No. APL-2019-0166

To Be Argued By: John W. Caffry
Time Requested: 15 Minutes

STATE OF NEW YORK
COURT OF APPEALS

PROTECT THE ADIRONDACKS! INC.,

Respondent-Appellant,

-against-

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION and ADIRONDACK PARK AGENCY,

Appellants-Respondents.

BRIEF OF RESPONDENT-APPELLANT

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Dated: September 22, 2020

Third Department No. 527256
Albany County Supreme Court
Index No. 2137-13

DISCLOSURE PURSUANT TO RULE 500.1(f)

Protect the Adirondacks! Inc. hereby states that it is a New York not-for-profit corporation with no parents, subsidiaries or affiliates.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGE**

NEW YORK STATE CONSTITUTION

NEW YORK STATUTES

MISCELLANEOUS AUTHORITIES

Constitutional Conventions

Reports to the Legislature

Other Authorities

QUESTIONS PRESENTED

1. Did the Appellate Division correctly hold that the Defendants' cutting of about 25,000 trees to build a system of snowmobile trails in the Adirondack Forest Preserve violated Article 14, § 1 of the State Constitution, which prohibits destroying the timber thereon?

2. Did the Appellate Division err when it held that the construction of those trails did not unconstitutionally impair the wild forest nature of the Forest Preserve, which Article 14, § 1 of the State Constitution requires "shall be forever kept as wild forest lands"?

INTRODUCTION

This Court recently observed that the "Adirondack Park is world-renowned treasure in our own backyard." Adirondack Wild v. NYS Adirondack Park Agency, 34 N.Y.3d 184, 187 (2019). This is due in large part to Article 14, § 1 of the New York State Constitution, commonly known as the forever wild clause, which has provided since 1894, in pertinent part, that the Forest Preserve lands in the Park:

> 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 Court must now decide whether the unprecedented actions of the Defendants[1] in cutting approximately 25,000 trees in the Adirondack Forest Preserve, and clearing more than 37 acres, in order to build the first 34 miles of a planned vast system of Class II Community Connector snowmobile trails, violated Article 14.

The Appellate Division correctly held that Defendants' cutting of the 25,000 trees violated Article 14's prohibition on the destruction of timber in the Forest Preserve, but erred when it held that the construction of the trails did not also unconstitutionally impair the wild forest nature of the land. Protect the Adirondacks v. Department of Environmental Conservation, 175 A.D.3d 24 (3d Dept. 2019) (R. 5011-5020).[2] Each side has appealed the part of the decision that was adverse to it, and this brief addresses both issues.

Defendants' Appeal Should Be Denied

In Association for the Protection of the Adirondacks v. MacDonald, 253 N.Y. 234 (1930) this Court articulated multiple criteria that State actions affecting the Forest Preserve must

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[1] Defendants-Appellants-Respondents Department of Environmental Conservation and Adirondack Park Agency (hereinafter "Defendants").

[2] References to pages of the Record on Appeal are preceded by "R.".

meet to pass constitutional muster. Point III, infra. The Appellate Division, applying one of the two such standards that is at issue herein, properly found that the amount of tree cutting for the Class II Community Connector snowmobile trails ("Class II trails") was unconstitutional because it destroyed a "substantial" amount of timber, to a "material degree". R. 5018. In so doing, it accepted the factual findings of the trial court that the Plaintiff's[3] expert witness's counts of the number of trees cut, or approved to be cut, were credible (R. xiv), and determined that approximately 25,000 trees would be destroyed by the construction of the trails at issue. Point I, infra.

The Appellate Division also agreed with the factual findings of the trial court (R. xiii), supported by the testimony of Plaintiff's expert historian, that the framers of Article 14 intended for the word "timber" in Article 14 to refer to trees of all sizes. R. 5017. Point II, infra. When it included trees under 3" DBH[4] in its analysis, the court also relied on the testimony of scientists as to the ecological values of smaller trees. R. 5017-5018. Point II, infra.

These affirmed factual findings are not reviewable by this

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[3] Plaintiff-Respondent-Appellant Protect the Adirondacks! Inc. (hereinafter "Plaintiff").

[4] "DBH" (diameter at breast height) is a standard measurement used by foresters and ecologists to report the size of trees. R. 3365.

Court. See CPLR § 5501(b); Points I.B.1, II.A, infra. Nevertheless, Defendants' appeal relies largely on the baseless theory that trees under 3" DBH are not protected by the Constitution. The plain language of Article 14, the undisputed historical testimony that was relied upon by both lower courts, the testimony of the scientists, and the judicial precedents, all confirm that such smaller trees are included within the "timber" on the Forest Preserve which may not be destroyed. Points II.B-II.D, infra.

Even if the Court were to ignore the destruction of about 18,000 smaller trees, as urged by Defendants, it is undisputed that at least 6,184 trees over 3" DBH will be destroyed. The Record shows that the actual count is 6,899 trees of that size. This level of destruction, being well over the 2,500 trees at issue in Association v. MacDonald, is "material" and "substantial", so Defendants' appeal is meritless. Point II.E, infra.

Because earlier legislative efforts had proven to be inadequate to protect the Forest Preserve from the depredations of loggers and their enablers in the Executive branch, the framers of Article 14 created a multi-layered defense for these forests, including that: (1) the land had to remain as wild forest land; (2) title could not be conveyed in any way; and (3) the trees themselves were to be protected from destruction by

logging or any other means. As both the trial court (R. viii) and the Appellate Division (R. 5012-5013) held, these requirements operate separately from each other to protect the Forest Preserve. Point III, infra.

However, Defendants argue that these separate prohibitions should be conflated, so that an almost unlimited amount of trees could be destroyed, so long as the forest arguably remained wild. This argument ignores the plain language and history of the Constitution, and its prior interpretation by the courts. The Constitution's requirement that the Forest Preserve's land be kept forever wild, and its prohibition on the destruction of the timber, are separate restrictions on the actions of the Defendants, and any activity on the Forest Preserve must comply with both of them. Point III, infra.

The Constitution also limits the purposes for which Forest Preserve trees may be cut, and Defendants rely heavily on the purported public recreational and accessibility benefits of these trails to justify their actions. However, the Constitution forbids cutting Forest Preserve "trees to any substantial extent for any purpose." Association v. MacDonald, 253 N.Y. at 242. In any event, that issue is not before this Court. Points III.C-D, infra.

Plaintiff's Cross-Appeal Should Be Granted

The Appellate Division's finding, on the other applicable Article 14 requirement, that the Class II trails' construction did not unconstitutionally impair the wild forest nature of the Forest Preserve should be reversed. These trails are wide, unnaturally flat, heavily excavated, and replete with man-made structures. The Appellate Division's finding that they did not violate the Constitution is not supported by the Record, which shows that the manner of their construction and their environmental impacts have impaired the Forest Preserve and not preserved the land in its wild state. Point V, infra. Plaintiff's cross-appeal should be granted.

It should also be granted because, in deciding the merits of this issue, that court relied upon Defendants' internal policy documents, in violation of the parties' trial stipulation that those documents were not admitted as evidence on the constitutional question. Point IV, infra.

The lower courts' use of a standard of "impairment" of the wild forest is not founded upon the record of the Constitutional Convention and has no precedent in the case law. The Appellate Division also erred as a matter of law when, in finding that the trails were not like roads, it relied upon the trial court's treatment of Defendants' witness's personal opinions about the characteristics of roads as expert testimony. Point V, infra.

This is potentially the most consequential Article 14 case to come before the courts in 90 years. In deciding it, the courts owe no deference to the opinions of the Defendants, particularly given the unique nature of Article 14. Point VI, infra.

THE JURISDICTION OF THE COURT

Plaintiff commenced this action on April 13, 2013 with the consent of the Appellate Division pursuant to State Constitution Article 14, § 5. R. 9. The first cause of action sought to restrain Defendants New York State Department of Environmental Conservation ("DEC") and Adirondack Park Agency ("APA") from violating Constitution Article 14, § 1 by destroying tens of thousands of trees in the Forest Preserve, creating a man-made setting, and interfering with the wild forest nature of the Forest Preserve, by the construction of a planned system of hundreds of miles of Class II trails. R. 14, 34.

A trial was held before Acting Justice Gerald W. Connolly over 13 days, from March 1 to April 4, 2017. Justice Connolly issued his Decision and Order denying the first cause of action on December 1, 2017. R. xxxi.

Plaintiff then appealed to the Appellate Division, Third Department. On July 3, 2019 that court reversed the trial court and properly concluded that "the construction of the Class II

trails resulted in, or would result in, an unconstitutional destruction of timber in the Forest Preserve." R. 5018. However, it erroneously upheld the trial court's ruling that the construction of these trails did not unconstitutionally impair the wild forest qualities of the Forest Preserve. R. 5015.

In August 2019 Defendants filed and served a notice of appeal (R. 5006) and Plaintiff filed and served a notice of cross-appeal (R. 5009). This Court has jurisdiction over those appeals because they are both taken from an order of the Appellate Division which finally determined an action that directly involves the construction of Article 14 of the State Constitution. CPLR § 5601(b)(1). The Court has conducted a jurisdictional inquiry, which it terminated on January 8, 2020.

STATEMENT OF THE FACTS

The Parties

Plaintiff is a New York not-for-profit, tax-exempt corporation. R. 15-16, 3955. It is the successor organization to the plaintiff in Association for the Protection of the Adirondacks v. MacDonald, 253 N.Y. 230, 234 (1930). R. 16, 3957. It is dedicated to ensuring that the forever wild clause of Article 14 of the Constitution is preserved, and to protecting the Forest Preserve and ensuring that it is managed strictly according to the Constitution. R. 16. Defendants DEC and APA

are Executive branch agencies of the State of New York.[5] R. 18.

The Protection of the Adirondack Forest Preserve

The constitutional protection of the Forest Preserve arose from the Constitutional Convention of 1894. Delegate David McClure, of the New York Board of Trade and Transportation, expounded that "[t]he State owns a vast expanse of forest, part of what is known as the Adirondack region ... [that] is vastly more valuable to the people of the State in its present condition than it can be by any change". R. 587. "What is the value of these woods and why should we try to preserve them intact? First of all, because they are woods". R. 589. "The lands are fit for none other than public and general uses. And what are these? First, as a great resort for the people of the State". R. 589. "For man and for woman thoroughly tired out, desiring peace and quiet, these woods are inestimable in value". R. 590. See also R. 581-614, 3220-3233.

Prior thereto, as explained by Plaintiff's expert historian Dr. Philip Terrie,[6] in 1885 "New York state was concerned about the quality of the forests," so it commissioned a report on the

[5] DEC is the successor to the Conservation Department, which was headed by Mr. MacDonald at the time of the 1930 case. See id.

