APL 2018-00112

To be argued by:
Laura Etlinger
Time Requested: 15 minutes

APPELLATE DIVISION THIRD DEPT. NO. 525165

State of New York
Court of Appeals

IN THE MATTER OF THE APPLICATION OF
ADIRONDACK WILD: FRIENDS OF THE FOREST PRESERVE AND
PROTECT THE ADIRONDACKS! INC.,

Petitioners-Appellants,

-AGAINST-

NEW YORK STATE ADIRONDACK PARK AGENCY; LEILANI ULRICH, IN HER CAPACITY AS CHAIRPERSON OF THE NEW YORK STATE ADIRONDACK PARK AGENCY; NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION AND BASIL SEGGOS, IN HIS CAPACITY AS ACTING COMMISSIONER OF THE DEPARTMENT OF ENVIRONMENTAL CONSERVATION,

Respondents-Respondents.

BRIEF FOR RESPONDENTS IN RESPONSE TO BRIEF OF AMICUS ADIRONDACK COUNCIL

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Dated: March 14, 2019

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PRELIMINARY STATEMENT

Amicus Adirondack Council ("amicus") provides no basis to disturb the Third Department's decision. That decision holds that the Department of Environmental Conservation properly applied the existing-use exception of the Wild, Scenic and Recreational Rivers System Act (the "Rivers Act") to allow seasonal motor vehicle use on a mile-long segment of an existing road in a Wild River area of the Adirondack Park.

Preliminarily, amicus affirmatively disavows any constitutional challenge to the Department's determination.[1] (*See* Jan. 23, 2019 letter to Court from Robert S. Rosborough, IV, at 2.) We therefore do not address any such challenge here, other than to note that, even if the provisions of the Rivers Act and Adirondack Park State Land Master Plan ("Master Plan") are constitutionally

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[1] Nor could amicus properly raise such a claim. As we explained in opposing amicus's motion to appear as amicus curiae, no party to this lawsuit has obtained the required consent of the Appellate Division to bring a citizen's suit under the Forever Wild clause, *see* N.Y. Const., art. XIV, § 5, and this Court's rules prohibit amicus from "present[ing] issues not raised before the courts below," 22 N.Y.C.R.R. § 500.23(a)(4).

based, as amicus argues (Br. at 13-19), that would be irrelevant to the threshold question presented here, which is whether the provisions of those two authorities conflict, and thus the more restrictive provisions of the Master Plan should govern.

The Court should reject the three arguments that amicus does raise. Contrary to those arguments: (1) upholding the Department's particularized, evidence-based determination will not give the Department unlimited authority to permit motor vehicle use in any Wild River area, (2) the broadly worded existing-use exception applies to State-owned land, and not by implication to private land only, and (3) the record evidence establishes continuing motor vehicle use on the disputed mile-long segment, and not abandonment of such use by the time the State acquired the property.

For these reasons and the reasons stated in our responding brief, the Court should affirm.

ARGUMENT

POINT I

RESPONDENTS' DETERMINATION IS BASED ON THE PARTICULAR HISTORICAL CIRCUMSTANCES OF THIS CASE

The Department's determination to allow seasonal motor vehicle use on the one-mile segment of Chain Lakes Road (South) at issue is based on extensive and detailed record evidence of continuous motor vehicle use on that segment since the 1920s. It is thus simply not true, as amicus contends (Amicus Br. at 22), that upholding the Department's determination will grant the Department "virtually limitless power" to ignore the general prohibition on motor vehicle use in all Wild River areas.

As we have explained (Respondents' Brief, at 13-16, 33-35), the record demonstrates that, when the segment of Chain Lakes Road (South) at issue was designated as a Wild River area in 1972, motor vehicles had been continuously used on the road since the 1920s, and snowmobiles since the 1950s, for heavy commercial use and also for recreational purposes. The record further demonstrates that such motor vehicle use on the segment continued after 1972,

and even after the sale of the property by Finch Pruyn & Company to The Nature Conservancy in anticipation of the State's ultimate acquisition. The Department's determination to allow the continuation of that pre-existing use thus rests on the particular record evidence in this case.

