STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In The Matter of the Application of
PROTECT THE ADIRONDACKS! INC.,

Plaintiff-Petitioner,

For A Judgment Pursuant to Section 5 of Article 14 of the New York State Constitution and CPLR Article 78,

-against-

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

Defendants-Respondents.

Supreme Court Albany County Article 78 Term
Hon. George B. Ceresia, Jr., Supreme Court Justice Presiding
RJI # 01-13-ST4541 Index No. 2137-13

Appearances:

Caffry & Flower
Attorney For Plaintiff-Petitioner
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Glens Falls, NY 12801
(John W. Caffry, Esq., of Counsel

Eric T. Schneiderman
Attorney General
State of New York
Attorney For Respondent
The Capitol
Albany, New York 12224
(Susan L. Taylor,
Assistant Attorney General, and
Lawrence A. Rappoport,
Associate Attorney General,
of Counsel)

DECISION/ORDER

George B. Ceresia, Jr., Justice

The plaintiff-petitioner (hereinafter "Petitioner") is a not-for-profit corporation dedicated to the protection and preservation of the lands of the Adirondack Forest Preserve. It has commenced the above-captioned combined action/proceeding to halt construction and development of new snowmobile trails within the Forest Preserve. The complaint-petition contains three causes of action. The first, in the form of a plenary action, generally alleges that construction and development of the snowmobile trails violates NY Constitution article XIV, § 1, which requires that the Forest Preserve remain forever wild. The petitioner alleges that a substantial amount of timber is being removed, and that the trails being constructed are not consistent with the wild forest nature, all in violation of NY Constitution article XIV, § 1 The petitioner seeks declaratory relief and a permanent injunction to prevent damage to, and illegal use of the Forest Preserve. In the second cause of action, pursuant to CPLR Article 78, the petitioner objects to the practice of the New York State Department of Environmental Conservation (DEC) of issuing temporary revocable permits ("TRPs") to towns within the Adirondack Park to allow towns to maintain and groom snowmobile trails with tracked vehicles known as snowcats; and to the practice of issuing Adopt-A Natural Resource agreements (AANR) with other municipalities and snowmobile clubs to authorize such entities to groom snowmobile trails within the Forest Preserve. It is argued that under the Adirondack Park Master Plan the only motor vehicles allowed within the Forest Preserve are snowmobiles. Petitioner's third cause of action, again pursuant to CPLR Article 78, alleges that the operation of snowcats and other such vehicles on Forest Preserve trails violates the rules and regulations of the DEC, specifically 6 NYCRR § 196.1 (a).

The action/proceeding was commenced by the filing of the summons, notice of

petition and complaint on April 15, 2013. The respondents made a motion to convert petitioner's first cause of action to a special proceeding under CPLR Article 78, and to dismiss the petitioner's second and third causes of action. The motion was rejected by the petitioner as untimely, prompting the respondents to make a motion to compel acceptance of the first motion. The petitioner has cross-moved for a default judgment against the respondents or, in the alternative, for a preliminary injunction to halt construction of the snowmobile trails.

Petitioner's Cross-Motion For A Default Judgment and Respondent's Motion To Compel Acceptance of Its Motion To Convert and For Dismissal

It is undisputed that, pursuant to CPLR 307, DEC was served with the summons, notice of petition and complaint/petition on April 17, 2013, the Adirondack Park Agency "APA" was served on April 18, 2013, and the Attorney General was served on April 19, 2013. The petitioner maintains that the respondents were required to serve an answer with respect to the summons and the first cause of action of the complaint/petition on or before May 9, 2013, even though the notice of petition contained a return date of June 28, 2013 (which, the Court observes was adjourned, on consent, to July 26, 2013).

