

**Caffry & Flower**  
ATTORNEYS AT LAW

100 BAY STREET  
GLENS FALLS, NEW YORK 12801  
(518) 792-1582 • FAX: (518) 793-0541



**JOHN W. CAFFRY**

**AMANDA J. KUKLE**

**KRISTINE K. FLOWER**

September 12, 2019

**VIA OVERNIGHT COURIER**

**RECEIVED**

SEP 16 2019

Hon. John P. Asiello  
Chief Clerk and Legal  
Counsel to the Court  
New York State Court of Appeals  
20 Eagle Street  
Albany, NY 12207-1095

N.Y.S. COURT OF APPEALS

Re: Protect the Adirondacks! Inc. v. NYS Department of  
Environmental Conservation and Adirondack Park Agency  
Index No. 2137-13/App. Div. Docket No. 527256

Dear Mr. Asiello:

This letter is submitted on behalf of plaintiff Protect the Adirondacks! Inc. pursuant to your letter dated August 26, 2019.<sup>1</sup> Plaintiff's cross-appeal in this matter directly involves a substantial constitutional question under Article 14, § 1, of the New York State Constitution, commonly known as the forever wild clause. On the other hand, the constitutional question presented by defendants' appeal is not substantial because the question is well-settled law, so their appeal should be dismissed. Also, plaintiff is an aggrieved party for purposes of filing its cross-appeal.

**The Cross-Appeal Directly Involves  
A Substantial Constitutional Question**

This case will determine how much alteration of the wild forest nature of the Forest Preserve is constitutional, and at what point it becomes unconstitutional. This is a substantial constitutional question. Plaintiff has cross-appealed from the Appellate Division's denial of plaintiff's appeal of the trial court's holding on this issue.

---

<sup>1</sup> We have been advised by the Office of the Attorney General that your office has granted both parties an extension of time to September 16, 2019 to file their letters.

Hon. John P. Asiello  
Re: Protect the Adirondacks v. NYS  
Dept. of Environmental Cons.

2

September 12, 2019

"An appeal may be taken to the court of appeals as of right [] from an order of the appellate division which finally determines an action where there is directly involved the construction of the constitution of the state". CPLR § 5601(b)(1). However, the "constitutional question must be a substantial one." Arthur Karger, The Powers of the New York Court of Appeals, § 7:5 (Westlaw, July 2019 Update); see also Davega City Radio v. State Labor Relations Bd., 281 N.Y. 13, 19 (1939). Plaintiff's cross-appeal presents a substantial constitutional question, so it is authorized by this rule, as of right.

Plaintiff's First Cause of Action (R34-R41)<sup>2</sup> is based solely on Article 14, § 1 of the New York State Constitution ("Article 14"),<sup>3</sup> which provides, in pertinent part:

The lands of the state, now owned or hereafter acquired, constituting the forest preserve as now fixed by law, shall be forever kept as wild forest lands. They shall not be leased, sold or exchanged, or be taken by any corporation, public or private, nor shall the timber thereon be sold, removed or destroyed.

The Opinion and Order herein of the Appellate Division, Protect the Adirondacks v. NYS Dept. of Environmental Cons., 175 A.D.3d 24 (3d Dept. 2019), finally determined that the action of the defendants in constructing 27 miles<sup>4</sup> of Class II Community Connector Snowmobile Trails ("Class II trails") on the Forest Preserve "violates N.Y. Constitution, article XIV, § 1", thereby granting the First Cause of Action. Id. at \*5. Both the defendants' appeal and the plaintiff's cross-appeal directly involve aspects of this constitutional question.

---

<sup>2</sup> References to pages of the Record on Appeal in the Appellate Division, a copy of which will be filed with you by the defendants, are abbreviated as "R\_\_\_".

<sup>3</sup> Plaintiff's other causes of action were previously dismissed and are not at issue herein. Protect the Adirondacks v. NYS Dept. of Environmental Cons., 175 A.D.3d at \*1, fn 3.

<sup>4</sup> The actual number of miles of Class II trails at issue in this case is more than 34 miles. R681, R4842-R4843.

Hon. John P. Asiello  
Re: Protect the Adirondacks v. NYS  
Dept. of Environmental Cons.

3

September 12, 2019

As the Appellate Division recognized, there are two ways in which the Class II trails may damage the Forest Preserve, in violation of Article 14: "(1) the land is not being kept forever wild, or (2) timber in the Forest Preserve is being destroyed." Protect the Adirondacks v. NYS Dept. of Environmental Cons., 175 A.D.3d at \*2.