Amicus alarmingly asserts (Amicus Br. at 11, 12, 22-23) that an affirmance here will authorize respondents to allow motor vehicles in *any* Wild River area and thereby threaten undeveloped and isolated portions of the Adirondack Park, where motor vehicles have not been traditionally used. Amicus is mistaken. The Department is allowing seasonal motor vehicle use on the road segment at issue only because such use constitutes an "existing land use" without alteration or expansion, within the meaning of the Rivers Act. *See* Environmental Conservation Law ("ECL") § 15-2709(2). Any future determinations allowing motor vehicle use in other Wild River areas would have to be based on similarly narrow circumstances and would, as here, be subject to review for rationality.

POINT II

THE RIVERS ACT EXISTING-USE EXCEPTION APPLIES TO STATE LAND

The Court should reject the new argument (Amicus Br. at 24-29) that the existing-use exception in the Rivers Act is limited to private land. There is no dispute that the Rivers Act generally applies to both private and state river areas. And by its plain terms, the existing-use exception in the Rivers Act applies without qualification to existing land uses on "classified river areas," ECL § 15-2709(2), which thus include both private and state river areas.

ECL § 15-2709(2)'s existing-use provision states:

> Notwithstanding anything herein contained to the contrary, existing land uses within the respective classified river areas may continue, but may not be altered or expanded except as permitted by the respective classifications, unless the commissioner or agency orders the discontinuance of such existing land use.

Id. There is thus no textual basis to limit the exception to classified river areas on private land. As this Court has explained, "[t]he text of a statute is the 'clearest indicator' of [the] legislative intent and 'courts should construe unambiguous language to give effect to its plain meaning.'" *See Matter of Avella v. City of New York*, 29 N.Y.3d

425, 434 (2017) (quoting *Matter of DaimlerChrysler Corp. v. Spitzer*, 7 N.Y.3d 653, 660 (2006)); *accord Majewski v. Broadalbin-Perth Cent. School Dist.*, 91 N.Y.2d 577, 583 (1998). Accordingly, both the parties and the courts below properly construed the existing-use exception as applying to the State-owned river area at issue here.

Amicus seeks to rely (Amicus Br. at 24-29) on the next sentence of ECL § 15-2709(2) to graft a limitation on the existing-use exception, but its argument is misguided. That sentence provides:

> In the event any land use is so directed to be discontinued, adequate compensation therefor shall be paid by the state of New York either by agreement with the real property owner, or in accordance with condemnation proceedings thereon.

ECL § 15-2709(2). To be sure, this sentence addresses an issue that arises only when private land is concerned, but that does not mean that the existing land-use exception in the previous sentence similarly addresses only private land. To the contrary, the adequate-compensation provision is properly read to mean that adequate compensation therefor shall be paid by the State of New

York *when appropriate,* i.e., when a land use is discontinued on private land.

Well-settled rules of statutory construction support this construction. First, as noted, the Legislature's use of the term "classified river areas"—without qualification—in the existing-use exception provides strong evidence that the Legislature intended the exception to apply to all classified river areas, not just private ones. *See, e.g., Matter of Avella*, 29 N.Y.3d at 434. Indeed, "classified river areas" has a distinct meaning under the statute. A "river area" means "the term river and the land area in its immediate environs as established by the commissioner or the agency, but not exceeding a width of one-half mile from each bank thereof." ECL § 15-2703(9). "Classified river areas" are thus the specific rivers, or sections of rivers, classified in the Act as wild, scenic, or recreational, and their immediate environs up to one-half mile from the river's banks. *See* ECL §§ 15-2703(13), 15-2707(2). Nothing in that definition suggests that such areas should be limited to *private* classified river areas.

Moreover, when the Legislature intended to distinguish between private and state land, it did so expressly. In ECL § 15-

2705, it vested the APA with authority to regulate private river areas in the Adirondack Park and gave the Commissioner of the Department exclusive jurisdiction over State-owned river areas in the Park. The fact that the Legislature did not distinguish between private and state land in the existing-use exception further supports the view that no such distinction was intended.

Although the plain language of the existing-use exception makes resort to legislative history unnecessary, nothing in the legislative history of the Rivers Act suggests that the Legislature intended the existing-use exception to apply only to private land. That fact is particularly significant because, when the Rivers Act was enacted, the vast majority (over 80%) of the river areas initially designated to be included in the system were owned by the State. *See* Bill Jacket to L. 1972, ch. 869, at 55. If the Legislature had intended to exclude the vast majority of these river areas from the existing-use exception, one would expect to find evidence of that intent in the legislative history. Instead, the only passages from the legislative history that discuss the existing-use and adequate-compensation provisions explain the need for "adequate

compensation" in cases involving private land in order to defeat constitutional challenges to the Act. *See* Bill Jacket to L. 1972, ch. 869, at 56, 68.