[6] Dr. Terrie is a renowned Adirondack scholar who has studied, taught, and written about Article 14 and its history for over 40 years. R. 566-574, 3176-3192. See Adirondack Wild v. APA, 34 N.Y.3d 184, 197, fn 1 (2019)(dissent citing Terrie).

status of its forest lands. R. 3194-3195. The report, which came to be known as the "Sargent Report", recommended to the Legislature, inter alia, that a forest preserve be created in the Adirondacks and that it "be forever kept as wild forest lands." R. 3194-3195; Report of the Forestry Commission, Assembly Documents of 1885, No. 36, at 39.

That same year, due to the "[w]idespread belief that commercial logging was destroying the Adirondacks and all its values" (R. 3194-3195, 3201), and the findings of the Sargent Report, the Legislature enacted Chapter 183 of the Laws of 1885, which first created the Forest Preserve. R. 3195, 3201-3202. See also Adirondack Wild v. APA, 34 N.Y.3d at 205 (dissent discussing genesis of Forest Preserve). The new law provided:

> The lands now or hereafter constituting the forest preserve shall be forever kept as wild forest lands. They shall not be sold, nor shall they be leased or taken by any person or corporation, public or private. Laws of 1885, Chapter 283, § 8.

However, the Forest Preserve's timber was not protected by that law, which did not prohibit the State from selling it. R. 583-584, 3195, 3202. Subsequently enacted statutes continued to allow its sale. See Laws of 1887, Chapter 475; Laws of 1892, Chapter 707; Laws of 1893, Chapter 332.

Following its creation, the Forest Preserve was controlled by the State's Forest Commission, a predecessor to Defendant DEC. R. 587, 595, 3201, 3203. During that period there was widespread

concern in the state about mismanagement and corruption, including collusion by that Commission with loggers who were operating on the Forest Preserve. R. 3203, 3209-3212.

Accordingly, at the Constitutional Convention of 1894, the Chairman of the Convention appointed Mr. McClure to head a Committee on Forest Preserves to address this issue. R. 582-584, 3211-3212. The resulting report recommended that an amendment "to the Constitution should be adopted for the preservation of the State forests", such that the State-owned forest lands and the timber thereon "should be preserved intact as forest preserves, and not under any circumstances be sold." R. 3212-3213, 3218, 3264-3276, 4880-4883. The proposal built upon Chapter 283, and included specific additional protections for the Forest Preserve's trees:

> The lands of the State now owned, or hereafter acquired, constituting the forest preserves, shall be forever kept as wild forest lands. They shall not, nor shall the timber thereon, be sold. R. 582, 4882.

When the report was presented to the Convention, the proposal was revised by McClure to state:

> The lands of the State, now owned, or hereafter acquired, constituting the forest preserves, as now fixed by law, shall be forever kept as wild forest lands; they shall not be sold, or exchanged, or be taken by any corporation, public or private, nor shall the timber thereon be sold. R 582.

While most suggested revisions to the proposal were rejected during the Convention's debates, a prohibition on leasing the land was added. R. 616.

Crucially, it was also successfully amended to prevent the Forest Preserve's timber from being "removed or destroyed" (R. 616, 3228-3229), additional protections that were not in the 1885 law (R. 3224) or in the original 1894 proposal. The independent restriction on the destruction of trees was intended to prevent the killing of trees by causes such as flooding from dam projects. R. 599-600, 615-616, 618-619, 3228-3229.

The Convention delegates identified several important reasons for supporting the proposal, including protecting the intrinsic values of the trees, timber, and woods of the Adirondacks, preserving the benefits of the Adirondacks as a health, recreational, and spiritual retreat, protecting the watersheds of the rivers on which the state's commerce depended, and preserving the wilderness intact. R. 588-597, 600-614, 3224-3231, 4821.

Some spoke at length about the need to strictly protect the Forest Preserve:

> First of all, we should not permit the sale of one acre of land. ... We should not sell a tree or a branch of one. R. 597.
>
> I trust, sir ... that we shall do all we can to preserve what is left of our great natural reservoirs as nearly as possible as they were designated and constructed by the Almighty, for the benefit of the generations yet unborn that

are to inhabit these peaceful shores... . R. 607.

> No one man, sir, objects to the simple proposition that the wild lands owned by the State, or hereafter owned by it, must be preserved... . R. 607. (emphasis added)

The delegates shared the widespread concern about the State's mismanagement and did not trust it to properly protect the land and the timber. R. 596-597, 600-602, 613-616, 3229-3230, 3232-3234. They intended to prevent any further mismanagement:

> The moment you put in any provision that anybody can cut timber there, then you destroy the effect of the whole amendment. R. 610.

> I say, sir, it is necessary to close the door unless you want this great water supply, this great sanitarium, this great health resort of our State that is known from ocean to ocean, and from land to land, destroyed, that you must shut the door, and you must close it tight, and close it right away... we here, now and to-day, should do something to protect that great and magnificent forest from further spoilation. R. 613-614. (emphasis added)

The proposal, as amended, was approved by the only unanimous vote of the Convention. R. 618-621, 3231. The new Constitution was approved by the People of the State in November 1894, and took effect on January 1, 1895.[7] R. 3231-3232. As a result, only the People have the power to approve significant alterations to the Forest Preserve.[8] See Constitution, Art. 19, §§ 1-3; R.

[7] The Forest Preserve provision was originally numbered as Article 7, § 7, and was renumbered as Article 14, § 1 in the Constitution of 1938. R. 3178.

[8] See Association v. MacDonald, 253 N.Y. at 240 (describing amendments to Article 14 approved by the voters in 1918 and 1927). The various amendments that have been approved since 1938

3232-3233. Article 14 cannot be altered by the Legislature (R. 3232-3233) or the Executive branch. Id. One and one-quarter centuries after they took effect, the first 54 words of the article adopted in 1894 remain unchanged in the current Constitution. R. 3264.

The Current Management of the Adirondack Forest Preserve

The Adirondack Forest Preserve now includes approximately 2.5 million acres.[9] R. 4159. The Defendants are the agencies which are now responsible for managing it on behalf of the People of the State, subject to the strictures of Article 14, § 1. See Environmental Conservation Law ("ECL") § 9-0105; Executive Law § 816.

Defendants have adopted various internal plans, policies and memoranda to guide their Forest Preserve management efforts, which include policies on cutting trees (R. 1271), snowmobile trail construction (R. 1253), and road construction (R. 854). However, as the parties stipulated at trial (R. 4120-4121, 4223-4224), these documents were not admitted on the issue of the constitutionality of the Class II trails. Point IV, infra.

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are enumerated in § 1 itself.

[9] The Forest Preserve was, and still is, defined as the lands owned by the State within 12 counties in the Adirondacks and 4 counties in the Catskills, with limited exceptions. See ECL § 9-0101.

The Defendants' Planning of the Class II Snowmobile Trail System

In 2006 DEC approved the Final Snowmobile Plan for the Adirondack Park/Final Generic Environmental Impact Statement ("2006 Snowmobile Plan"). R. 881-1252. It recommended creating a system of two dozen new "community connector" snowmobile trails, extending for hundreds of miles in the Adirondack Park, much of which would be located on the Forest Preserve. R. 26-31, 71, 888-889, 922, 928-952, 1219, 3290-3324, 4067-4071, 4675.

In 2009, DEC and APA adopted the "Management Guidance" for "Snowmobile Trail Siting, Construction and Maintenance on Forest Preserve Lands in the Adirondack Park" ("2009 Guidance"). See generally Adirondack Council v. APA, 92 A.D.3d 188, 191-192 (3d Dept. 2012)(holding that the 2009 Guidance is non-binding). R. 1254-1270. It was intended to "provide guidance to DEC and APA staff in the planning and management of snowmobile trails on Forest Preserve lands in the Adirondack Park" (R. 1253), and to implement the vast system of community connector trails proposed in the 2006 Snowmobile Plan. R. 1255-1257.

The 2009 Guidance created a new category of snowmobile trails on the Forest Preserve known as Class II trails, which are the trails at issue herein. R. 1255-1256. Under the 2009 Guidance, the Class II trails will be 9 feet wide, and 12 feet wide on some curves and slopes. R. 1263. It also provides for the removal of trees, brush, rocks, stumps, ledges and other

natural features, the grading and leveling of the trails, and the cutting of side slopes by means of "bench cuts" on the Class II trails. R. 1263-1267. These planning documents are subject to the parties' stipulation at trial which bars them from being considered on the merits of this case. Point IV, infra.

The Defendants' Destruction of Trees to Build the Class II Snowmobile Trail System

In 2013, DEC began the construction of the new Class II trail system with the 11.9-mile long Seventh Lake Mountain Trail. R. 681. Since then it has constructed eight such trails, with a combined length of 34.06 miles, resulting in the clearing of about 37 acres of Forest Preserve land. R. 681, 3462, 4842-4843. About 25,000 trees have been destroyed or approved by Defendants to be destroyed.[10] R. 681, 4842-4843. About 6,899 of these trees measured 3" DBH or more. R. 544, 681, 4832-4841; see R. xi-xii. Approximately 18,000 additional trees under 3" DBH were, or will be, destroyed.[11] R. 544, 681, 3462, 4839. Tables showing how these totals were compiled are set forth at R. 681 and 4840-4844.

[10] A pre-trial injunction issued by the Appellate Division (R. 477) halted work on the Newcomb to Minerva trail, so that construction of about five miles of it is not yet complete, and about 6,400 trees still stand in the path of the planned route. R. 681, 3388-3389. These as-yet-uncut trees were counted and are included in the total of about 25,000. R. 681, 4841.

[11] The trial court did not calculate the actual number of trees under 3" DBH that would be destroyed. R. xi-xii.

At the outset of the trial, the parties stipulated in Court Exhibit 1 that "[f]actual assertions regarding the following trails as provided below are not subject to objection by the parties." R. 544. The exhibit contained a table showing that 6,184 trees of 3" DBH or more had been approved to be cut on some, but not all, of the trails at issue, as counted by DEC in its planning process. R. 544, 3156. Nothing in the wording of this stipulation indicates that it was intended to be the definitive count of all destroyed trees or that evidence of additional tree cutting would be excluded.

Plaintiff's expert forestry witness Stephen Signell testified that he had counted the trees on the marked route of the as-yet-uncut segment of the Newcomb to Minerva Trail. This trail was included in the stipulation, but not all of the trees in its path had been counted by DEC, so they were not in the stipulation. Where the trees to be cut were not individually marked by paint marks, Mr. Signell used a measured dowel rod to approximate the minimum 9' width of the trail, and counted 715 trees of 3" DBH or more. R. 3392-3394. This brought the total number of such trees to 6,899.

Because Court Exhibit 1 did not cover smaller trees, Mr. Signell also testified about the almost 18,000 individually counted trees under 3" DBH that had been cut, or were planned to be cut. R. 544, 681, 3462, 4839-4844. On the first two trails

he counted all of the cut tree stems of one-quarter inch or more, which had several observable annual growth rings. R. 3384-3385, 3393-3394. When this became impractical he changed the protocol for the remaining trails to count only trees of 1" diameter or more, based on a U.S. Forest Service research protocol. R. 3406-3409. Thus, Plaintiff's tree counts were generally limited to trees 1" in diameter and above. The Record on Appeal in Balsam Lake Anglers Club v. DEC, 199 A.D.2d 852 (3d Dept. 1993) shows that a similar protocol was used by DEC in that case. R. 4908-4923.