Counsel for the respondents maintains that generally, in hybrid actions/ proceedings, the plaintiff/petitioner and the defendant/respondent usually come to an agreement with respect to a schedule for service of responsive papers, so that a single answer can be served in response to the complaint/petition. In furtherance of the foregoing, defense counsel indicates that he contacted the attorney for the petitioner on May 15 or 16, 2013, in an effort to discuss such a schedule, but was unsuccessful. After it became apparent to defense

counsel that such an agreement would not be possible he, on June 21, 2013 made the motion to convert the first cause of action to a special proceeding, and to dismiss the second and third causes of action. In response, the attorney for the petitioner indicates that the respondents, under CPLR 320, had twenty days (until May 9, 2013) to serve an answer to petitioner's first cause of action; and that when respondent's attorney attempted to contact him on May 15 or 16, 2013, the respondents were already in default in serving an answer. Counsel maintains, *inter alia*, that the respondents have presented no excuse for their default in serving an answer, and therefore the petitioner is entitled to a default judgment.

"Supreme Court possesses the discretion to permit late service of an answer upon a showing of a reasonable excuse for the delay and a meritorious defense to the complaint" (Puchner v Nastke, 91 AD3d 1261, 1261-1262 [3d Dept., 2012], citing CPLR 3012 [d]; Williams v Charlew Constr. Co., Inc., 82 AD3d 1491, 1492, 918 NYS2d 764 [2011]; Kostun v Gower, 61 AD3d 1307, 1308 [2009]; Huckle v CDH Corp., 30 AD3d 878, 879 [2006]). Moreover, "CPLR 2004 permits a court to grant an extension of time 'upon such terms as may be just and upon good cause shown, whether the application for extension is made before or after the expiration of the time fixed.'" (Saha v Record, 307 AD2d 550, 551 (3d Dept., 2003]). "Factors to be considered on an application for an extension include the stated reason for the delay, the length of the delay, any prejudice to the opposing parties, whether the moving party was in default prior to seeking the extension and, finally, whether an affidavit of merit has been proffered" (id.).

The CPLR does not address the procedure to be followed with regard to a hybrid action/proceeding. The use by a plaintiff/petitioner of a combined complaint/petition affords

the plaintiff/petitioner the advantage of preparing a single pleading, while requiring the defendant/respondent to prepare two separate answers, which must be served at different times. The respondents have demonstrated that the very brief delay was inadvertent, unintended and not willful. There is a strong public policy in favor of resolution of cases on the merits. To the extent that the default here may be attributable to law office failure, the Court finds that the brief default should be excused in the interests of justice (see CPLR 2005; Watson v Pollacchi, 32 AD3d 565, 565-566 [3rd Dept., 2006]). In addition, the respondents have demonstrated a meritorious defense to the complaint/petition. Moreover, there has been no showing of prejudice to the petitioner by the relatively modest delay. Based upon all of the foregoing, the Court finds that petitioner's motion for a default judgment against the respondents should be denied, and respondents' motion to compel the petitioner to accept their motion to convert and dismiss be granted (see Matter of Russo v Jorling, 214 AD2d 863 [3d Dept., 1995] lv denied 86 NY2d 705 [1995]; see also Cefala v Basila, 95 AD2d 889 [3d Dept., 1983]). Because the petitioner has addressed said motion on the merits, by affidavit and memorandum of law, the Court finds that it is now fully submitted for purposes of determination.

Respondents' Motion To Convert Petitioner's First Cause of Action to A CPLR Article 78 Proceeding

Petitioner's first cause of action, in sum and substance, argues that the actions of the respondents, in causing snowmobile community connector trails to be constructed, have violated, and are continuing to violate New York Constitution article XIV, § 1 because:

> "(a) a substantial amount of timber will be cut and destroyed in the construction of these trails; (b) these trails are not consistent with the wild forest nature of the Forest Preserve; and (c) the construction of these trails will result in the creation of a man-made setting in the Forest Preserve." (Combined Complaint and Petition, ¶ 82).

Petitioner seeks a declaration that the respondents' actions violate NY Constitution article XIV, § 1, and an injunction to prevent further such violations. Indeed, NY Constitution article XIV, § 1, entitled: "[Forest preserve to be forever kept wild; certain highways and ski trails authorized]" contains the following provision:

> "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."