The First Cause of Action alleged, *inter alia*, that separate and apart from the illegal destruction of large amounts of timber (R34-R37), construction of the Class II trails led to the flattening of the forest floor, up to 20 feet wide in places, the removal of all understory vegetation, and the construction of large bridges. R37-R41. As described in Plaintiff's October 1, 2018 brief at the Appellate Division ("Brief") (pp. 12-14, Point II),<sup>5</sup> these actions have altered the ecology of long stretches of the forest. However, the Appellate Division found that the type of "construction used for the Class II trails did not violate the "forever wild clause' ". Protect the Adirondacks v. NYS Dept. of Environmental Cons., 175 A.D.3d at \*2. Plaintiff has cross-appealed on this question.

This constitutional question is substantial. The forever wild clause "is 'generally regarded as the most important and strongest state land conservation measure in the nation.' ". *Report and Recommendations Concerning the Conservation Article in the State Constitution*, New York State Bar Association, August 3, 2016, at 1-2 (quoting Prof. William R. Ginsberg, *The Environment*, 1997).<sup>6</sup>

Despite its importance, "there is a dearth of appellate court precedent concerning" the forever wild clause. Protect the Adirondacks v. NYS Dept. of Environmental Cons., 175 A.D.3d at \*3 (citing only Association for the Protection of the Adirondacks v. MacDonald, 253 N.Y. 234 (1930), and Balsam Lake Anglers Club v. NYS Dept. Of Environmental Cons., 199 A.D.2d 852 (3d Dept. 1993)). Neither of these cases squarely addressed the question of whether the manner of construction of trails like the Class II trails violates the forever wild clause of Article 14. Therefore, plaintiff's cross-appeal presents a substantial constitutional question.

---

<sup>5</sup> A copy thereof will be filed with you by the defendants.

<sup>6</sup> Available at [www.nysba.org/ArticleXIVreport/](http://www.nysba.org/ArticleXIVreport/).

Hon. John P. Asiello  
Re: Protect the Adirondacks v. NYS  
Dept. of Environmental Cons.

4

September 12, 2019

Defendants' Appeal Does Not Involve  
A Substantial Constitutional Question

Defendants' appeal similarly presents a constitutional question, but it is not a substantial constitutional question, so it should be dismissed because "the settled law is to the contrary of the position urged by the appellant". Karger, The Powers of the New York Court of Appeals, at § 7:5.

It is well-settled law that the destruction of 2,500 trees to construct facilities in the Forest Preserve violates Article 14. Association for the Protection of the Adirondacks v. MacDonald, 253 N.Y. at 234 (barring construction of Olympic bobsleigh run on Forest Preserve lands); cf Balsam Lake Anglers Club v. NYS Dept. Of Environmental Cons., 199 A.D.2d at 852 (destruction of 350 trees of all sizes for construction of cross-country ski trails found to not violate Article 14).

Defendants' construction of the Class II trails at issue herein would destroy over 6,000 trees of 3 inches or more in diameter at breast height, and over 25,000 trees of all sizes. Protect the Adirondacks v. NYS Dept. of Environmental Cons., 175 A.D.3d at \*1. These numbers vastly exceed the 2,500 trees at issue in the Association for the Protection of the Adirondacks case, and defendants' appeal is "utterly lacking in merit". Karger, The Powers of the New York Court of Appeals, at § 7:5, quoting Hamilton v. Regents of the Univ. Of Calif., 293 U.S. 245, 258 (1934). Therefore, defendants' appeal does not involve a substantial constitutional question and it should be dismissed.

The Plaintiff Is an Aggrieved Party  
And Its Cross-Appeal Should be Heard

Although the Appellate Division held in favor of plaintiff, finding that the level of timber cutting for the Class II trails violated Article 14's prohibition on the destruction of timber (Protect the Adirondacks v. NYS Dept. of Environmental Cons., 175 A.D.3d at \*4), it also held for the defendants, finding that the Class II trails did not impair the wild forest qualities of the Forest Preserve (id. at \*2), and so these trails did not violate Article 14's mandate that the Forest Preserve "shall be forever kept as wild forest lands". In doing so, the court left the Forest Preserve vulnerable to damage to its forever wild nature.

Hon. John P. Asiello  
Re: Protect the Adirondacks v. NYS  
Dept. of Environmental Cons.

5

September 12, 2019

The court "declared that construction in the Forest Preserve of the Class II Community Connector trails that were planned and approved as of October 15, 2014 violates N.Y. Constitution, article XIV, § 1." Id. at \*5. However, despite being the prevailing party, due to the split decision, plaintiff is still an aggrieved party and may appeal from the part of the Opinion and Order of the Appellate Division which favored the defendants.