Over Defendants' objections (R. 3337-3346, 3683-3691), a table prepared by Mr. Signell that summarized the tree destruction counts, based on both his fieldwork and the parties' stipulation, was admitted into evidence as Exhibit 80.[12] R. 681, 3339, 3691. In its decision the trial court credited both this expert's counting methodology and his tree counts, including the counts of trees under 3" DBH. R. xiv.

These figures actually significantly undercounted the number of trees cut. First, Mr. Signell only included trees within the minimum width, rather than the maximum width, of the trails that had not yet been cut. R. 3393-3394. Second, because DEC's

[12] Exhibit 80 did not include four of the smaller trails that were included in the stipulation. However, the trees and trail miles for those trails are included in the totals of about 25,000 trees and 34.06 miles of trail set forth above. R. 681, 4840-4844.

grading of other trails removed a lot of the stumps of trees that were already cut, they could not be counted. R. 3446-3447, 3459-3460. Also, the counts could not address the fact that the after-effects of trail construction, such as damage to tree roots, would cause the eventual destruction of many more trees that were not directly destroyed by DEC. R. 3580-3585, 3655, 3728, 3741-3742.

Court Exhibit 1 also listed the mileage of the trails that were included therein, which totaled 32.11 miles. R. 544. Defendants' June 10, 2020 brief (hereinafter "Brief")(*e.g.* pp. 28, 37) repeatedly claims that there are only 27 miles of trail listed in the stipulation at R. 544, apparently based on paragraph 10 thereof, which gives that number. R. 543. The source of this error could not be identified at trial. See R. 4122-4126, 4136-4138. However, applying the immutable laws of mathematics to add up the trail miles in the stipulation's table (R. 544) yields a total of 32.11 miles.

When the additional 1.95 miles of the uncut segment of the Newcomb to Minerva Trail (R. 544, 681, 3348, 3388, 3391-3396, 3690-3691) are included, the total mileage is 34.06. R. 3463. The trial court did not make a finding as to the exact number of miles of trail involved, and the Appellate Division only stated that it was "more than 27 miles" (R. 5012), but the Record shows that the correct number is 34.06 miles.

The Defendants' Damage to the Wild Forest Nature of the Forest Preserve

In addition to cutting thousands of trees, the construction of the Class II trails required intensive recontouring of the land into wide, straight, flat, road-like corridors, with heavy-duty bridges and traffic signs. The testimony showed that these trails are unlike typical foot trails.

Where bench cuts are made to reduce the side slope of the trails, their sides are "tapered", so that the trails' width is greater than 12 feet, requiring the cutting of more trees and the clearing of more land. R. 4363-4365. Thus, in many locations, the area cleared for these trails is up to 20' wide, much wider than recommended by the 2009 Guidance. R. 700-703, 710, 715, 3525-3526, 3544, 3618, 3923-3924, 4765. This is comparable to the width of the clearing that would have been required for the proposed bobsleigh run and its return route that were at issue in Association v. MacDonald, 253 N.Y. at 236, being about 16 to 20 feet wide over a total length of about 2.5 miles, affecting about 4.5 acres.

The construction of the Class II trails also required extensive grading, leveling (including the removal of hummocks, rocks and stumps), and flattening of the trail surface with 9,000 pound excavators and other tools "to an extent where there were no longer rocks and logs and other structures that were in the

surface of the trail bed or footbed or roadbed" R. 3544; see R. 770-777, 816-818, 3368, 3405, 3926-3928, 3965-3966, 3973, 3976, 3978-3997, 4260, 4268, 4337-4338, 4578-4580, 4748, 4753.

This construction required cutting flat benches up to 75 feet long into hillsides. R. 2512-2513, 3520, 3526, 3539-3544, 3938, 3977-3983, 4341-4343. Steep slopes were cut and filled, and soil erosion problems were created. R. 700-703, 706, 759, 771-773, 3606-3643. The erosion of soil into streams caused adverse impacts to the aquatic environment of the Forest Preserve. R. 715-724, 3540-3542.

Moreover, Class II trail construction involved building numerous unnatural structures on the Forest Preserve, including massive 12-foot-wide bridges that are capable of carrying automobiles (R. 704-705, 761, 774, 2514-2516, 3535-3536, 3641, 3937, 3941-3942, 3985), signs that look like street signs (R. 850-853, 4038-4041), and numerous erosion control structures in and along the trails (R. 706, 715-724, 3541-3542, 3614-3641).

These man-made structures and human disturbances destroyed trees on and alongside the trail, increased the risks from invasive species, adversely affected populations of native species, and altered the existing natural ecosystem. R. 684-692, 725-727, 818, 823-824, 830, 836, 839-840, 3530-3548, 3574-3585, 3591-3608, 3642, 3648-3649, 3654, 3665, 3739-3741, 3776, 4547-4558.

The Class II trails have the characteristics of roads and their adverse impacts on the Forest Preserve are comparable to the impacts of new roads. R. 700-705, 761, 774, 822, 3519-3522, 3527-3537, 3546-3547. They were constructed very differently from foot trails, which are much narrower, do not require significant contouring, and cause only minimal amounts of tree cutting. R. 3905-3944, 4851-4852.

The trails at issue herein are part of the planned vast system of trails first identified in the 2006 Snowmobile Plan. Defendants admitted this in their Answer (R. 27-28, 71, 3288-3290, 4827-4828) and in their testimony (R. 3291-3324, 4069-4071, 4675, 4828-4830). However, pursuant to its earlier decisions (R. 354, 492), the trial court limited the proof at trial to Class II trails that had been planned or approved as of October 15, 2014, so no testimony was heard regarding the hundreds of miles of additional trails that are part of that planned system. R. v, 5012-5013.[13]

[13] The facts are more fully set forth in Plaintiff's post-trial Proposed Findings of Fact. R. 4811-4878.

ARGUMENT

POINT I

DEFENDANTS' APPEAL SHOULD BE DENIED BECAUSE THEY VIOLATED THE CONSTITUTION BY DESTROYING A SUBSTANTIAL NUMBER OF TREES IN THE FOREST PRESERVE

Article 14, § 1 "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 (hereinafter "NYSBA Report").[14]

The Appellate Division correctly held that cutting approximately 25,000 trees would be a "substantial" destruction of timber, to a "material degree", so that "the construction of the Class II trails resulted in, or would result in, an unconstitutional destruction of timber in the Forest Preserve." R. 5018. This level of destruction by the agencies of the State that are responsible for protecting the People's Forest Preserve is unprecedented.

Despite the fact that the count of approximately 25,000 trees is a non-reviewable finding of fact by the lower courts, the Defendants ask the Court to look only at the 6,184 trees which they concede were cut, or marked to be cut. Their reasons

[14] Available at https://nysba.org/app/uploads/2020/02/Article-XIV-final.pdf (last accessed on September 21, 2020).

for ignoring the other 18,000 +/- trees are unsupported by either the law or the Record. Regardless, even destroying 6,184 trees is unconstitutional.

A. The Courts Have Strictly Limited the Number Of Trees That Can Be Cut on the Forest Preserve

Although "[t]here is a dearth of appellate court precedent concerning N.Y. Constitution, article XIV, § 1" (R. 5016), those precedents that do exist strongly support the Appellate Division's decision. It was the intention of the delegates to the 1894 Constitutional Convention to prevent the Adirondack forests from being destroyed. See pp. 9-13, supra. Four years after Article 14 took effect, this Court held that the "primary object of the [Adirondack] park, which was created as a forest preserve, was to save the trees ...". People v. Adirondack Railway Co., 160 N.Y. 225, 248 (1899).

In the seminal case of Association for the Protection of the Adirondacks v. MacDonald, 253 N.Y. 234 (1930), the State wanted to construct on the Forest Preserve a bobsleigh run for the 1932 Winter Olympics that were to be held in Lake Placid. Id. at 236. It was "estimated that the construction will necessitate the removal of trees from about four and one-half acres of land, or a total number of trees, large and small, estimated at 2,500." Id. The Court held that on the Forest Preserve "any cutting or any removal of the trees and timber to a substantial extent", or "to

any material degree", was prohibited. Id. at 238. The proposed cutting of 2,500 trees for the bobsleigh run failed that test and its construction was enjoined. Id. at 242.

Although the Court held that then-Article 7, § 7 must be given a reasonable interpretation (id. at 238), a mere three years later it emphasized that "the courts have adhered to a strict and literal construction of the entire section" of the Constitution. Kenwell v. Lee, 261 N.Y. 113, 116-117 (1933); see also R. 5015; Helms v. Reid, 90 M.2d 583, 593 (Sup. Ct., Hamilton Co. 1977).

Six decades later, in Balsam Lake Anglers Club v. DEC, 199 A.D.2d 852 (3d Dept. 1993), DEC had begun building 2.3 miles of cross-country ski trails and five new parking areas on the Catskill Forest Preserve, and it had cut about 350 trees of 1" diameter or more, as of the time of the lawsuit. Id. at 853-854; R. 4826-4827, 4908-4923. The Third Department held that "[t]hese proposed uses appear compatible with the use of forest preserve land, and the amount of cutting necessary is not constitutionally prohibited". Id. at 854.

This Court did not define in Association v. MacDonald the terms "substantial" or "material degree" (253 N.Y. at 234). However, the Merriam-Webster (www.merriam-webster.com) dictionary definition of "substantial" includes "large in amount, size, or number", "considerable in quantity", and "significantly great".

"Material" is defined as "having real importance or great consequences". Id. Dictionary.com (www.dictionary.com) defines "substantial" as "of ample or considerable amount, quantity, size, etc.", and "material" as "of substantial import; of much consequence; important".

This Court also did not set in Association v. MacDonald the lower threshold for what "substantial" or "material" levels of timber destruction would be. 253 N.Y. at 242. Subsequently, in Balsam Lake Anglers Club v. DEC, 199 A.D.2d at 853, cutting 350 trees of 1" diameter or more was found to be constitutional. Thus, there is a range, between about 350 trees to 2,500 trees, for which the prior reported decisions do not provide precise standards for this Court to apply.

However, the level of timber destruction required for the Class II trails is greatly above either of those levels, leaving no doubt that the number of trees cut, and approved to be cut, for these trails is substantial and material, and therefore unconstitutional.

B. The Destruction of 25,000 Trees Is Not Permitted By the Constitution

Construction of the eight trails at issue herein will result in the destruction of about 25,000 trees on the Forest Preserve and the clearing of 37.1 acres of land. R. 681, 4842-4843. Moreover, this was an undercount of the total number of trees

destroyed by DEC. See pp. 18-19, supra. Furthermore, Defendants have admitted that DEC intends to construct an entire system of such Class II trails. See pp. 15, 22, supra. Thus, the destruction of timber caused by the construction of the Class II trails (R. 544, 681, 4840-4843) will greatly exceed the 2,500 trees which Association v. MacDonald found to be too many to pass constitutional muster.