NY Constitution article XIV, § 5, entitled "[Violations of article; how restrained]", authorizes a citizen suit to enjoin a violation:

> "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." (NY Const art XIV, § 5)

It has been held that a declaratory judgment action is the appropriate vehicle to seek review of a continuing policy or practice of a State Agency (Zuckerman v Board of Education, 44 NY2d 336, 343-344 [1978]; Allen v Blum, 58 NY2d 954 [1983]; Williams v Blum, 93 AD2d 755 [1st Dept., 1983]). In this respect, the petitioner alleges that the respondents have implemented a broadly applied policy to cut down thousands of trees within

the Forest Preserve and to construct snow mobile trails, in furtherance of respondents' goal to expand the Snowmobile Connector Trail system throughout the State, all in violation of NY Constitution article XIV, § 1. The petitioner's first cause of action, being addressed to respondents' policy and practice, need not be converted into a CPLR Article 78 proceeding (see Zuckerman v Board of Education, supra; Allen v Blum, supra; Williams v Blum, supra; see also, Balsam Lake Anglers Club v Department of Envtl. Conservation, 199 AD2d 852 [1993]). As such, the motion must be denied.

Petitioner's Cross-Motion For A Preliminary Injunction

The petitioner seeks a preliminary injunction "enjoining [respondents] from cutting or otherwise destroying trees in the Adirondack Forest Preserve for the construction of Class II Community Connector snowmobile trails and other trails having similar characteristics, and from otherwise clearing, excavating or filling land for such trails, during the pendency of the First Cause of Action" (petitioner's notice of cross-motion dated July 19, 2013). The petitioner alleges that the cutting of trees to construct the proposed Community Connector Snowmobile trails requires the removal of trees within the Adirondack Forest Preserve in violation of NY Constitution article XIV, § 1. In support of its argument, the petitioner indicates that DEC acknowledges having removed 2,085 trees of three inches or more in diameter at breast height ("dbh") for construction of the new Seventh Lake Mountain Connector Trail; 666 trees for the Wilmington Connector Trail (with 56 trees remaining to be cut); and 30 trees from the new portion of the Gilmantown Snowmobile Connector Trail (with 123 tree remaining to be cut). Taking into account all snowmobile community

connector trails which DEC plans to construct in the future throughout the Adirondack Forest Preserve, the petitioner estimates that 8,223 trees have, or will be destroyed.

A preliminary injunction may be granted under CPLR article 63 when the party seeking such relief demonstrates: (1) a likelihood of ultimate success on the merits; (2) the prospect of irreparable injury if the provisional relief is withheld; and (3) a balance of the equities tipping in the moving party's favor (Nobu Next Door, LLC v Fine Arts Hous., Inc., 4 NY3d 839, 840 [2005]; Confidential Brokerage Services, Inc. v Confidential Planning Corporation, 85AD3d 1268, 1269 [3d Dept., 2011]; Emerald Green Property Owners Association, Inc. v Jada Developers, LLC, 63 AD3d 1396, 1397 [3rd Dept., 2009]; SYNC Realty Group, Inc. v Rotterdam Ventures, Inc., 63 AD3d 1429, 1430-1431 [3rd Dept., 2009]; Green Harbour Homeowners' Association, Inc. v Ermiger, 67 AD3d 1116, 1117 [3rd Dept., 2009]). It is a drastic remedy, which should be used sparingly (Clark v Cuomo, 103 AD2d 244, 246 [3rd Dept., 1984]; Welcher v Sobol, 222 AD2d 1001, 1002 [3rd Dept., 1995]). The party seeking the preliminary injunction has the burden of proof of demonstrating his or her entitlement to such relief (see SYNC Realty Group, Inc. v Rotterdam Ventures, Inc., supra; Schulz v State, 217 AD2d 393 [3rd Dept., 1995]; Aetna Ins. Co. v Capasso, 75 NY2d 860 [1990]).

