STATE OF NEW YORK
SUPREME COURT ALBANY COUNTY

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.

INDEX NO. 2137-13

RJI NO.01-13-ST-4541

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Dated: August 31, 2016

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TABLE OF CONTENTS

PRELIMINARY STATEMENT 1

STANDARD OF REVIEW 2

POINT I: THE DEFENDANTS HAVE VIOLATED THE CONSTITUTION BECAUSE THEY ARE DESTROYING A SUBSTANTIAL NUMBER OF TREES IN THE FOREST PRESERVE 5

A. Cutting Trees in the Forest Preserve Violates the Constitution 5

B. The Meaning of Article 14, § 1 of The Constitution Can be Ascertained From Legislative History, So There is No Reason to Give Deference to DEC 13

CONCLUSION 18

PRELIMINARY STATEMENT

This memorandum of law is submitted in support of the motion by plaintiff-petitioner Protect the Adirondacks! Inc. ("PROTECT" or "Plaintiff") for summary judgment. Plaintiff brings this motion for summary judgment to permanently enjoin the destruction of more than 31,000 trees that Defendant Department of Environmental Conservation ("DEC") is cutting for the construction of a Class II Community Connector snowmobile trail network in the Adirondack Forest Preserve.

This combined action and CPLR Article 78 proceeding was commenced by the filing of the Summons, Notice of Petition and Complaint in the Office of the Albany County Clerk on April 15, 2013.[1] The facts of this action are set forth in the Complaint and in the affidavits of the parties, including the affidavits submitted herewith.

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[1] Copies of all of the pleadings are being submitted herewith pursuant to CPLR § 3212(b).

STANDARD OF REVIEW

A motion for summary judgment should be granted if the movant "establish[es] a prima facie entitlement to summary judgment as a matter of law by presenting competent, admissible evidence demonstrating the absence of triable issues of fact." Allegro v. Youells, 67 A.D.3d 1081, 1082 (3d Dept. 2009); see CPLR § 3212(b). A motion for summary judgment "cannot be defeated by mere conjecture." Naylor v. CEAG Elec. Corp., 158 A.D.2d 760, 762 (3d Dept. 1990).

The part of the First Cause of Action addressed in this motion lacks genuine issues of fact to be resolved at trial, and therefore it should be summarily decided as a matter of law. See Mente v. Wenzel, 158 A.D.2d 775, 777-778 (3d Dept. 1990), lv denied 76 N.Y.2d 701 (1990).

To determine if an agency acted without, or in excess of, its jurisdiction, or contrary to the Constitution, the court must look to the relevant constitutional language. See Anderson v. Regan, 53 N.Y.2d 356, 359 (1981); The Ass'n for the Protection of the Adirondacks[2] v. MacDonald, 253 N.Y. 234 (1930) (discussing the record of the Constitutional Convention); see also Lighthouse Pointe Property Associates LLC v. New York State Dept. of Environmental Conservation, 14 N.Y.3d 161, 176-177 (2010). If, after reviewing that language, and the "intent of the framers of

[2] Plaintiff is the successor organization to The Association for the Protection of the Adirondacks, Inc. Complaint ¶4.

the Constitution", the agency's actions are found to be contrary to the law, or in excess of its jurisdiction, then its actions, no matter how "well-intended", must be found to "violate" the Constitution. Anderson v. Regan, 53 N.Y.2d at 363, 367-368.

In determining whether an action violates the Constitution, the court is free to conduct its own analysis when the question is one of "'pure legal interpretation' of clear and unambiguous statutory terms". Lewis Family Farm, Inc. v. Adirondack Park Agency, 64 A.D.3d 1009, 1013 (3d Dept. 2009). The court is not required to defer to an agency's interpretation of the language at issue when "there is little or no need to rely on any special expertise on the agency's part". Id.; see also Madison-Oneida Board of Cooperative Educational Services v. Mills, 4 N.Y.3d 51, 58-59 (2004); Kee v. Daines, 68 A.D.3d 1503, 1504 (3d Dept. 2009). Agency deference on such questions only arises in tax cases and in other areas with very technical requirements and considerations relating to statutes that the agency has been charged with administering. See New York State Superfund Coalition, Inc. v. New York State Dept. of Environmental Conservation, 18 N.Y.3d 289, 296 (2011).