The level of cutting herein is also much greater than was found to be allowable by Balsam Lake Anglers Club v. DEC, 199 A.D.2d at 853-854. There, the 350 cut trees of 1" diameter or more amounted to approximately 152 per mile. R. 4841-4844, 4909-4922. This average is vastly exceeded by the 743 trees of that size per mile that have been, and would be, cut for the Class II trails herein. R. 681, 4839-4844.

Also in Balsam Lake, only 78 trees of 3" or more in diameter at stump height were cut, which was approximately 34 per mile. R. 4909-4922. This average is vastly exceeded by the 203 trees of that size per mile that have been, and would be, cut for the Class II trails herein. R. 681, 4833, 4841-4844.

Looking at the data in this case on a trail-by-trail basis also shows that the number of trees cut for the Class II trails is far greater than the number permitted by the Balsam Lake decision, and, for the longer trails, is greater than, or at least close to, the number that was proscribed by Association v.

MacDonald. The total of 14,452 trees cut, and to be cut, for the Newcomb to Minerva Trail and the 7,201 trees cut for the Seventh Lake Mountain Trail (R. 681), would each greatly exceed 2,500 trees, the cutting of which was proscribed by Association v. MacDonald for being "substantial" and "material".

The 1,972 trees cut for the Wilmington (Cooper Kill) Trail (R. 681) are almost as many as were to be cut in Association v. MacDonald, and well more than five times as many as were cut in Balsam Lake Anglers Club. Standing alone, even without any comparison to these prior decisions, this number of trees is "large in amount, size, or number", "considerable in quantity", and "of ample or considerable amount, quantity, size, etc.", such that it is "substantial". Merriam-Webster.com, supra; Dictionary.com, supra.

Although the Class II trails are being constructed in phases, this Court should consider the entire system of Class II trails as a whole, and not piecemeal. See Association for the Protection of the Adirondacks v. MacDonald, 228 A.D. 73, 76 (3d Dept. 1930)(considering total of all trees to be cut for both the bobsleigh run and the return road); Balsam Lake Anglers Club v. DEC, 199 A.D.2d at 853-854 (considering total of all trees to be cut for all planned elements of the unit management plan for which locations had been chosen); see also p. 25, supra. Thus, the Class II trail system is unconstitutional as a matter of law.

1. The Parties' Trial Stipulation Was Not Intended to Be the Complete Count of Trees Destroyed and Trail Miles Constructed, And the Appellate Division's Factual Finding That the Count Was About 25,000 Is Not Reviewable

The Defendants' Brief repeatedly attempts to limit the number of trees at issue herein to the 6,184 trees that were listed in the stipulation at R. 544. However, as shown above at pp. 17-19, that trial stipulation was not intended to be the sole source of data on the number of trees cut, or to be cut, for the trails at issue. The trial testimony of Plaintiff's expert Stephen Signell proved that an additional 715 trees of 3" DBH or larger were planned to be cut, and that about 18,000 trees under 3" DBH had been cut or approved to be cut. See pp. 16-19, supra.

Although the trial court did not tally the total number of trees, it held that it "generally accepts the tree counts (which included trees of less than 3" dbh) proffered by the plaintiff", and also credited the testimony "with regard to the counting methods utilized". R. xiv. Based on that, the Appellate Division did tally the total number of trees and found that "[a]ccepting those factual findings [of the trial court], approximately 25,000 trees either had been or would be cut to construct the trails." R. 5017-5018. This finding of fact is not reviewable by this Court, and Defendants' attempt to slash the tree count by over 75% by ignoring the trial testimony must fail. See CPLR § 5501(b).

2. The Level of Timber Destruction Is Unprecedented

The sheer number of trees cut for the Class II trails is unprecedented, far greater than any level of cutting previously addressed by the courts, such as in Balsam Lake Anglers Club, and much higher than the numbers of trees typically cut by DEC for new trails and other facilities. For example, the trial testimony showed that creating the 1.25-mile Goodman Mountain hiking trail circa 2014 required cutting just 64 trees, and the circa 2016 rerouting of a mile-long section of the Coney Mountain hiking trail cut only 13 trees. R. 636, 682-683, 3694-3697, 3704-3707, 4010-4012. Plaintiff's expert Mr. Signell testified that this amount of tree cutting was "vastly fewer than on the snowmobile connector trails by an order of magnitude or more", meaning at least "ten times less". R. 3707-3708.

These two trails, and their tree cutting numbers, are typical of trail construction on the Forest Preserve when DEC seeks to improve recreational access, such as by building public foot trails. See R. 745-752, 3913-3916, 3922-3923, 3927-3933, 3938-3941 (testimony and exhibits of Plaintiff's trail building expert William Amadon (see R. xix-xx)).

Additional examples of typical levels of tree cutting by DEC are found in its online Environmental Notice Bulletin ("ENB").[15]

[15] The ENB is published online weekly pursuant to Environmental Conservation Law § 3-0306(4) at www.dec.ny.gov/enb/enb.html (last accessed on September 21, 2020).

Whenever DEC is planning to cut trees in the Forest Preserve, it publishes public notice thereof online in the ENB. A sampling of these notices shows that DEC's management actions on the Forest Preserve typically only require cutting anywhere from a few trees to several dozen, e.g.:[16]

- Region 5 ENB notice for 6/26/2013 - 146 trees cut for campground renovations;
- Region 5 ENB notice for 8/7/2013 - 95 trees cut for parking area for foot trail;
- Region 5 ENB notice for 10/28/2015 - 26 trees cut for hiking trail re-route and parking area;
- Region 5 ENB notice for 11/18/2015 - 50 trees cut for re-route of 653 feet of Class II snowmobile trail;
- Region 5 ENB notice for 9/27/2017 - 108 trees cut for hiking trail re-route;
- Region 6 ENB notice for 11/15/3027 - 33 trees cut for road rehabilitation;
- Region 5 ENB notice for 6/7/2017 - 98 trees cut for parking area;
- Region 6 ENB notice for 4/11/2018 - 174 trees cut for campground renovations;
- Region 5 ENB notice for 5/23/2018 - 11 trees cut for mountain bike trails; and
- Region 5 ENB notice for 11/7/2018 - 19 trees cut for snowmobile trail re-route.

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[16] The Court may take judicial notice of these public notices because they contain data from public records. Affronti v. Crosson, 95 N.Y.2d 713, 718, 719-720 (2001) (data from the State Statistical Yearbook); People v. Sowle, 68 M.2d 569, 571-572 (County Ct., Fulton Co. 1971) (public records). "Even material derived from official government websites may be the subject of judicial notice." Kingsbrook Jewish Medical Center v. Allstate Insurance Co., 61 A.D.3d 13, 20-21 (2d Dept. 2009)(U.S. government diagnosis and procedure codes key); Munaron v. Munaron, 21 M.3d 295, 296-297 (Sup. Ct., Westchester Co. 2008)(corporate information from Department of State website).

Similar ENB notices for the Class II trails are in the Record at R. 2231, 2270, 3019-3022.

It would also be possible for DEC to provide snowmobile trails for the public without cutting any trees, by designating old roads for that purpose. See Adirondack Wild v. NYS Adirondack Park Agency, 34 N.Y.3d 184, 187 (2019).[17]

Comparatively, destroying tens of thousands of trees, or even just the 6,184 large trees that Defendants admit to destroying, for the Class II trails is "material" and "substantial". Association v. MacDonald, 253 N.Y. at 238.

Collectively, and individually, the construction of the Class II trails is "forbidden by the Constitution". Association v. MacDonald, 253 N.Y. at 241, 242. The ruling by the Appellate Division should be upheld. Pursuant to Article 14, § 5, the Defendants should be enjoined from further construction of Class II trails and ordered to rehabilitate the damage that they did to the Forest Preserve.

POINT II

UNDER ARTICLE 14 ALL TREES ARE "TIMBER"

For purposes of Article 14, all trees on the Forest Preserve, regardless of their size, are considered to be "timber", the destruction of which is prohibited. Defendants

[17] Such trails could also be created if a constitutional amendment were to be approved by the Legislature and the People, similar to what has been done for highways and alpine ski areas in the past. See Article 14, § 1; p. 13, supra.

dispute this fact and argue that only trees over 3" DBH are protected by Article 14. The trial court made a finding of fact that trees under that size are included, which was affirmed by the Appellate Division, so this Court has no jurisdiction to review it.

If the Court does review this issue, the Record shows that the intent of the framers of Article 14 was to protect trees of all sizes, and not just so-called "merchantable timber". Even if the Court does find that trees under 3" DBH are not protected, the 6,899 trees larger than that which have or will be destroyed constitute a "substantial amount" and a "material degree" of tree cutting, which violates the Constitution.

A. This Is An Issue of Fact and Is Not Reviewable by This Court

The question of whether trees under 3" DBH were intended by the framers to be protected by Article 14 is a finding of fact that was affirmed on appeal, and is not reviewable by this Court. CPLR § 5501(b). Defendants' attempt to have the Court reexamine this issue should be rejected.

Before trial, the court ruled that "what constitutes 'timber' for purposes of the Constitution ... [and] whether only trees 3" dbh or greater should be counted" were among the "factual issues" that precluded summary judgment. R. 501-502; see R. 3195-3201. Following the trial the court credited and

accepted the testimony on this issue of Plaintiff's expert historian, Dr. Philip Terrie. It then held that "the reference to 'timber' in [Article 14] refers to all 'trees'". R. xiii. This factual finding was upheld by the Appellate Division:

> We agree with Supreme Court's determination, based on the expert historian's testimony as well as other evidence, that the use of the word "timber" in the constitutional provision at issue is not limited to marketable logs or wood products, but refers to all trees, regardless of size. R. 5017.

With certain limited exceptions not applicable to this point, the jurisdiction of this Court is limited by CPLR § 5501(b) to questions of law, and it may not review "[i]ssues of fact with respect to which the determinations of Supreme Court were affirmed by the Appellate Division". L. Smirlock Realty Corp. v. Title Guarantee Company, 63 N.Y.2d 955, 957 (1984). Therefore, Defendants' argument that this Court should ignore their destruction of about 18,000 trees under 3" DBH must be rejected.

B. The Plain Language of Article 14, Its History, the Testimony of the Scientists, and the Judicial Precedents All Show That "Timber" Includes All Trees

If this Court does reach this issue, the findings of Supreme Court and the Appellate Division are well supported by both the Record and the law. The plain language of Article 14, § 1, the history prior to its adoption, the debates of the Constitutional

Convention of 1894, the testimony of the scientific experts, and the judicial precedents, all show that the term "timber" in Article 14 includes all trees, of all sizes.