In support of the cross-motion, the petitioner has submitted the affidavit of Peter Bauer, petitioner's Executive Director. Mr. Bauer indicates that he visited the Seventh Lake Mountain Snowmobile Connector Trail on October 18, 2012, November 12, 2012, January

21, 2013 and June 28, 2013.[1] He annexes sixteen photographs to his affidavit to show that the trail is being widened up to twenty feet (far beyond the eight foot limit which he maintains applies). The photographs also depict ruts in the trails caused by heavy machinery. They show two bridges under construction. They show cut timber along the side of the trail, tree stumps (recently cut), side cutting and/or bench cuts into sloped terrain, a natural rock ledge which has been partially removed, excavation work, wood planks placed upon a portion of the trail surface, and damage to the forest floor. He indicates that the bridges are designed and constructed to accommodate snowcats, vehicles weighing several tons, used to groom snow mobile trails.

Respondents indicate that work on the Seventh Lake Connector Trail commenced in September 2012. They indicate that the construction work is practically complete. This includes all tree-cutting, grading and bench cutting. 1,924 live trees have been cut. The work remaining includes construction of six bridges, access ramps to five bridges already constructed, installation of railings on two forty foot bridges, and trail restoration work (improving drainage, removal of tree stumps & wood piles, seeding, removal of debris at bridge sites, and elimination of ruts). DEC maintains that trail surface is currently deemed adequate for snowmobiling by reason that in the winter the trail is frozen and covered with snow.

The respondents have submitted the affidavits of DEC employees Tate Connor, Robert J. Daley and Eric Kasza in support of their various arguments. Tate Connor, whose

[1]There is no evidence that Mr. Bauer visited and/or made observations with regard to the Wilmington Connector Trail or the Gilmantown Connector Trail.

title is Forester I, was assigned to oversee construction of the Seventh Lake Mountain Community Connector Trail ("Seventh Lake Connector Trail"), located in the Moose River Plains Wild Forest, between Raquette Lake and Inlet, New York. Mr. Connor indicates that construction of the Seventh Lake Connector Trail was commenced in September 2012. As of December 2012 all tree cutting, grading and bench cutting[2] along the trail had been completed. 1,924 live trees were cut over a distance of 11.9 miles. He indicates that the trail is generally 9 feet wide. He indicates that although the trail is currently adequate for snowmobiling (and was open to snowmobiling during the winter of 2012-2013), additional work is necessary to render it useable for hiking and mountain biking. This work includes construction of: (1) six bridges and a bridge/walkway over a wetland area; (2) access ramps on five bridges already constructed; and (3) railings over two 40-foot bridges. Mr. Connor indicates that the bridges are necessary to prevent public use from disturbing the bed and banks of streams, and damaging a wetland area along the trial. He avers that issuance of a preliminary injunction would prevent completion of the trail.

Robert J. Daley, whose title is Forester II, is land manager for the Wilmington Wild Forest. He was assigned to oversee construction of the Wilmington Community Connector Snowmobile Trail ("Wilmington Connector Trail"). Mr. Daley indicates that the Wilmington Connector Trail, which is 7.6 miles long, connects the community of Wilmington with the Northern Adirondack Trail System. DEC approved construction of the Trail in October 2005. Construction commenced in 2008. The Trail was constructed with an 8 foot wide

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[2]Bench cutting is the process of constructing a trail across the side slope of a hill.

trail tread. 666 trees were removed from the Forest Preserve portion of the Trail. An additional 56 trees will need to be removed. Completion of the Trail requires installation of: (1) five bridges; (2) four short re-routes to improve the trail; (3) construction of a 300 foot re-route; and (4) installation of a bog walkway to divert public use away from a wetland area. The Trail is open to snowmobile use when there is sufficient snow cover.