Further, and contrary to amicus's claim, reading the existing-use exception to apply to both private and state land is consistent with the more limited application of the adequate-compensation provision to private land, and does not render any part of the statute superfluous. *See Matter of Lemma v. Nassau County Police Officer Indem. Bd.*, 31 N.Y.3d 523, 528 (2018) ("Whenever possible, statutory language should be harmonized, giving effect to each component and avoiding a construction that treats a word or phrase as superfluous.").

Finally, amicus's reliance (Amicus Br. at 27-28) on *Matter of Helms v. Diamond*, 76 Misc. 2d 253 (Sup. Ct., Schenectady County 1973), is misplaced. That decision involved a claim of vested private rights, which, as we have already explained (Responding Br. at 29-30), are not at issue here. Further, the court's conclusion in *Helms* that the existing-use provision at issue in that case—Executive Law § 811(b)—applied "only to privately-owned land within the park,

and not public land owned by the State," 76 Misc.2d at 257, was not, as petitioner claims, a general statement that existing-use statutes never apply to state land. Rather, the *Helms* court merely recognized that the statute at issue in that case applied by its terms only to the regulation of private lands. *See* Executive Law §§ 805(1)(a), 809, 811.

POINT III

THE RECORD CONTRADICTS AMICUS'S CONTENTION THAT MOTOR VEHICLE USE OF THE SUBJECT ONE-MILE SEGMENT WAS ABANDONED

There is likewise no merit to amicus's new factual argument (Amicus Br. at 29-32) that motor vehicle use on the subject segment had been abandoned by the time the State acquired the property containing the segment at issue and, having been abandoned, may not be continued. Even assuming that the latter proposition is a correct statement of the law,[2] amicus's argument fails because it is contradicted by the record.

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[2] Under the Department's regulations, if an existing land use is discontinued for one year, a resumption of that use requires a permit from the Department. *See* 6 N.Y.C.R.R. §§ 666.2(j),

The State acquired the property in 2013 from The Nature Conservancy, which acquired the property from Finch Pruyn & Company ("Finch") in 2007. The record establishes that after 2007, motor vehicles continued to be used on the subject segment by The Nature Conservancy itself, whose own use was permitted to continue until 2020, and thus after transfer of the property to the State; by Finch, which continued logging activities on the property until 2012; and by recreational club members and their guests, who were allowed to use the property through September 2018 under leases with The Nature Conservancy. (A223-224, 225, 513; RA4, 28, 73; *see also* A729-730 (lease between The Nature Conservancy and the Gooley Club), A753-759 (The Nature Conservancy leasehold reservation and management agreement).) Thus, motor vehicles were still being used on the road segment at issue when the State acquired the property. To be sure, the road was not legally open to

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666.13(a)(3). While amicus describes these regulations as applying only to private lands (Amicus Br. at 29), they in fact apply to both private and state river areas. But as we explain below, they are irrelevant here because there was no discontinuance of motor vehicle use.

the general public, as amicus points out. (Amicus Br. at 30-31.) But as we explained (Respondent's Br. at 36-41), the Department rationally found that it could open the road segment to the general public for seasonal motor vehicle use without materially altering or expanding existing motor vehicle use. Accordingly, the record belies amicus's claim of abandonment.

CONCLUSION

This Court should affirm the judgment affirming dismissal of the petition.

Dated: Albany, New York
March 14, 2019

Respectfully submitted,

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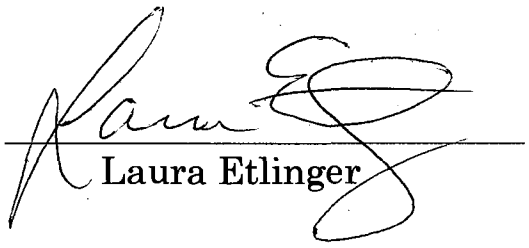
AFFIRMATION OF COMPLIANCE

Pursuant to the Rules of Practice of the New York Court of Appeals (22 N.Y.C.R.R.) § 500.13(c)(1), Laura Etlinger, an attorney in the Office of the Attorney General of the State of New York, hereby affirms that according to the word count feature of the word processing program used to prepare this brief, the brief contains 2,045 words, which complies with the limitations stated in § 500.13(c)(1).



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