1. The Plain Language of Article 14

When interpreting a law, a court should give effect to the plain meaning of words and apply it according to its express terms. Tucker v. Board of Education, Community School District No. 10, 82 N.Y.2d 274, 278 (1993). Where "nothing indicates a contrary legislative intent, the courts should not impose limitations on the clear ... language." Id. This is especially so where, as here, the "context and evolution" of the language do not support creating qualifications or exceptions to the rule. Jensen v. General Electric Co., 82 N.Y.2d 77, 83 (1993).

There is nothing in the plain language of Article 14 that limits its protection to trees of at least 3" DBH. No lower limit is placed on the size of the trees that are included in the word "timber". Nor is there an upper limit. There is just the word "timber".

The language of Article 14 may be contrasted with § 103 of Chapter 332 of the Laws of 1893, by which, just a year earlier, the Legislature had empowered the "forest commissioners [to] sell any spruce and tamarack timber, which is not less than twelve inches in diameter" from the Forest Preserve, and also "poplar

timber of such size as the forest commission may determine". If "timber" in that era had meant only trees that were of a "merchantable" size, these specifications would have been unnecessary. Article 14 contains no such express limitations on what size of timber is covered thereby. The Court should not create any exceptions to its plain language.

2. The Historical Context of the Adoption of Article 14

At trial, Dr. Terrie testified as to the common usage of the word timber at the time of the 1894 Convention, including in "the standard dictionary in American usage at the time" (R. 577-580, 3192-3194), and in government reports and popular literature about the Adirondacks, all of which showed that timber was understood to include trees of all sizes, and was not limited to so-called "merchantable" timber. R. 575-576, 622, 3191-3194, 3233-3252. This testimony, and his testimony about the Convention itself, convinced both lower courts in this case that "timber" was intended to include trees under 3" DBH. R. xiii, 5017.

Defendants' Brief (pp. 46-47) relies on a smattering of cherry-picked examples from State forestry reports issued in the years after the adoption of then-Article 7 to support their argument that "timber" only includes "merchantable timber" larger than 3" DBH. Notably, Defendants did not see fit to use these

historic documents at trial, so their interpretations of these highly technical descriptions of historic logging practices are not supported by any expert testimony that would have put them in context. See Oneida Indian Nation of New York v. State of New York, 691 F.2d 1070, 1085-1086 (2d Cir. 1982). Likewise, the Plaintiff was not able to cross-examine such an expert, and the trial court could not assess the relevance of these documents.

Assuming arguendo that these post-hoc reports are at all relevant to the events of 1894, all they show is that by the use of the adjective "merchantable" to modify "timber" in some instances, the reports recognized that such larger timber is just a subset of the broader word "timber", which, for purposes of Article 14, includes trees of all sizes. Many, if not all, of the examples pulled from these reports come from discussions of hypothetical plans to commercially log the Forest Preserve, an activity which was clearly prohibited by then-Article 7, so they have no relevance to legitimate uses of the constitutionally protected forests. Indeed, it was the depredations of the timber on the Forest Preserve by the predecessors of these same agencies that compelled the adoption of Article 14 in 1894. See pp. 10-13, supra.

Contrary to Defendants' ad hoc characterizations, these post-1894 reports used the terms trees and timber interchangeably, and are rife with examples that show that

"timber" was not limited to large saw logs. See Third Annual Report of the Commissioners of Fisheries, Game and Forests, Assembly Documents of 1898, No. 74, at 274 (describing the cutting of fuel (firewood) from the Forest Preserve as timber theft, and distinguishing between "trees" and "merchantable timber", but not "timber" in general). This Report, at pages 282-283 and 307, described both saw logs and spruce pulpwood as "timber". See also Sixth Annual Report of the Forest, Fish and Game Commission, Report of the Superintendent of Forests, Assembly Documents of 1901, No. 25, at 25-26; Eighth and Ninth Reports of the Forest, Fish and Game Commission, Assembly Documents of 1907, No. 71, at 454 (small spruce and pine trees were "timber").

Dr. Terrie testified that in that era "the pulp loggers often took very small trees to be used in their operations." R. 3204. Similarly, page 270 of the 1898 Third Annual Report described how "the pulpwood industry with its cutting of small spruces became such a prominent feature in forest operations". Verplanck Colvin's Report of the Superintendent of State Land Survey, Senate Documents of 1896, No. 42, at 90, described how at Mount Seward, chutes were to be built up the mountainside so that "not only logs fit for lumber could be sent down to the skidways but even the small soft-wood spruce timber would be thoroughly

cut for pulp-wood", almost up to the timberline. See R. 622,[18] 3207-3208. Based on his own observations in the field at the location described by Colvin, where he saw the remnants of these chutes, Dr. Terrie testified that these trees were sometimes as small as 1" DBH. R. 3204-3208.

More relevantly than the post-hoc reports cited by Defendants, State reports issued in the years prior to the 1894 Convention also show that timber included trees of all sizes at that time. The Annual Report of the Forest Commission for the Year 1893, Senate Documents of 1894, No. 85, at 223, stated that "[n]early all the timber used in the pulp-mills is spruce, and mostly sapling trees at that." At page 329 it quoted an 1864 book that described timber as "every tree, great and small".

The First Annual Report of the Forest Commission for the Year 1885, Assembly Documents of 1886, No. 103, at 81, described how the tanning industry virtually exterminated the hemlock "timber" in various territories of the state by peeling the bark from "giants and saplings, small and great". Similarly, the Second Annual Report of the Forest Commission for the Year 1886, Assembly Documents of 1887, No. 104, at 138, quoted a "hoop dealer" who described how in that industry, "[t]he timber used for hoops ... is all small second growth, one and a half to three-fourths inches in diameter." Thus, very small trees were

[18] The exhibit at R. 622 which contains this quotation mis-labeled it as being from an earlier report by Colvin.

considered to be "timber" at the time of the adoption of Article 14.

The 1885 Sargent Report (see pp. 9-10, supra) at page 10, described how, similarly to the pulpwood loggers, the charcoal industry in the Adirondacks would, "on a considerable scale", "clear off the forest, taking small as well as large trees." This industry used wood "from all sizes down to two inches in diameter." First Annual Report of the Forest Commission (1885), at 93.

These reports show that in the years leading up to the 1894 Convention trees of all sizes, from three-fourths inch diameter and up, were considered to be "timber" by State officials. They also show that logging for all sorts of industries threatened the health of the forests. Article 14 ended those threats to trees of all sizes on Forest Preserve lands.

3. The Debates of the Constitutional Convention of 1894

Dr. Terrie's testimony (R. 3194-3252) demonstrated that it was the "intent of the framers of the Constitution" (Anderson v. Regan, 53 N.Y.2d 356,363, 367-368 [1981]) that trees of all sizes would be protected by Article 14, and both courts below so found.[19] R. xiii, 5017-5018. The delegates to the

[19] Defendants (Brief, pp. 44-45) misrepresent Dr. Terrie's testimony as supporting their premise that the delegates' sole concern was commercial logging of large trees, so they did not intend to protect smaller trees. The quoted testimony was

Constitutional Convention noted the importance of all trees, even dead trees, to the Forest Preserve. See pp. 3, 11-13, supra; R. 597, 3236-3252. They also used the words "tree", "timber", "woods", and "forest" interchangeably, demonstrating no intent to limit "timber" in any way. R. 588-590, 594-595, 597, 600-601, 610. Their concerns were not limited to commercial loggers or large trees, as they vehemently rejected a proposal to make an exception for the gathering of firewood by local residents. R. 602-603, 613, 615, 618. Indeed, as Dr. Terrie testified, the delegates never showed any intent to protect only large trees of merchantable size. R. 3230.

4. The Expert Scientific Testimony

The expert testimony on both sides proved that smaller trees serve important ecological functions in the forest. R. 800, 3369-3370, 3406-3413, 3692-3694, 4525-4526, 4539-4541. Indeed, many of the small trees that were cut by DEC were as old as 80 years and would have been able to reproduce. R. 3409. Many were as much as 50 feet tall. R. 3409-3411, 3693-3694. The Appellate Division found that "smaller mature trees play an important role in the continuing ecology of the forest." R. 5017.

Defendants (Brief, p. 48) rely on the testimony of DEC

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actually about the 1885 statute that first created the Forest Preserve. R. 3201. As Dr. Terrie testified, in 1894 the concerns of the Convention delegates were much broader than that. See pp. 11-13, supra.

employees that in the modern-day logging industry, "timber" is limited to marketable logs of 8" DBH or more. Since logging is not permitted in the Forest Preserve, the standards of that industry are entirely irrelevant. DEC's testimony did not address the definition of "timber" in the scientific, ecological, recreational, spiritual, watershed, or wilderness contexts, all of which were of importance to the delegates to the 1894 Convention. See pp. 11-13, supra. Neither court in this case has credited Defendants' testimony on this issue of fact.

The Bureau Chief of the DEC Forest Preserve Bureau admitted that he knew of no scientific basis for DEC's policy of only counting trees of 3" DBH and greater. R. 4086. The only reason DEC gave for not counting smaller trees was that it did not have a policy that required it to do so. R. 4264. No historical or scientific evidence was admitted to support the use of this metric, rather than counting all trees. See R. 4823-4827. Moreover, DEC's internal policy is irrelevant to the question of whether its actions violated the Constitution and the courts are barred by the parties' mid-trial stipulation (R. 4119-4120, 4124) from considering it. See Point IV, infra.

5. The Judicial Precedents

When this Court held in People v. Adirondack Railway Co., 160 N.Y. 225, 248 (1899) that the "primary object of the

[Adirondack] park, which was created as a forest preserve, was to save the trees ...", it did not use the word "timber", nor did it limit that purpose to saving only the "merchantable" trees or timber. The subsequent decision in Association for the Protection of the Adirondacks v. MacDonald, 253 N.Y. 234, 238-242 (1930) used the words "trees" and "timber" interchangeably, and as often than not, referred only to "trees".

> Taking the words of section 7 in their ordinary meaning, we have the command that the timber, that is, the trees, shall not be sold, removed or destroyed. Id. at 238.

Therefore, "[t]o cut down 2,500 trees for a toboggan slide, or perhaps for any other purpose, is prohibited". Id. Given the need to correct the prior

> depredations which had been made on the forest lands, and the necessity for restricting the appropriation of trees and timber, section 7 of Article VII was adopted. Id. at 240-241.

"The framers of the Constitution ... intended to stop the willful destruction of trees upon the forest lands". Id. at 242. No mention was made of "merchantable timber" in the entire decision. Id.

The Record on Appeal from that case does show that the Court was only presented with an estimate of trees of 3" DBH or more that would be cut for the bobsleigh run. R. 549, 4899-4900. Because the parties did not provide any estimates of trees less than 3" DBH to be cut, the Court had no reason to specifically

consider them. Nor, in light of the outcome, was it necessary for it to do so. The massive level of cutting of larger trees was sufficient for the Court to find the project to be unconstitutional, even without considering the uncounted smaller trees that would have been destroyed. Association v. MacDonald, 253 N.Y. at 242.

