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DIVISION OF APPEALS & OPINIONS

September 16, 2019

Hon. John P. Asiello
Chief Clerk and Legal Counsel
Court of Appeals
20 Eagle Street
Albany, New York 12207

Re: Protect the Adirondacks v. NYS Dept. of Envtl. Cons.

Dear Mr. Asiello:

We represent defendants New York State Department of Environmental Conservation ("DEC") and Adirondack Park Agency ("APA") in the above-referenced matter, and submit this response to your letter of August 26, 2019. The Court should retain subject matter jurisdiction of defendants' appeal because a substantial constitutional question is directly involved. However, the Court should dismiss plaintiff's cross appeal because plaintiff is not aggrieved by the decision from which it purportedly appeals.

In this declaratory judgment action, plaintiff challenges the constitutionality of a plan by DEC and APA to construct various Class II "community connector" trails in the state-owned Forest Preserve of the Adirondack Park.[1] Plaintiff seeks a declaration that construction of the trails violates what is known as the "forever wild" clause of the New York State Constitution. In relevant part, the forever wild clause states that state-owned Forest Preserve lands (1) "shall be forever kept as wild forest lands," and

[1] Supreme Court limited the scope of this action to Class II trails that had been constructed or were under construction between January 1, 2012 and October 15, 2014.

(2) "shall not be leased, sold or exchanged . . . nor shall the timber thereon be sold, removed or destroyed." N.Y. Const. art. XIV, § 1.[2]

After a 13-day bench trial, Supreme Court, Albany County (Connolly, J.), declared that construction of the trails at issue did not violate the forever wild clause. On plaintiff's appeal, the Appellate Division, Third Department, reversed. The Third Department held, in a 4-1 decision, that although construction of the trails did not unconstitutionally impair the wild forest nature of the Forest Preserve, the construction was nevertheless unconstitutional because it resulted in, or would result in, an unconstitutional destruction of "timber."

In reaching its conclusion, the Third Department noted that the parties had stipulated that 6,184 trees measuring 3-inches diameter at breast height ("dbh") or larger[3] had been, or would be, cut to construct the 27 miles of trails at issue. But the court concluded that the 3-inches dbh standard was too restrictive and, instead, broadly interpreted the term "timber" in the forever wild clause to "refer[] to all trees, regardless of size"—which would encompass saplings and seedlings. Based on plaintiff's evidence at trial, the court found that 25,000 trees of all sizes would be cut to construct the trails at issue—an average per mile of over 200 trees at least 3-inches dbh and approximately 925 trees of all sizes. The Third Department concluded that construction of Class II trails resulted in an unconstitutional destruction of timber in the Forest Preserve.

Defendants have appealed from the Third Department's order under C.P.L.R. 5601(b)(1), which permits an appeal as of right from a final order of the Appellate Division when two conditions are satisfied. First, an appeal as of right is permitted "where there is *directly involved* the construction of the constitution of the state or of the United States" (emphasis added). A constitutional question is "directly involved" if it was properly raised in the courts below and was necessarily passed upon by the Appellate Division. *See*

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[2] In addition to its constitutional claim, plaintiff originally asserted two causes of action under C.P.L.R. article 78. (Record on Appeal at 41-52.) But Supreme Court (Ceresia, Jr., J.) dismissed those two causes of action in 2014, before trial, and they are not at issue in this appeal. (Record on Appeal at 380-399.)

[3] "Breast height" is 4'6" above the ground. DEC uses dbh as the standard measure for projects involving the cutting, removal, or destruction of trees.

Arthur Karger, Powers of the New York Court of Appeals § 7:4 at 224-225, §§ 7:8-7:9 at 229-243 (3d ed. rev. 2005). And second, the constitutional question must be a substantial one. *See id.* § 7:5 at 226-228. Defendants' appeal satisfies both requirements.

First, the record establishes that a constitutional question is directly involved. A constitutional question was raised in both courts below. In its complaint, plaintiff asserted as its first cause of action that construction of the at-issue trails would violate article XIV, § 1 of the New York State Constitution, because it would result in destruction of a substantial amount of timber and would impair the wild forest nature of the Forest Preserve. (Record on Appeal at 34.) The trial in Supreme Court was held for the sole purpose of resolving this constitutional question. (Record on Appeal at xxvii.) Moreover, this constitutional question was the only question presented to the Third Department on plaintiff's appeal, and the only question the Third Department addressed and resolved in its opinion and order. Accordingly, defendants' appeal satisfies the "direct involvement" requirement.

Second, the constitutional issue presented on defendants' appeal is "substantial." The proper interpretation of the term "timber" in the forever wild clause presents an issue of first impression for this Court with significant public policy implications. To be sure, the Court touched on the issue in *Association for Protection of Adirondacks v. MacDonald*, 253 N.Y. 234 (1930), when it held that construction of a toboggan slide in North Elba that required the clear-cutting of 2,500 "large and small" trees over one and one-quarter miles (approximately four acres) was unconstitutional. But the Court did not define "large and small," and the record in *MacDonald* shows that the Court relied on a tree count that utilized DEC's 3-inches dbh standard. (Defendants' A.D. Br. at 32.) Thus, the Third Department's rejection of that standard in this case, and its holding that the term "timber" should be broadly interpreted to encompass trees of all sizes—which necessarily encompasses saplings and seedlings—has significantly expanded existing precedent. Moreover, the Third Department's broad interpretation of "timber," if left intact, will significantly restrict DEC's ability to design, construct, and maintain a variety of trails and other public facilities in the Forest Preserve, which would have serious implications for public access, use, and enjoyment of the Forest Preserve.

Defendants' appeal thus presents a substantial constitutional question and the Court should retain subject matter jurisdiction.

The Court should dismiss plaintiff's cross appeal, however, because plaintiff is not aggrieved by the Third Department's decision. Only an aggrieved party may appeal from an appealable judgment or order. C.P.L.R. 5511. Because plaintiff was granted all the relief it sought in this litigation—namely, a declaration that construction of the trails was unconstitutional—it "has no need and, in fact, no right to appeal." *Parochial Bus Sys. v. Board of Educ.*, 60 N.Y.2d 539, 545 (1983); *see also T.D. v. New York State Off. of Mental Health*, 91 N.Y.2d 860, 862 (1997) ("A successful party who has obtained the full relief sought is not aggrieved, and therefore has no grounds for appeal[.]"). That plaintiff may disagree with one aspect of the Appellate Division's reasoning—namely the court's holding that the trails and their construction did not unconstitutionally impair the wild forest nature of the Forest Preserve—does not render plaintiff an aggrieved party. *Parochial Bus Sys.*, 60 N.Y.2d at 545 (party not aggrieved even when it "disagrees with the particular findings, rationale or the opinion supporting the judgment or order below in [its] favor").

For all these reasons, the Court should retain subject matter jurisdiction of defendants' appeal and dismiss plaintiff's cross appeal.

Respectfully submitted,

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