including the list of threatened and endangered species, are posted on DEC's website (<http://www.dec.ny.gov/regs/3932.html>) along with frequently asked questions on the regulations (<http://www.dec.ny.gov/68645.html>). *This News note is taken from a longer description found in the December 2010, Vol. 104, No.9 of ESFPA's The Empire Envoy.*

Pete Grannis continues his work for the citizens of New York

DEC Commissioner "Pete" Grannis was fired by the Governor's office reportedly for a letter criticizing the cuts in the DEC budget being leaked to the press. Subsequently a press release on December 14 announced that Mr Grannis would be joining Environmental Advocates as Counsel. Subsequently, on December 31 Comptroller Tim DiNapoli announced his appointment of Pete Grannis as First Deputy Comptroller effective January 20, 2011. DiNapoli praised Grannis for his "life-long vision, leadership, integrity and ability to get things done.

Foundation for Land and Liberty is a new advocate for private property

Karen Moreau is president of a newly formed not-for-profit, the Foundation for Land and Liberty, which seeks to protect the security of private property and economic liberty by documenting cases, educating the public, and litigating or supporting litigation when necessary. The organization's tag line is a quote from John Adams, "Property must be secured or liberty cannot exist". For further information their website is <http://www.landandliberty-foundation.org/about.html>. ALA's Senior Advisor has had the opportunity to introduce ALA to Ms. Moreau, and to mention the expertise on property rights issues that lies in our legal committee.

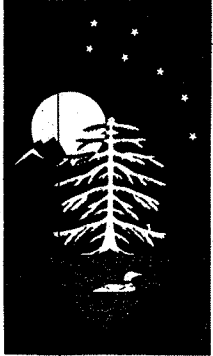
Brandreth Park files an action seeking declaratory judgement to clarify private property rights vs. public access in the Mud Pond parcel case

In a public statement the Brandreth Park Association announced it had filed an action on Monday November 15, 2010 to seek declaratory judgement from a court on

<p>MEMBERSHIP & ORGANIZATIONAL INFORMATION</p> <p>NEW MEMBERS</p> <p>The ALA welcomes membership by Adirondack landowners who share its commitment to promoting private stewardship and protecting the basic rights of private property owners in the Adirondacks. Membership information is available from the corporate office:</p> <p><i>Ingrid L. Smith, Executive Secretary/ALA 512 South 2nd Street, Fulton, NY 13069. Tel. No. (315) 592-2567</i></p> <p>OFFICERS & DIRECTORS</p> <p>President Theodore S. Wickersham <i>North Woods Club</i></p> <p>Vice President Thomas E. Williams <i>West Canada Preserve</i></p> <p>Treasurer Robert E. Friedman <i>Kildare Club</i></p> <p>Secretary John G. Fritzinger, Jr. <i>Adk. Mountain Reserve</i></p> <p>Directors Peter B. Robinson</p>	<p>Kevin Arquit David Skovron Peter K. Bertine Jerry B. Ward William Hutchens, Jr. Michael M. Gridley David Dearborn Frank A. Clark <i>Ex Officio</i> John L. Ernst</p> <p>Senior Advisor Dr. Ross S. Whaley <i>478 Bungalow Bay Tupper Lake, NY 12986</i></p> <p>OUR ORGANIZATIONAL MEMBERSHIP</p> <p>The following clubs and individuals, by their membership in the ALA, help to achieve the organization's goals of promoting good private stewardship in the Adirondacks:</p> <p>Adirondack League Club Adirondack Mountain Reserve Ampersand Pond Arquit Property Asgaard Farm Bay Pond Park Big Wolf Lake Association Brandon Park Brandreth Park Association</p>	<p>Camp Otterbrook Dug Mountain Ponds Elk Lake Lodge Ellis Property Fishery Forestry, LLC Gooley Club Grasse River Club Heart Bay Environment Hollywood Club Kildare Club Little Rapids Park Livingston Lake Club Matamek Corporation McCavanaugh Pond Club Meenahga Miller Park Association North Woods Club Paine Family Estate Putnam Camp Skye Notch Thisse Family Properties Underwood Club Watch Rock Point Property West Canada Preserve Wilmurt Club</p>
--	--	--

<p>the issue of private property rights versus public access in a very specific part of their property known as the Mud Pond Parcel. The public statement goes on to say, "This filing has been made necessary due to repeated intentional trespassing by various parties to test whether claims of public access to the waterways in this remote parcel of land have primacy over the private property rights of the land owners." Later in the public statement, "If we were not to defend our private rights and were to allow the public to traverse this section of our land, especially when an alternative public access route is available and significantly shorter, we would be voluntarily and unnecessarily abdicating the legal foundations of our property rights." The Legal Affairs Committee of the ALA Board has been briefed on the suit by representatives of Brandreth Park, and will be following its progress closely.</p> <p>Adirondack Partnership is a new group advocating for the Adirondacks</p> <p>Over the past few years there have been two groups working at identifying and then moving for implementation Adirondack programs for which there is shared agreement between environmental groups, local government officials and concerned citizens. One of these groups was a grass-roots effort known as the Common Ground Alliance. The other was an Adirondack Steering Com-</p>	<p>mittee formed by DEC Commissioner Pete Grannis and chaired by Bill Farber, Supervisor of the Town of Morehouse. The main activity of the Common Ground Alliance was drafting a Blue Print for the Blue Line that captured an agenda developed from an annual forum of Adirondack citizens and groups. The Steering Committee would use the Blue Print and other inputs to communicate to state agencies through the Commissioner of DEC an agenda for moving toward sustainable communities and economy in the Adirondacks. With the change in DEC Commissioner there is no guarantee that the Steering Committee will continue. Therefore, the Common Ground Alliance core group and the Steering Committee with advice from the Department of State have formed a new group, the Adirondack Partnership that will continue trying to find, advocate for, and implement activities for which there is shared agreement amongst Adirondack citizens.</p> <p>The Adirondack Landowners Association has been at the table throughout these negotiations, and will be an active member of the Adirondack Partnership. The Partnership is in its formative stages, and you will hear more as it matures.</p>
---	---

ADIRONDACK



Landowners Association

ALA ASSOCIATE MEMBERSHIP FORM

Why not join ALA today?

Become an associate member and help support the promotion of private property rights and good stewardship of the Adirondacks.

Membership costs just \$85.00 per year.

Please complete the following application and send it, together with your check for \$85.00 payable to the Adirondack Landowners Association, to:

Ingrid L. Smith
Executive Secretary/ALA
512 South Second Street
Fulton, NY 13069

Name _____

Mailing Address _____

Club affiliation (if any) _____

Adirondack LANDOWNERS
ASSOCIATION

512 SOUTH 2ND STREET

FULTON, NEW YORK 13069