However, as shown by the Record (R. 550, 4908-4923) in Balsam Lake Anglers Club v. DEC, 199 A.D.2d 852 (3d Dept. 1993), in that case DEC counted all 350 of the trees of 1" or more in diameter at stump height that had been, or would be, cut for the trails at issue therein. R. 4826-4827, 4910-4916, 4919-4922. The Appellate Division relied upon that count of 350 trees in its decision, although it did not consider the 312 saplings under 1" DBH. Id. at 853-854. Similarly, the trial court therein considered all "seedlings, saplings and timber-sized trees" in its decision. Balsam Lake Anglers Club v. DEC, 153 M.2d 606, 609-610 (Sup. Ct., Ulster Co. 1991).

C. The Debates of the Constitutional Convention of 1915 Are Irrelevant

The debates of delegates to the Constitutional Convention of 1915 are irrelevant to divining the intent of their predecessors 21 years earlier. If they were to be considered, as Defendants urge the Court to do, they would actually show that it was believed then that smaller trees were already included in the

term "timber" in Article 14.

At this subsequent convention the delegates considered a number of potential amendments to then-Article 7, § 7, some of which they approved, and some of which they rejected. Revised Record of Constitutional Convention of 1915, Vol. 2 ("1915 Record"), at 1327 *et seq*. One which was approved was a proposal to change the wording to "nor shall the trees and timber thereon be ... destroyed." See R. 3271-3272. This change never became law because the voters later rejected the entirety of the proposed new Constitution of which it was a part, but there is no known evidence that the proposed changes to Article 7 played any part in that. R. 3185, 3260-3262, 3271-3272.

Defendants' Brief (pp. 9, 47) incorrectly claims that the Convention rejected this proposed amendment,[20] when in fact it was approved by the delegates. R. 3271-3272; 1915 Record at 4236, 4259, 4332. Defendants then go on to speculate that had it been approved, it would have "broadened the protections afforded," presumably by adding small non-merchantable trees to the term "timber" from which, Defendants argue, they were previously excluded.[21] However, Delegate Dow, the Chairman of

[20] The delegate quoted in Defendants' Brief (p. 47), Mr. Angell (1915 Record at 1448), was the sole delegate to oppose this change. He was later identified as "the attorney for a lumber company" (1915 Record at 1472), so any statements he made must be taken with a full shaker of salt.

[21] Defendants' Brief (p. 47) also grossly misrepresents the testimony of Plaintiff's expert, Dr. Terrie, on this question, as

the Conservation Committee (1915 Record at 1327), stated in introducing the proposed amendment that:

> [t]his is not in spirit new matter; it is merely the intelligent and practical construction of the present provisions... . It is the construction, no doubt, which the framers of the original provision would have put upon it had they been called upon to define the intent of the enactment... . 1915 Record at 1340.

Regardless of the intent behind the proposal, a debate at a subsequent convention some 20 years later is not relevant to divining the intentions of the framers in 1894. See Bostok v. Clayton County, Georgia, 140 U.S. 1731, 1747 (2020).

D. Defendants' Claims About the Effects of Counting Small Trees on DEC's Work Are Not Supported by Any Evidence in the Record

The Defendants (Brief, pp. 50-51) cite statements purportedly made by DEC, outside the Record, that having to count trees under 3" DBH[22] has, and will, hamper its management work in the Forest Preserve. DEC had the opportunity to present evidence of these speculative effects during the trial and failed to do so. There is no evidence in the Record to support these conclusory factual allegations, and they must be rejected. DBS Realty v. NYS Department of Environmental Conservation, 201

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he did not testify about the intent of the proposed 1915 amendment. See R. 3271-3272.

[22] As discussed above at p. 18, Plaintiff's expert generally counted only trees of at least 1" in diameter, based on a U.S. Forest Service research protocol.

A.D.2d 168, 173 (3d Dept. 1994); Block v. Nelson, 71 A.D.2d 509, 511 (1st Dept. 1979).

E. The Class II Trails Violate Article 14 Even If Trees under 3" DBH Are Not Counted

The 6,899 trees of at least 3" DBH that the Class II trails will destroy (p. 17, supra) is almost triple the 2,500 trees that led this Court to find that the proposed bobsleigh run was unconstitutional in Association v. MacDonald. Point I.A, supra. Even if trees under 3" DBH are not counted, that alone makes these trails unconstitutional.

POINT III

IN ARTICLE 14, FORBIDDING CUTTING TREES, AND FORBIDDING DAMAGING THE WILD FOREST NATURE OF THE LAND, ARE SEPARATE RESTRICTIONS ON THE EXECUTIVE BRANCH'S ACTIONS IN THE FOREST PRESERVE

Both the Appellate Division and the trial court recognized that Article 14, § 1 contains multiple separate and equally important restrictions on the State's management of the Forest Preserve. Two of these restrictions apply herein: "The lands . . . shall be forever kept as wild forest lands" and "nor shall the timber thereon be . . . destroyed." See R. 5013-5014 ("two separate clauses of the constitutional section at issue"); R. vii-viii ("separate Constitutional stricture", "dual test"); *cf* R. xxi, xiv-xv. Any action that violates either of these

restrictions is unconstitutional. Id. See also Association for the Protection of the Adirondacks v. MacDonald, 253 N.Y. 234, 240, 242 (1930).

Defendants do not even attempt to argue that the destruction of about 25,000 trees would comply with the stand-alone prohibition on destroying timber, because there is no good answer to that question available to them. Instead, they argue (Brief, pp. 41-42) that the Constitution's prohibition on destroying timber is "intended to serve the provision's overarching purpose - to maintain the wild forest nature of the Preserve." This would make it a mere modifier to the qualitative requirement that the Forest Preserve be kept as wild forest lands, rather than an independent quantitative restraint on Defendants' actions. This theory is contrary to the plain language of Article 14, its history, and the prior interpretations of it by the courts.

Cutting a substantial amount of timber is, alone, prohibited. Likewise, as shown by Point V, infra, an ecological impact (or other impact) on the wild forest nature of the land is, alone, prohibited. If Defendants' argument is adopted by the Court, that would weaken the Constitution, by allowing them to cut a virtually unlimited number of trees, which would otherwise be considered to be substantial or material, so long as the context of the cutting arguably justified it.

A third restriction under Article 14, § 1 is that trees may only be cut in the Forest Preserve for a proper purpose. Defendants' Brief discusses at great length the purported recreational and public access benefits of the Class II trails. However, in this case, the purpose and benefits of the cutting are irrelevant.

A. The Plain Language of Article 14

The first two sentences of Article 14, § 1 set forth the Constitution's restrictions on the State's management of the Forest Preserve:

> 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.

This language has remained unchanged since its adoption at the Constitutional Convention of 1894. R. 3264. In it, the restrictions are set out in two entirely separate sentences, with no conjunction or modifier linking them. As the Appellate Division held, they are "two separate clauses of the constitutional section at issue". R. 5013.

The prohibition on destroying timber is not found in the first sentence, which it allegedly serves. Instead, it is found in the second sentence, along with the prohibition on conveying the land by various means. The second sentence is not

subordinate to the first. Nothing in the wording of Section 1 evinces any intent by its framers that the prohibition on destroying timber was merely intended to provide a means of keeping the land as wild forest lands. Instead, it is a co-equal limitation on the State's actions regarding the Forest Preserve.

Under Defendants' theory, the only real restriction in Article 14 on DEC's actions is that under the first sentence of Section 1, the land must be forever kept as a wild forest. If this were true, thousands of trees from Forest Preserve land could be sold and removed, and so long as the land somewhat retained its wild forest nature, this would not violate Article 14. However, there is no disputing that the independent restriction of the second sentence of Section 1 absolutely prevents such a sale and removal of timber. Despite the lack of any semantic differences among the prohibitions on sale, removal, or destruction of the timber, Defendants argue that only the prohibition on destruction of the timber merely modifies the first sentence of Section 1. The idea that the second sentence is a mere modifier of the first sentence, and is not an independent restriction on Defendants' actions, is a logical fallacy.

B. The History of the Adoption of Article 14

The evolution of the list of proscribed actions in Section 1 also shows that these restrictions were not intended to be dependent on each other. What began in 1885 as a legislative mandate to preserve the land in its wild forest state and prevent its sale was found to be inadequate to protect the Forest Preserve, so additional layers of protection were added by the 1894 Constitution.

The 1885 statute which created the Forest Preserve required that it be forever kept as wild forest lands and prohibited sale, leasing or condemnation thereof, but notably, this law did not protect the trees growing on those lands from logging or otherwise prevent their destruction. See Association v. MacDonald, 253 N.Y. at 239; pp. 9-13, supra. Thus, at that time, sale and destruction of the timber was apparently considered to be consistent with the keeping of the Forest Preserve as "wild forest lands".

By 1894, it had become apparent that "forever wild" status was not adequately protecting the Forest Preserve and that additional protections were needed. See pp. 9-13, supra. The loophole in the then-existing laws that allowed the timber to be sold, cut, removed, and/or destroyed had resulted in "widespread public outrage" over the destruction of the forests. Adirondack Wild v. APA, 34 N.Y.3d at 206 (dissent); see also R. 3209-3212.

As described above (pp. 9-13) these concerns led to this issue being taken up at the Constitutional Convention of 1894, resulting in the proposal that a Forest Preserve section be added to the Constitution. In describing the purpose of the new prohibition on the sale of timber, neither the Report of the Committee on Forest Preserves, or its Chairman, Mr. McClure, indicated in any way that it was to be subordinate to any other purpose of the amendment. R. 582-584, 3211-3212, 3216-3218, 4881-4882.

McClure did, however, emphasize deforestation and the destruction of trees as matters of great concern. R. 594. In proposing the remedies for the risks of fire, and alternating flood and drought due to deforestation (R. 589-597), he said "[w]e should not sell a tree or a branch of one." R. 597. In his lengthy speech, he made no mention of forever keeping the lands as wild forest lands, and gave no indication that the prohibition on the sale of timber was a mere adjunct to that mandate. However, the delegates did go on to add the prohibition on destruction of the timber (p. 12, supra), again without expressly linking that to the wild forest nature of the land.

C. The Judicial Precedents

Consistent with the plain language of Article 14 and its history, none of the relevant judicial precedents have

subordinated Section 1's bar on the destruction of timber to its mandate to keep the land as a wild forest. Instead, this Court has held that the "primary object" of then-Article 7, § 7 was "to save the trees". People v. Adirondack Railway Co., 160 N.Y. 225, 248 (1899).