However, in this situation, interpreting the meaning of Article 14 of the Constitution can be accomplished without deferring to agency expertise. Moreover, DEC and Defendant Adirondack Park Agency ("APA") (hereinafter DEC and APA are

referred to collectively as "Defendants") are not charged with administering a statutory program to cut trees in the Forest Preserve, their duty is to protect the Forest Preserve. Therefore, the Court herein is not required to defer to the Defendants' interpretation of Section 1 of Article 14 of the Constitution. Adirondack Mtn. Club and Protect the Adirondacks! v. Adirondack Park Agency, 33 M.3d 383, 389-390 (Sup. Ct. Albany Co. 2011).

POINT I:

THE DEFENDANTS HAVE VIOLATED THE CONSTITUTION BECAUSE THEY ARE DESTROYING A SUBSTANTIAL NUMBER OF TREES IN THE FOREST PRESERVE

DEC is destroying trees and clearing land on the Adirondack Forest Preserve[3] in violation of the NYS Constitution, for the construction of Class II Community Connector snowmobile trails. Therefore, the First Cause of Action in the Complaint should be granted, and Defendants should be permanently enjoined from all such activities.

A. Cutting Trees in the Forest Preserve Violates the Constitution

Article 14, § 5 of the Constitution provides in pertinent part that:

> [a] violation of any of the provisions of this article [14] 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. (emphasis added)

Article 14, § 1 of the Constitution provides in pertinent part that:

> 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.

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[3] The Forest Preserve was, and is defined in pertinent part as: "the lands owned or hereafter acquired by the state within the county of Clinton, except the towns of Altona and Dannemora, and the counties of Delaware, Essex, Franklin, Fulton, Hamilton, Herkimer, Lewis, Oneida, Saratoga, Saint Lawrence, Warren, Washington, Greene, Ulster and Sullivan". ECL § 9-0101(6). There is no dispute that the lands in question herein are part of the Forest Preserve.

> 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. (emphasis added)

The First Cause of Action of the Complaint dated April 12, 2013 ("Complaint") seeks to restrain the Defendants from constructing certain new snowmobile trails in the Adirondack Forest Preserve, and from the cutting of a substantial number of trees in furtherance thereof, because such destruction of timber and construction is a violation of Section 1 of Article 14.[4] Complaint pp. 1-2, 15-28, 39-40.

The actions taken by DEC so far have, or will have, destroyed over 31,000 trees in the Forest Preserve and ripped up many acres of land. See Caffry Aff.; Affidavit of Steve Signell, sworn to on August 25, 2016 ("Signell Aff."), Ex. D, which is being submitted herewith. DEC has admitted that it has already cut 6,327 large trees and that it intends to continue constructing the entire snowmobile trail network. See Community Connector Snowmobile Trail Plan, Signell Aff. Ex. B, Ex. D.

In the seminal case of The Ass'n for the Protection of the Adirondacks v. MacDonald, 253 N.Y. 234 (1930) the Court of Appeals held:

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[4] By a Decision and Order on Motion decided and entered on March 28, 2013, the Appellate Division, Third Department, granted Plaintiff's motion for consent to maintain this suit pursuant to Article 14, § 5, with regard to the First Cause of Action. Affidavit of John W. Caffry sworn to on August 31, 2016 ("Caffry Aff."), which is being submitted simultaneously herewith, Exhibit A.

Taking the words of section 7[5] in their ordinary meaning, we have the command that the timber, that is, the trees, shall not be sold, removed or destroyed. To cut down 2,500 trees for a toboggan slide, or perhaps for any other purpose, is prohibited. Id., at 238 (emphasis added).

The purpose of the constitutional provision [Article 14, § 1], as indicated by the debates in the Convention of 1894, was to prevent the cutting or destruction of the timber or the sale thereof, as had theretofore been permitted by legislation, to the injury and ruin of the Forest Preserve. 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 (emphasis added).

If it were deemed necessary to obtain a constitutional amendment for the construction of a State highway, the use to which the Forest Preserve might be put with legislative sanction was greatly limited. Trees could not be cut or the timber destroyed, even for the building of a road. This seems to be a fair conclusion to be drawn from the adoption of these constitutional amendments after the Constitution of 1894. Id., at 240.