Eric J. Kasza, having the title Forester II, is land manager for the Jessup River Wild Forest. He was assigned to oversee construction of the Gilmantown Community Connector Snowmobile Trail ("Gilmantown Connector Trail"). The trail will be 3.3 miles long, connecting the Town of Wells and the Village of Speculator. Mr. Kasza indicates that 2.4 miles of the 3.3 mile long trail will be located within the Forest Preserve. Approximately 2.1 miles of the Forest Preserve portion will incorporate existing forestry haul roads with .3 miles being new construction. Thirty trees were removed along the new, .3 mile section of the Trail during the winter of 2012-2013. Approximate ninety- three trees remain to be removed. Four bridges will be constructed on the 2.1 mile portion of the Trail. Although no bridge-work has begun, bridge materials were hauled to the bridge sites during the 2012-2013 winter.

All of the DEC employees maintain that the trails are beginning to show signs of revegetation. They maintain that installation of the bridges is necessary to protect the beds and banks of stream and wetland areas from damage caused by public use. It is also indicated that upon completion of construction, work is performed by hand to restore the wild forest character of the land crossed by the trail. This work includes improving drainage along the trail, removal of some of the tree stumps, removal of piles of wood along the trail,

seeding of sections of some bench cuts, removal of debris at bridge sites, and eliminating ruts caused by machines.

In general, the material facts with regard to construction of the trails to date, removal of trees, and the amount of work which will be required to complete the trails are derived from information supplied by the respondents, which is not factually controverted in any meaningful way. The leading case with respect to article XIV of the New York Constitution is Association for Protection of Adirondacks v MacDonald (253 NY 234 [1930]), which involved an enactment of the state legislature (L 1929, c 417) to authorize construction of a bobsled run on State lands within the Forest Preserve. The purpose of the legislation was to provide a bobsled facility for the 1932 Winter Olympics held in Lake Placid. The bobsled structure itself was to be approximately six and one half feet in width, one and one-quarter miles in length, with a return road. The land on which it was to be constructed was to be between sixteen and twenty feet in width. It was estimated that approximately 2,500 trees would need to be removed within an aggregate area of four acres of land. The Court noted that NY Constitution article XIV, § 1 (then, NY Const art VII, § 7) was adopted in 1894 to prevent the cutting, destruction and sale of timber "to the injury and ruin of the Forest Preserve". As the Court stated,

> "To accomplish the end in view, it was thought necessary to close all gaps and openings in the law, and to prohibit any cutting or any removal of the trees and timber to a substantial extent. The Adirondack Park was to be preserved, not destroyed. Therefore, all things necessary were permitted, such as measures to prevent forest fires, the repairs to roads and proper inspection, or the erection and maintenance of proper facilities for the use by the public which did not call for the removal of the timber to any material degree." (id., at 238-239)

The Court of Appeals held that by virtue of NY Constitution article XIV, § 1, the trees could not be cut and removed to construct the bobsled run.

Subsequently, the Third Department Appellate Division had occasion to rule upon the issue in Balsam Lake Anglers Club v Department of Envtl. Conservation (199 AD2d 852, supra). In Balsam Lake Anglers Club, DEC had issued a negative declaration (pursuant to Environmental Conservation Law article 8) with regard to a project within the Catskill Forest Preserve that included construction of five parking lots, the relocation of two trails, the construction of a new hiking trail, and construction of a cross-country ski trail loop, on lands within the Catskill Forest Preserve. The construction plans called for the removal of approximately 350 trees to accommodate the trail relocation, together with removal of an unknown number of additional trees for the proposed new trail and parking lots. The petitioner commenced a combined action/proceeding to challenge the approval, arguing (in part), that the tree removal violated NY Constitution article XIV, § 1. The Appellate Division quoted the Court of Appeals in commenting:

> "Although [NY Constitution art XIV, § 1] would appear, as petitioner argues, to prohibit any cutting or removal of timber from the forest preserve, the Court of Appeals, noting that the words of the NY Constitution must receive a reasonable interpretation, has construed this provision as 'prohibiting [the] cutting or [the] removal of * * * trees and timber *to a substantial extent*' (Association for Protection of Adirondacks v MacDonald, 253 NY 234, 238, [emphasis supplied]). Thus, the court has indicated that only those activities involving the removal of timber "to any material degree" will run afoul of the constitutional provision (id., at 238). Although petitioner may question the soundness of this interpretation, particularly in view of what it has characterized as the unambiguous and absolute prohibition contained in NY Constitution, article XIV, § 1, we elect, absent authority to the contrary, to follow the

> interpretation advanced by the Court of Appeals in Association for Protection of Adirondacks v MacDonald (supra)." (Balsam Lake Anglers Club v Department of Envtl. Conservation, supra, at 853)

The Court reviewed the proposed construction and commented: "[t]hese proposed uses appear compatible with the use of forest preserve land, and the amount of cutting necessary is not constitutionally prohibited (cf., Association for Protection of Adirondacks v MacDonald, supra)." (Balsam Lake Anglers Club v Department of Envtl. Conservation, supra, at 854).

While the petitioner tends to view the work on the three trails as a single project, the respondents have analyzed each trail separately. In viewing the work as a whole, the Court must indicate that it has serious concerns about the constitutionality (and administrative policy) of cutting down, now and in the future, thousands of trees throughout the Forest Preserve without any attempt to secure an amendment to NY Constitution article XIV, § 1. As the Court of Appeals stated in Association for Protection of Adirondacks v MacDonald (253 NY 234, supra), "[t]o cut down 2,500 trees for a toboggan slide or perhaps for any other purpose, is prohibited" (id., at 238).

Addressing first the cutting of trees, the respondent argues that the petitioner has waited too long in seeking to obtain a preliminary injunction. As noted, respondent indicates that work on the Seventh Lake Connector Trail commenced in September 2012, and that all tree cutting on that Trail has been completed. They indicate that work on the Wilmington Connector Trail commenced in 2008, that 666 trees have been cut, and that fifty-six trees still need to be cut. Lastly, they indicate that the Gilmantown Connector Trail commenced in

December 2012, 30 trees have been cut, with 93 additional trees planned to be cut. The respondents maintain that the petitioner has been dilatory in seeking to enjoin construction of the snowmobile trails. They point out that although petitioner knew about the construction activity on the Seventh Lake Connector Trail in the Fall of 2012, and was authorized to seek an injunction by order of the Appellate Division dated March 28, 2013, it did not immediately do so; that it failed to do so when the hybrid action was commenced (April 15, 2013); and that it ultimately did not make the instant cross-motion until July 12, 2013. Notably, all trees which were planned to be removed from the Seventh Lake Connector Trail have already been removed. As pointed out by the respondent, "an injunction will not issue to prohibit a *fait accompli*" (E.F.S. Ventures Corp. v Foster, 71 NY2d 359, 372 [1988]). With regard to tree cutting on the Seventh Lake Connector Trail, there is nothing to enjoin.

With regard to tree cutting on the Wilmington and Gilmantown Connector Trails, whether considered separately or together, the Court finds that they fall within the parameters of the Balsam Lake Anglers Club case (Balsam Lake Anglers Club v Department of Envtl. Conservation, 199 AD2d 852, 854, supra). If these are viewed as separate and distinct projects, the petitioner has failed to demonstrate that the tree cutting along these trails destroys the Forest Preserve "to a substantial extent" or "in any material degree" (Association for Protection of Adirondacks v MacDonald, 253 NY 234, supra, at 238; Balsam Lake Anglers Club v Department of Envtl. Conservation, supra, at 853). Conversely, were the Court to consider the three Trails in the aggregate as a single project, as pointed out by the respondents, well over ninety percent of the trees planned to be removed have already been

removed and constitute a *fait accompli* (E.F.S. Ventures Corp. v Foster, supra). The fact that some portion of the construction work still needs to be done does not change the result (see Many v Village of Sharon Springs Bd. of Trustees, 234 AD2d 643, 644 [3d Dept., 1996]).