In Association v. MacDonald this Court held that the purpose of prohibiting the destruction or removal of timber was "to close all gaps and openings in the law" (253 N.Y. at 238), rather than finding it to be subordinate to the wild forest mandate. It also recognized the disjunctive nature of the Constitution's strictures. "The forests were to be preserved as wild forest lands, and the trees were not to be . . . destroyed." Id. at 240 (emphasis added). "[T]he erection and maintenance of proper facilities for the use by the public" is permitted where necessary, but only if doing so does "not call for the removal of the timber to any material degree." Id. at 238. Thus, no matter what the purpose or context, cutting a material number of trees is prohibited.

> The framers . . . intended to stop the willful destruction of trees upon the forest lands, and to preserve these in the wild state now existing; they adopted a measure forbidding the cutting down of these trees to any substantial extent for any purpose. Id. at 242 (emphasis added).

Likewise, Balsam Lake Anglers Club v. DEC, 199 A.D.2d 852, 854 (3d Dept. 1993), found that DEC's planned trails were constitutional because they "appear compatible with the use of

forest preserve land, and the amount of cutting necessary is not constitutionally prohibited" (emphasis added).

The Constitution contains a multi-pronged defense of the Forest Preserve. Any management actions by state agencies must comply with each and every restriction in Article 14.

D. In This Case, the Purpose and Benefits Of the Tree Cutting Are Not Relevant

Despite Defendants' heavy reliance on the alleged recreational and accessibility benefits to the public of the Class II trails, they are not relevant herein. As shown above at Point III.C, it is true that trees may be cut for a proper use of the Forest Preserve, but that is only permitted if the cutting will not be substantial. In this case it was far beyond substantial. Also, Plaintiff's action never alleged that the sport of snowmobiling is not a permissible use of the Forest Preserve. R. vii. Thus, as the Appellate Division held, whether or not the trails are a "beneficial use of the Forest Preserve for the public good" is not an issue herein. R. 5013.

E. No Matter What the Context, Cutting 25,000 Trees is Material and Substantial

Assuming, arguendo, that the level of timber destruction must be analyzed in the context of the proposed project and of its alleged public benefits, the Class II trails are still

unconstitutional. The number of trees at issue herein is ten times as many as were at issue in Association v. MacDonald. The backers of that project similarly, but unsuccessfully, tried to justify their actions by pointing to its purported public benefits and allegedly minimal impact of clearing 4.5 acres on the then-1.9 million acre Forest Preserve. Id. at 236-238, 241. This argument was rejected because:

> [t]he timber on the lands of the Adirondack Park in the Forest Preserve ... cannot be cut and removed to construct a toboggan slide simply and solely for the reason that section 7, Article VII, of the Constitution says that it cannot be done. Id. at 242.

Destroying 2,500 trees for an Olympic sporting facility could not be done in 1930 and destroying 25,000 to facilitate access for the sport of snowmobiling cannot be done in 2020.

POINT IV

THE APPELLATE DIVISION ERRED AS A MATTER OF LAW WHEN IT DISREGARDED THE PARTIES' STIPULATION AND RELIED UPON DEFENDANTS' POLICY DOCUMENTS IN FINDING THAT THE WILD FOREST NATURE OF THE LAND HAD NOT BEEN IMPAIRED

The holding of the Appellate Division that the construction of the Class II trails did not unconstitutionally impair the wild forest nature of the Forest Preserve must be reversed because it relied upon Defendants' internal snowmobile trail guidance documents (R. 5014-5015), which was prohibited by a stipulation (R. 4120-2121, 4223-4224) made between the parties during the trial. The stipulation stated that, *inter alia*:

> Defendants' policies, guidances, guidelines and plans ... were not offered or admitted as evidence on the question of whether Class II community connector trails ... are constitutional (R. 4120) [and]
>
> ... these exhibits are not admitted on the question of ... whether Defendants' employees alleged following of those policies, procedures and standards was constitutional under Article XIV, Section 1. R. 4121.

The parties to an action may agree to limit the scope of the courts' review. See Trustees of Union College v. Board of Assessment Review of City of Schenectady, 91 A.D.2d 713, 714 (3d Dept. 1982); see also Ardrey v. 12 West 27th St. Association, 117 A.D.2d 538, 540 (1st Dept. 1986). When they stipulate on the record that a certain issue is not to be an issue during the trial, it is reversible error for the court to decide it. See Cullen v. Naples, 31 N.Y.2d 818, 820 (1972).

"[T]he courts are bound to enforce" such stipulations, Biener v. Hystron Fibers, 78 A.D.2d 162, 167 (1st Dept. 1980), because they are binding on the courts as well as the parties. See Cullen v. Naples, 31 N.Y.2d at 820. When the court fails to enforce such a stipulation, it "effectively undermine[s] the well-established policy favoring the non-judicial resolution of legal claims." Orlich v. Helm Brothers, Inc., 160 A.D.2d 135, 143 (1st Dept. 1990); see also FMC Corporation v. DEC, 31 N.Y.3d 332, 341 (2018)(court cannot consider propriety of parties' agreed-upon interpretation of a statute).

The parties' stipulation at trial effectively prohibited the consideration of the Defendants' various policies, guidances and plans[23] in deciding the merits of the case.[24] R. 4120, 4224. However, in deciding whether the wild forest nature of the land had been impaired, the trial court failed to abide by this (R. x, xv) as did the Appellate Division, which relied upon the trial court's findings in deciding this issue. R. 5014.

The Appellate Division opened its discussion of the constitutional issue by stating its conclusion that the trails' construction did not violate the forever wild clause. It then discussed "Defendants' guidance documents", and went on to analyze the related evidence, before restating its conclusion. R. 5014-5015. Analyzing the evidence in this manner, even though those documents had not been admitted into evidence for that purpose, was contrary to the parties' stipulation. The holding that construction of the Class II trails did not impair the wild

[23] Said documents include, but are not limited to, the 2006 Snowmobile Plan (R. 881), the 2009 Guidance (R. 1253), the 1991 DEC Policy LF-91-2 "Cutting, Removal or Destruction of Trees … on Forest Preserve Lands" (R. 1271), the 1986 DEC Policy on Snowmobile Trails (R. 2183), the 1998 DEC Policy "Snowmobile Trails-Catskill Forest Preserve" (R. 2197), the Adirondack Park State Land Master Plan (R. 2271), and the 2010 DEC/APA Memorandum of Understanding (R. 2402).

[24] With or without this stipulation, the courts may not "enshrine" the standards of a state agency as the controlling definition of a right provided by the Constitution, as this "would be to cede to a state agency the power to define a constitutional right." Campaign for Fiscal Equity v. State of New York, 100 N.Y.2d 893, 907 (2003). See also Point VI, infra.

forest qualities of the Forest Preserve (R. 5015) should be reversed.[25] Even if this Court does not reverse due to this error alone, the factual determinations of the trial court and Appellate Division on the issue of the impairment of the forever wild nature of the land are so tainted by this error of law that this Court may review those findings de novo.

POINT V

THE CLASS II TRAILS ARE INCONSISTENT WITH THE WILD FOREST NATURE OF THE FOREST PRESERVE

Defendants' construction of the Class II trails unconstitutionally damaged the wild forest nature of the Forest Preserve. Article 14 was intended "to preserve these lands in the wild state now existing." Association for the Protection of the Adirondacks v. MacDonald, 253 N.Y. 234, 242 (1930). In reviewing the first of the two restrictions of Article 14 that were relevant to this case (see Point III, supra), the Appellate Division was "called upon to determine . . . whether such construction violates NY Constitution, article XIV, § 1" because "the land is not being kept forever wild". R. 5014. The Appellate Division erred when it found (R. 5014-5015) that the

[25] Defendants' Brief (pp. 11-18, 27, 29, 32, 48-50, 58) is replete with reliance on the 2006 Snowmobile Plan, 2009 Guidance, DEC's tree cutting policy, and other planning documents, all of which were covered by the stipulation. These arguments are barred by the stipulation and should be disregarded by this Court.

construction of the trails did not do so, and Plaintiff's cross-appeal should be granted.

The evidence admitted at trial (see pp. 20-22, supra) showed that the construction process, and the resulting trails, did not preserve the land "in the wild state now existing" (id.), and that they are inconsistent with the "wild forest" nature of the Forest Preserve. See also Association for the Protection of the Adirondacks v. MacDonald, 228 A.D. 73, 82 (3d Dept. 1930) (holding that "[s]ports which require a setting that is man-made are unmistakably inconsistent with the preservation of these forest lands in the wild and natural state in which Providence has developed them").

Although the 1894 Convention did not discuss "impairment" of the forests (R. 581-621), and none of the appellate precedents did so, the trial court and the Appellate Division framed this issue as being whether the Class II trails unconstitutionally "impair" the wild forest nature of the Forest Preserve. R. viii, 5015. They did not define what they meant by "impair". Because "impair" generally means only to weaken or lessen something, that was inconsistent with the stricter requirement enunciated by this Court in Association v. MacDonald, 253 N.Y. at 242, that the intent of the framers was to "preserve ... the wild state now existing" in the Forest Preserve. However, regardless of how the

applicable standard is worded, the damage done to the Forest Preserve by the Defendants was unconstitutional.

A. The Construction of the Class II Trails Used Aggressive Construction Techniques and Created Adverse Impacts That Impaired The Wild Forest Nature of the Forest Preserve

The construction of the Class II trails required aggressive earth-altering techniques that transformed the land into a straight, artificially "even and safe surface" (Association v. MacDonald, 228 A.D. at 82) for snowmobiling, complete with significant land contouring, heavy duty bridges, and traffic signage. These man-made trails and human disturbances destroyed trees on and alongside the trail, and impaired the wild forest nature of the Forest Preserve. R. 685-692, 725-726, 818, 823-824, 830, 836, 839-840, 3530-3548, 3574-3585, 3591-3608, 3642, 3648-3649, 3654, 3665, 3739-3741, 3776, 4547-4558. See also pp. 20-22, supra. APA's representative Walter Linck admitted that the construction of, and existence of, the Class II trails had adverse and significant impacts on the wild forest character of the land where the trails are located as a result of the construction techniques employed by DEC. R. 818, 824, 829-830, 836.

Moreover, Supreme Court credited Plaintiff's expert's testimony that "the Community Connector trails are substantially larger and, even discounting tree cutting, involve more invasive

techniques (grading, root/rock removal, bridge building) than" foot trails. R. xx. Supreme Court found that "the signage on the community connector trails also is not akin to that of foot trails, and is, in certain areas, more akin to road signs". R. xxiv. Moreover, Supreme Court credited Plaintiff's evidence regarding "bridges, bench cuts, grading, and construction equipment" used to create the Class II trails. R. xx.

In addition, the Class II trails create a threat from invasive species in that they will provide opportunities for non-forest species to move in along the trails and establish themselves deep in the forest. R. 3592-3596. Defendants' expert agreed with this testimony. R. 4547-4548. The lower courts' findings relating to the future spread of invasive species found only that one invasive species (i.e. Japanese knotweed in the Santanoni area) was "already present" and was not introduced as a direct result of the construction of the Class II trails. R. xxiv, 5015. Thus, they failed to address the unrebutted proof of the risk of new infestations.