However tempting it may be to yield to the seductive influences of outdoor sports and international contests, we must not overlook the fact that constitutional provisions cannot always adjust themselves to the nice relationships of life. The framers of the Constitution, as before stated, 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 241-242 (emphasis added).

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[5] Now Article 14, § 1.

> In other words, this plea in behalf of sport is a plea for an open door through which abuses as well as benefits may pass. The Constitution intends to take no more chances with abuses, and, therefore, says the door must be kept shut. The timber on the lands of the Adirondack Park in the Forest Preserve, or that on the western slope of the Sentinel range cannot be cut and removed to construct a toboggan slide simply and solely for the reason that section 7, article VII,[6] of the Constitution says that it cannot be done. Id., at 242 (emphasis added).

See also The Ass'n for the Protection of the Adirondacks v. MacDonald, 228 A.D. 73 (3d Dept. 1930); Balsam Lake Anglers Club v. DEC, 199 A.D.2d 852 (3d Dept. 1993).

The holding in the case states that the Constitution's "ordinary meaning" is that "trees, shall not be sold, removed or destroyed", and that therefore, cutting trees for "a toboggan slide . . . is prohibited". The Ass'n for the Protection of the Adirondacks v. MacDonald, 253 N.Y. at 238. Therefore, one of the primary precedential points of this case is that trees cannot be cut in the Forest Preserve in response to "the seductive influences of outdoor sports", even for a project as beneficial as the bobsleigh run project that was proposed to be built for the 1932 Lake Placid Winter Olympics. Id. at 241.

The Court of Appeals specifically noted prior Attorney General Opinions that stated "that a single tree, and even fallen timber and dead wood, cannot be removed" from the Forest Preserve. Id. at 238. Accordingly, DEC has violated the

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[6] Now Article 14, § 1.

Constitution, as a matter of law, because it has cut trees in the Forest Preserve to accommodate an "outdoor sport", namely the sport of snowmobiling. Id.

The idea that an immaterial amount of trees may possibly be cut in the Forest Preserve without violating the Constitution comes from dicta in the MacDonald case. The Court stated that it was "not at this time called upon to determine" whether "reasonable cutting or removal of timber may be necessitated in order to properly preserve the State Park". Id. at 240. The Court hypothesized that some tree cutting may be permitted for "things necessary . . . such as measures to prevent forest fires, the repairs to roads and proper inspection, or the erection and maintenance of proper facilities for use by the public". Id. at 238.

However, the Court, in The Ass'n for the Protection of the Adirondacks, rejected the idea that cutting 2,500 trees (and clearing 4.5 acres of land) on the Forest Preserve would not be "substantial", or would not amount to cutting to a "material degree". Id. at 238-242. The Court, noting that "trees could not be cut or the timber destroyed, even for the building of a road" (id. at 240), found that cutting 2,500 large trees (3" dbh and greater), and an unknown number of small trees (less than 3" dbh), in the Forest Preserve to construct a toboggan slide was

not permissible "simply and solely for the reason that" Article 14, Section 1 "says that it cannot be done". Id. at 242.

Similarly, this Court is "not at this time called upon to determine" whether "reasonable cutting or removal of timber may be necessitated in order to properly preserve the State Park". Id. at 240. The Class II Community Connector snowmobile trails are not "necessary" to protect the Forest Preserve or to allow the public to "use" the Forest Preserve. Id. at 238. The purpose of the Class II Community Connector snowmobile trails is to allow transportation through the Forest Preserve from one town to another. Caffry Aff. ¶27.

Therefore, cutting more than 31,000 small and large trees in the Forest Preserve to construct the Class II Community Connector snowmobile trails is not permissible "simply and solely for the reason that" Article 14, Section 1 "says that it cannot be done". Id. at 242; see Balsam Lake Anglers Club v. DEC, 199 A.D.2d 852 (3d Dept. 1993); Balsam Lake Anglers Club v. DEC, 153 M.2d 606 (Sup. Ct. Ulster Co. 1991); see also Signell Aff. Ex. D. Accordingly, the construction of the Class II Community Connector snowmobile trails is "forbidden by the Constitution" (id. at 241), "which prevents the cutting of the trees" (id. at 237), and DEC should be enjoined from further construction of Class II Community Connector snowmobile trails.