A prevailing party is still an aggrieved party pursuant to CPLR § 5511, and may appeal or cross-appeal the decision of a lower court, when it "is nevertheless prejudiced because [the decision] does not grant [it] complete relief" or if the party "received an award less favorable than [it] sought or a judgment which denied [it] some affirmative claim or substantial right." Parochial Bus Systems v. Board of Ed. of City of New York, 60 N.Y.2d 539, 544-545 (1983) (citations omitted). "[A] party is generally considered to be aggrieved, for the purpose of appeal, if the order of the Appellate Division grants [it] only part of the relief [it] requested." Karger, The Powers of the New York Court of Appeals, at § 11:3.

Plaintiff's complaint alleged that:

82. The Class II Community Connector snowmobile trails and any similar trails violate Article 14, § 1 because: (a) a substantial amount of timber will be cut and destroyed in the construction of these trails; (b) these trails are not consistent with the wild forest nature of the Forest Preserve; and (c) the construction of these trails will result in the creation of a man-made setting in the Forest Preserve. R34-R41. See also Brief, pp. 11-14, Points I and II.

The complaint requested the following relief:

(A) Enjoining Defendants from constructing, in the Forest Preserve, Class II Community Connector snowmobile trails, and other trails having similar characteristics or requiring like amounts of tree cutting, trails requiring construction techniques that are not consistent with the wild forest nature of the Forest Preserve, or trails that result in the creation of a man-made setting for the sport of snowmobiling; R52.

Hon. John P. Asiello  
Re: Protect the Adirondacks v. NYS  
Dept. of Environmental Cons.

6

September 12, 2019

(B) Ordering Defendants to rehabilitate the damage done to the Forest Preserve so far by the construction of said trails, including, but not limited to, the replanting of trees on said trails; R52-R53.

Thus, plaintiff sought to remedy both the excessive destruction of timber and the adverse effects on the wild forest nature of the land that resulted from the way in which the trails were constructed.

The Appellate Division granted the requested relief regarding the amount of tree cutting (Protect the Adirondacks v. NYS Dept. of Environmental Cons., 175 A.D.3d at \*4-\*5) but denied (*id.* at \*2) the requested relief enjoining the construction of Class II trails, "and other trails having similar characteristics ... [and] trails requiring construction techniques that are not consistent with the wild forest nature of the Forest Preserve, or trails that result in the creation of a man-made setting for the sport of snowmobiling." R52.

Plaintiff is aggrieved because, although it obtained the requested relief regarding the number of trees cut, unless the other holding of the Appellate Division is overturned, the Forest Preserve is still at risk of destruction, even if fewer trees may be cut. The building of wide, flattened, graded corridors, from which all woody vegetation is cleared, and which alter the forest ecosystem (Brief, Point II), for other Class II trails, or for similarly constructed trails to be used for other purposes, will result in a Forest Preserve that is no longer forever wild.

Article 14 protects the Forest Preserve from multiple threats. The Appellate Division granted Plaintiff's requested relief regarding one of them, the destruction of the timber. It did not grant the requested relief regarding the separate mandate that the Forest Preserve be "forever kept as wild forest lands". Therefore, plaintiff is aggrieved for purposes of CPLR § 5511.<sup>7</sup>

---

<sup>7</sup> Even if plaintiff is not an aggrieved party, it may still argue this issue before the Court of Appeals, in support of its response to the defendants' appeal, "because a reversal of that incidental determination would entitle [plaintiff] to prevail on this appeal". Parochial Bus Systems v. Board of Ed. of City of New York, 60 N.Y.2d at 546.

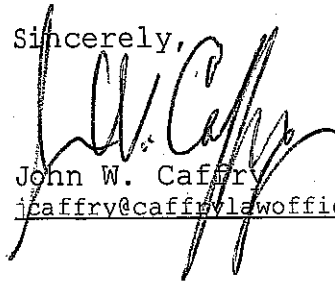
Hon. John P. Asiello  
Re: Protect the Adirondacks v. NYS  
Dept. of Environmental Cons.

7

September 12, 2019

Also enclosed are an affidavit of service on opposing counsel and the disclosure statement required by § 500.1(f) of the Court of Appeals Rules.

Sincerely,



John W. Caffry  
[jcaffry@caffrylawoffice.com](mailto:jcaffry@caffrylawoffice.com)

JWC/ljs  
enc.

cc: Jennifer L. Clark, Esq.  
Claudia K. Braymer, Esq.  
Client  
(w/enc.)

\\C\_F\_DATA\public\Client.Files\Protect.SnoMobs.2952\CourtOfAppeals.2019\Asiello.jurisdiction.let.wpd

**DISCLOSURE**

Pursuant to 22 NYCRR § 500.1(f), Protect the Adirondacks!  
Inc. states that it is a New York not-for-profit corporation with  
no parents, subsidiaries or affiliates.