The Appellate Division (R. 5014) disagreed with the Plaintiff's characterization of the Class II trails as being "akin to roads", but that superficial disagreement does not justify disregarding the testimony of Plaintiff's expert, who the Court found was "a well-qualified expert in the field of Environmental Science", about the impacts that these trails have

on the wild forest nature of the Forest Preserve, and Plaintiff's evidence about potential impacts to the old growth forest, with trees between 190 and 295 years old, through which the Newcomb to Minerva trail was routed. R. xx; R. 3718, 3722-3723, 3726-3727.

Class II trails do not have every single characteristic of a road, such as a paved or graveled surface, but they do share enough of roads' adverse characteristics and impacts – width, excessive tree cutting and root damage, grading, obstacle removal and terrain alteration, and ecological and habitat changes - that they are impermissible in the Forest Preserve. R. 3519-3520, 3527-3531, 3545, 3552-3562. Even Defendants' expert concurred that snowmobile trails adversely affect the forest. R. 4537-4538, 4547-4551. Additionally, Defendants' own witnesses confirmed that destroying seedlings and saplings has an adverse ecological impact on the forest ecosystem. R. 800, 4525-4526, 4539-4541.

Supreme Court relied upon the testimony of DEC forester Tate Connor (R. 4244-4246) characterizing the Class II trails as not being like woods roads. R. xx-xxi. Defendants' Brief (p. 30) also relies heavily on this. However, Mr. Connor's testimony was not based on science, DEC standards, or any other official or professional definition of a road. He admitted that, instead, it was based only on his own understanding of what a road is. R. 4361. Thus, the courts below erred when they credited this as

expert testimony. R. xix, 5014. See Getty Oil Co. v. State of New York, 33 A.D.2d 705, 706 (3d Dept. 1969).

Moreover, Mr. Connor did not testify that the characterization of the trails as a trail or a woods road in any way lessened the Class II trails' ecological effects or their impact on the wild forest nature of the land. In fact, Mr. Connor conceded that, like roads, Class II trails have constructed drainage devices, which require maintenance, as do roads' drainage devices. R. 4245.

Lastly, he testified that Forest Preserve roads are generally 12 to 20 feet wide, a fact noted by the Appellate Division (R. 5014), but that they may sometimes be up to 30 feet wide. R. 4245-4246. The Class II trails are as wide as 12 feet, and the cleared area can often be as wide as 20 feet. See p. 20, supra. Thus, the Class II trails and Forest Preserve roads are comparable in width. Ultimately, Mr. Connor's testimony did nothing to distinguish the impacts caused by Class II trails from the impacts caused by roads.

In conclusion, the Class II trails are not at all like permissible foot trails because of their intensive construction techniques, width, and negative impacts on the Forest Preserve. See pp. 21-22, supra. Therefore, the Class II trails violated the Constitution because they impermissibly destroyed the wild forest nature of the Forest Preserve.

B. The Class II Trails Caused Fragmentation Of Forest Habitat That Has Not Been Offset By the Closure of Other Snowmobile Trails

Defendants argue that the construction of the Class II trails has decreased forest fragmentation because they will replace older trails, even though their witness admitted on cross-examination that new trails do cause forest fragmentation. R. 4547. He also admitted that he did not conduct any ecological analysis of the trails at issue. R. 4548. The Appellate Division found (R. 5015) that "the shifting of snowmobile trails to the periphery of the Forest Preserve had decreased forest fragmentation", despite the fact that Supreme Court found this to be "largely irrelevant" and "not in and of itself significant" (R. xxv-xxvi). Because the two lower courts concluded differently on this issue of fact, it is reviewable by this Court under CPLR § 5015(b).

In addition, the trial testimony and exhibits showed that almost all of these supposedly closed trails were already abandoned, or would continue to remain open for other uses, so that the mileage of open trails would not really change. R. 626-627, 3665-3666, 3828-3853, 4544, 4551-4859. Both sides' experts agreed that it can take decades for a forest to completely recover from the presence of roads, trails, or other linear corridors that were once used by motor vehicles such as snowmobiles. R. 3666-3668, 4551. As a result, it was error for

the Appellate Division to find (R. 5015), contrary to the holding of the lower court, that relocating these trails would reduce forest fragmentation.

The construction of the Class II trails unconstitutionally impaired the wild forest nature of the affected Forest Preserve lands. Defendants should be permanently enjoined from constructing such trails and ordered to rehabilitate the damage that the Class II trails have done to the Forest Preserve.

POINT VI

THE COURT OWES NO DEFERENCE TO DEFENDANTS' INTERPRETATION OF ARTICLE 14

As the Appellate Division held herein (R. 5013), and as this Court's decision in Association for the Protection of the Adirondacks v. MacDonald, 253 N.Y. 234 (1930) showed, the courts owe no deference to the Defendants' interpretation of Article 14, § 1.

"[I]t is the province of the Judicial branch to define, and safeguard, rights provided by the New York State Constitution, and order redress for violation of them." Campaign for Fiscal Equity v. State of New York, 100 N.Y.2d 893, 925 (2003) (interpreting Art. 11, § 1, "the Education Article"). When such questions are brought to the courts, it is "the responsibility of the courts to adjudicate contentions that actions taken by the Legislature and the executive fail to conform to the mandates of

the Constitution[] which constrain the activities of all three branches." Board of Education of Levittown v. Nyquist, 57 N.Y.2d 27, 39 (1982).

Like Article 14, the Education Article "constitutionalized" an issue that had previously been governed only by a statute. Campaign for Fiscal Equity v. State, 100 N.Y.2d at 936 (concurrence); see also Paynter v. State of New York, 290 A.D.2d 95, 99 (4th Dept. 2001) (purpose of the Education Article was to deprive the Legislature of discretion regarding maintaining free public schools). In both of these spheres of governance, the Constitution of 1894 made mandatory something that had previously been left up to the whims of the Legislature and the caprices of commissioners and bureaucrats. See Association v. MacDonald, 253 N.Y. at 239-240; pp. 10-13, supra.

However, Article 14, § 1 may be unique in the State Constitution in the degree to which it limits the discretion of the Executive and Legislative branches. It does not merely authorize State action. Instead, it strictly prohibits certain actions by dictating that the land "shall be forever kept as wild forest lands", and that it "shall not be leased, sold or exchanged, or be taken ..., nor shall the timber thereon be sold, removed or destroyed ...". By comparison, other such constitutional provisions provide discretion to the Legislature regarding the rights created. See Brownley v. Doar, 12 N.Y.3d

33, 43 (2009)(under Article 17, § 1, regarding aid to the needy, it is the prerogative of the Legislature to define who is needy and how much money to allocate; Campaign for Fiscal Equity v. State, 100 N.Y.2d at 925 (allowing Legislature limited discretion on budgetary matters under Article 11, the Education Article).

Indeed, the ultimate authority over the Forest Preserve resides with the People, through the constitutional amendment process. See Association v. MacDonald, 253 N.Y. at 239-240 (observing that the Legislature's power to authorize the building of roads in the Forest Preserve was taken away by the adoption of the forever wild clause); NYSBA Report, supra, at 3-4, 17-19; pp. 10-13, supra.

This grant of power to the citizenry and the strict limits on the discretion of the Legislative and Executive branches was not put in the Constitution on a whim. The proceedings of the Constitutional Convention of 1894 show that after more than a decade of abuses of the State's publicly owned Adirondack forest lands, the delegates saw a need to restrain the actions of those branches. What is now Article 14, § 1, was intended to strictly control their management of the Forest Preserve on behalf of the People. See pp. 10-13, supra; Association v. MacDonald, 253 N.Y. at 238-242 ("the Constitution intends to take no more chances with abuses, and, therefore, says the door must be kept shut");

Kenwell v. Lee, 261 N.Y. 113, 116-117 (1933); Helms v. Reid, 90 M.2d 583, 590-594 (Sup. Ct., Hamilton Co. 1977).

To that end, Article 14 may also be unique in that Article 14, § 5 evinces the intent of its framers for the Judicial branch, "the people", and even "any citizen" to limit the actions of the other two branches of government on the Forest Preserve:

> A violation of any of the provisions of this article may be restrained at the suit of the people or, with the consent of the supreme court in appellate division, on notice to the attorney-general at the suit of any citizen.

"The intent of Section 5 was to remove the Forest Preserve from the control of the legislature and to vest oversight of its mandates within the powers of the judiciary". NYSBA Report, supra, at 21. Accordingly, unlike Articles 11 and 17, Article 14 contains a citizen suit provision.

Like a free "sound basic education" (Art. 11, § 1), the preservation of the Forest Preserve as forever wild is a public right, guaranteed by the Constitution. See Association v. MacDonald, 253 N.Y. at 238, 240-241. "The Forest Preserve is preserved for the public; its benefits are for the people of the State as a whole". Id. at 238. It is up to the Judicial branch to ensure that the Legislative and Executive branches live up to their obligations to protect this right of the People of the State.

CONCLUSION

The Appellate Division's holding, that Defendants' cutting of about 25,000 trees to build the Class II snowmobile trails violated Article 14's prohibition on the destruction of timber in the Forest Preserve, should be upheld because 25,000 trees is a material and substantial amount of timber. Defendants' arguments that trees under 3" DBH should not be counted, and that the bar on destruction of timber is not a separate enforceable prohibition, rely on nonreviewable factual determinations. They have no basis in the Record, the history of Article 14, the scientific testimony, or the judicial precedents. Defendants' appeal should be denied.

The Appellate Division's holding that the construction of the trails did not unconstitutionally impair the wild forest nature of the Forest Preserve should be reversed because of that court's errors of law. The Record shows that the Class II trails have not preserved the land in its wild state and have impaired its wild forest nature. Plaintiff's cross-appeal should be granted.

The construction of the Class II Community Connector snowmobile trails is unconstitutional and Defendants should be permanently restrained from building or maintaining them pursuant to §§ 1 and 5 of Article 14 of the State Constitution. This matter should be remanded so that an order may be entered

requiring the Defendants to rehabilitate the tremendous damage that they have done to the Forest Preserve.

Dated: September 22, 2020

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CERTIFICATION OF COMPLIANCE WITH RULE 500.13(c)(1)

John W. Caffry, an attorney for the respondent-appellant, hereby certifies as follows: the foregoing brief was prepared on a computer word-processing system. A monospaced typeface was used, as follows:

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Point size:	12
Line spacing:	Double

The total number of words in the body of the brief, inclusive of point headings and footnotes, and exclusive of signature blocks and pages containing the disclosure pursuant to Rule 500.1(f), table of contents, table of citations, and certifications of compliance, is 15,965. By a letter dated September 16, 2020, pursuant to Rule 500.13(c)(4), the Chief Clerk of the Court granted Plaintiff permission to file a brief of 16,000 words. Therefore, this brief is in compliance with Rule 500.13(c).

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