The Appellate Division described in detail the effects on the Forest Preserve of the construction of the proposed bobsleigh run project:

> The proposed bobsleigh run does not follow any existing road or trail but the return-way partially follows a former road now used as a trail and in large part follows an abandoned lumber road. If constructed the proposed bobsleigh run will be approximately one and one-quarter miles long and six and one-half feet in width, and it will be necessary to clear additional land on either side of the run so that where the course is straight the width will be approximately sixteen feet and where the course curves the width will be twenty feet. The return-way will be either a roadway approximately one mile long and eight feet wide up which the bobsleighs will be hauled to the top of the slide by a tractor, or a line approximately five-eighths of a mile long and six feet wide up which the bobsleighs will be hauled by a cable. The Ass'n for the Protection of the Adirondacks, supra, 228 A.D. at 75.

> To construct the bobsleigh run it would be necessary to cut down and remove 1,710 trees of varying kinds and sizes down to three inches in diameter. In addition it would be necessary to cut and remove for the return-way about fifty per cent more, or in all about 2,600 trees. Of these some 480 are eight inches or more in diameter at breast height and as many as 33 are twenty inches or more in diameter. Most of the softwood is second growth but there is a scattering stand of first growth hardwoods. In all, over four and one-half acres of land must be cleared. In addition it will be necessary to blast away about fifteen large boulders and the ends of three or four ledges of rock, entailing the removal by blasting of about 50 cubic yards of rock. Id., at 76.

> This bobsleigh run and return-way require the clearing of four or five acres of forest lands, the cutting of 2,600 trees which must unquestionably be regarded as of 'timber' size and the blasting of some fifty cubic yards of rock from their natural state, to say nothing of the cuts and fills of earth and rock which will be required to make the slide an even and safe surface for

the sport and the return-way possible up a steep slope to the top of the slide. Id., at 82.

In the present case, the amount of trees destroyed is far more than that which would have occurred in the construction of the unconstitutional bobsleigh run project:

Bobsleigh run and return trail - about 2,500 trees[7] (id., at 82; Caffry Aff. Ex. Q);

Snowmobile trails - at least 6,327 large trees cut so far, as admitted by DEC (Signell Aff. Ex. E); plus 12,195 small trees cut by DEC, as counted by Plaintiff (Signell Aff. Ex. D); plus another 8,544 small and large trees to be cut for the construction of three segments of the Minerva-Newcomb-North Hudson Class II Community Connector Trail (Signell Aff. Ex. D); plus another 7,122 small and large trees for the construction of the Polaris Bridge Trail (Signell Aff. Ex. D); and an unknown number of additional trees for the other Class II Community Connector trails.

As shown above, the Class II Community Connector snowmobile trails will require a substantial amount of tree cutting, so they are prohibited by the Constitution, as a matter of law. In this

[7] It appears from the Appellate Division and Court of Appeals decisions that there was no data regarding the number of trees less than 3" dbh that would be cut for the construction of the project. However, the Court recognized that "construction will necessitate the removal of trees from about 4.5 acres of land" that were to be completely "cleared" of trees for the run and return. Id. at 236.

motion for summary judgment, Plaintiff seeks a determination that DEC is violating the Constitution's prohibition on tree cutting based on the fact that DEC has cut, or is cutting, more than 8,000[8] large trees in the Forest Preserve for the construction of Class II Community Connector snowmobile trails that are already built or are already in the process of being built, and because DEC is cutting nearly 19,000[9] small trees in the Forest Preserve for the construction of Class II Community Connector snowmobile trails that are already built or are already in the process of being built.

B. The Meaning of Article 14, § 1 of The Constitution Can be Ascertained From Legislative History, So There is No Reason to Give Deference to DEC

As shown by the affidavit of Philip G. Terrie, Ph.D. sworn to on August 30, 2016 ("Terrie Aff.") and submitted simultaneously herewith, the Constitutional framers intended to stop the cutting of all trees in the Forest Preserve. See Caffry Aff. ¶33. "From 1895 to 1919, successive Attorneys General have uniformly given opinions advising strict constitutional

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[8] Including the large trees to be cut for the Polaris Bridge Trail, the count would be over 10,000 trees. See Signell Aff. Exhibits D and E.