One further point should be made, the petition/complaint, citing the Adirondack Park State Land Master Plan[3], alleges that the respondents, in the future, intend to create hundreds of miles of snowmobile connector trails throughout the Forest Preserve. In the Court's view there is insufficient evidence in this record to demonstrate that the removal of trees in connection with construction of other snowmobile connector trails (other than those specifically mentioned here) is imminent. For this reason, the Court is of the view that there is no showing of a necessity to issue a preliminary injunction at this time with respect to proposed snowmobile trails which may never be constructed. In the event that there is a change in circumstances, petitioner may re-apply for such relief.[4]

Overall, with regard to the alleged unconstitutional removal of trees, and limiting its finding to the motion at bar, the Court concludes that the petitioner failed to satisfy its burden of demonstrating either a probability of success on the merits and/or that the equities balance

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[3]The petitioner also cites the "Final Snowmobile Plan for the Adirondack Park/Final Generic Environmental Impact Statement", apparently adopted by DEC and the New York State Office of Parks, Recreation and Historic Preservation".

[4]The Court is aware of the cases cited by the petitioner, namely, Green Harbour Homeowners' Assn., Inc. v Ermiger (67 AD3d 1116 [3d Dept., 2009]), Gramercy Co. v Benenson, 223 AD2d 497 [1st Dept., 1996]), Walsh v St. Mary's Church (248 AD2d 792 [3rd Dept., 1998]), and Wiederspiel v. Bernholz (163 AD2d 774 [3d Dept., 1990]), which hold that the threatened removal of large trees constitutes irreparable harm. Again, the Court is of the view that petitioner must demonstrate in some fashion that the respondents' plans pose an immediate and present threat of a violation of NY Constitution article XIV, § 1 in order to obtain a preliminary injunction.

in its favor. The Court need not and does not, on this motion, reach the issue of irreparable injury in regard to removal of trees.

Turning to the issue with regard to the clearing, excavating and/or filling of trails, the petitioner maintains that the construction work violates NY Constitution article XIV, § 1 by creating a man-made setting within the Forest Preserve. However, other than the observations of Peter Bauer, who has not been shown to possess expert qualifications with regard to forestry, forest habitat or a related field, no other evidence is produced to demonstrate a permanent, significant and detrimental impact upon the Forest Preserve. Nor is there evidence in admissible form to describe and quantify the specific damage allegedly being done to the Forest Preserve. In contrast to activity involving removal of timber, NY Constitution article XIV, § 1 does not expressly prohibit the construction of trails within the Forest Preserve. The petitioner's evidence fails to establish how, or in what respect, the grading and excavation work "to a substantial extent" or "material degree" impair the forever wild character of the Forest Preserve (Association for Protection of Adirondacks v MacDonald, 253 NY 234, supra, at 238; Balsam Lake Anglers Club v Department of Envtl. Conservation, supra, at 853). Moreover, the respondents have presented evidence to demonstrate that (1) the unpaved trails are generally nine to twelve feet in width; (2) the work includes post-construction remediation (and seeding) of the forest floor along the connector trails; and (3) in areas where the forest floor has been disturbed, it re-vegetates relatively quickly. Again, for purposes of the instant motion the Court finds, in connection with clearing, excavation, grading and filling of trails, that the petitioner failed in its burden to demonstrate irreparable harm to the Forest Preserve, a probability of success on the merits,

or that the equities balance in its favor.

For all of the foregoing reasons, the Court finds that the motion for a preliminary injunction must be denied.

Respondent's Motion To Dismiss Petitioner's Second and Third Causes of Action[5]

As noted, in the second and third causes of action of the complaint/petition, the petitioner seeks an order annulling temporary revocable permits (TRPs) that DEC issues to municipalities and adopt a natural resource agreements (AANRs) between DEC and snowmobile clubs, authorizing the use of tracked motor vehicles to groom snowmobile trails in the Forest Preserve lands. The petitioner alleges that the use of tracked groomers are prohibited under the Adirondack Park State Land Master Plan and DEC's regulation, 6 NYCRR § 196.1 (a). The respondents move to dismiss on grounds that the petitioner failed to join the municipalities and snowmobile clubs as parties to the action, since they will be inequitably affected if the TRPs and AANRs are annulled.

The respondents indicate, however, that the purpose of the TRPs and AANRs are to authorize municipalities and snowmobile clubs to maintain the snow mobile trails on DEC's behalf. Respondents fail to demonstrate specifically how or in what manner the rights of either the municipalities or the snowmobile clubs would be inequitably affected by a judgment in this proceeding (see CPLR 1001 [a]). They are not, in the Court's view, necessary parties. For this reason, the motion to dismiss will be denied.

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[5]Respondent has withdrawn its motion to dismiss as it relates to the Gilmantown Connector Snowmobile Trail, which was predicated on grounds of ripeness.

Accordingly, it is

ORDERED, that respondents' motion to be relieved of its default and to compel the petitioner to accept its motion to convert and dismiss is granted; and it is

ORDERED, that petitioner's cross-motion for a default judgment, or in the alternative for a preliminary injunction is denied; and it is

ORDERED, that respondent's motion to convert petitioner's first cause of action pursuant to CPLR 103 (c) from an action to a CPLR Article 78 proceeding is denied; and it is

ORDERED, that respondents' motion to dismiss petitioner's second and third causes of action be and hereby are denied; and it is

ORDERED, that the respondents be and hereby is directed to serve and file an answer to the complaint and the petition within twenty (20) days of the date hereof; and it is further

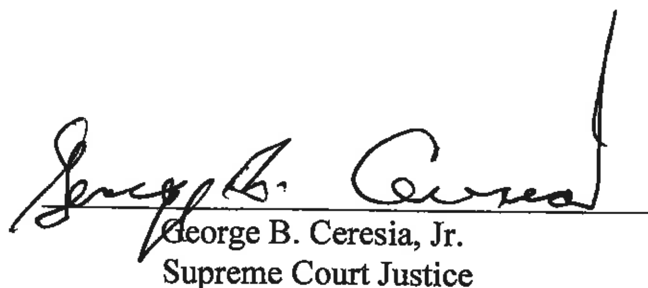
ORDERED, that respondent re-notice the CPLR Article 78 proceeding in conformity with CPLR 7804 (f); and it is further

ORDERED, that the proceeding, after being re-noticed, shall be referred to the undersigned for disposition.

This shall constitute the decision and order of the Court. The original decision/order is returned to the attorney for the respondents. All papers (other than Paper No. 1 below) are being delivered by the Court to the County Clerk for filing. The signing of this decision/order and delivery of this decision/order does not constitute entry or filing under CPLR Rule 2220. Counsel is not relieved from the applicable provisions of that rule respecting filing, entry and notice of entry.

ENTER

Dated: August 22, 2013
Troy, New York



George B. Ceresia, Jr.
Supreme Court Justice

Papers Considered:

1. Summons, Notice of Petition, and Combined Complaint and Petition Verified April 12, 2013
2. Respondent's Notice of Motion dated June 21, 2013, to Convert and Dismiss, Supporting Papers and Exhibits
3. Respondent's Notice of Motion Dated July 1, 2013 To Compel Acceptance of Respondent's Motion To Convert and Dismiss, Supporting Papers and Exhibits
4. Petitioner's Notice of Cross-Motion Dated July 12, 2013 For a Default Judgment or Preliminary Injunction, and Supporting Affidavit
5. Affidavit of Peter Bauer, sworn to July 15, 2013 and Exhibits
6. Reply Affirmation of Lawrence A. Rappoport Dated July 19, 2013, Supporting Papers and Exhibits