[9] Including the small trees to be cut for the Polaris Bridge Trail, the count would be nearly 24,000 trees. See Signell Aff. Exhibit D.

construction against cutting timber belonging to the state in the Forest Preserve". The Ass'n for Prot. of Adirondacks v. MacDonald, 228 A.D. 73, 80, (3d Dept. 1930). Therefore, this Court should grant the First Cause of Action as a matter of law because DEC is cutting trees in the Forest Preserve in violation of the Constitution.

The prohibitions imposed by Article 14, Section 1 of the Constitution were established to prevent the prevailing legislative and executive branch mismanagement and overreaching that the Constitutional framers faced and sought to eliminate. See Terrie Aff. ¶¶ 26-27, 35; Caffry Aff. ¶57; see also The Ass'n for the Protection of the Adirondacks v. MacDonald, 253 N.Y. 234, 239-240 (1930). In light of the "intent of the framers of the Constitution in adopting the predecessor of" Article 14, Section 1, it should be interpreted strictly to ensure the goals of the framers of the Constitution were met, and to "maintain[] the delicate balance of powers that exists between the legislative and executive branches of government". Anderson v. Regan, 53 N.Y.2d 356, 363-366 (1981).

Article 14, Section 3 of the Constitution supports the position that the Article 14, Section 1 prohibition against the cutting of trees in the Forest Preserve within the Adirondack Park should be interpreted strictly. Section 3 of Article 14 lifts the prohibition against cutting trees in areas of the

Forest Preserve that lie outside the boundaries of the Adirondack Park. See ECL § 9-0101(1). Therefore, taken together, and in order to give full meaning to the entire Article, trees within the boundaries of the Adirondack Park are given the strongest protection possible from cutting, and cannot be cut absent a constitutional amendment set forth in Section 1 of Article 14, unless the cutting is related to a necessary purpose and would not involving cutting "to a material degree". The Ass'n for the Protection of the Adirondacks v. MacDonald, 253 N.Y. 234, 238 (1930); see also McKinney's Statutes § 98.

Through its self-appointed mandate to create the Class II Community Connector snowmobile trail network, DEC has "stretched . . . beyond its constitutionally valid reach". Boreali v. Axelrod, 71 N.Y.2d 1, 9 (1987). While the Environmental Conservation Law authorizes DEC to manage and restrict the public's use of the Forest Preserve, it cannot, and does not, authorize DEC to violate the Constitution by cutting trees in Forest Preserve, even if the agency's actions serve a "laudable goal". Id. at 11; see ECL § 9-0105(1),(3); ECL § 9-0301; ECL § 9-0303 (prohibiting the cutting of "any trees or timber"). DEC is "therefore operating outside of its proper sphere of authority" and is violating the Constitution. Id. at 12.

As shown above, and in the accompanying affidavits, the meaning of Article 14 can be ascertained, so there is no reason

to defer to DEC's interpretation of the Constitution, or to defer to its internal policies regarding tree counting. The Court of Appeals did not see fit to defer to the Legislature's plan to construct a bobsleigh run in the Adirondack Forest Preserve. The Ass'n for the Protection of the Adirondacks[10] v. MacDonald, 253 N.Y. 234 (1930). Similarly, this Court should not defer to DEC's plan to construct the Class II Community Connector snowmobile trail network. Id.

Since the Constitutional history demonstrates that all trees in the Forest Preserve are, regardless of size, protected by the Constitution, the Court should take into consideration all trees, meaning trees that are at least one inch in diameter at breast height ("dbh"), when determining if DEC's actions violate the Constitution. See Signell Aff. ¶¶ 6-12; Affidavit of Peter Bauer, sworn to on August 31, 2016 ("Bauer Aff."), which is being simultaneously submitted herewith. As demonstrated by the affidavits submitted herewith, DEC is cutting a constitutionally-impermissible amount of trees. Its actions must be permanently enjoined by this Court.

Finally, the Court is not required to review, nor is it relevant for the Court to consider, DEC's internal policies regarding the trees that it counts or the manner in which it cuts

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[10] Plaintiff is the successor organization to The Association for the Protection of the Adirondacks, Inc. Complaint ¶4.

the trees in the Forest Preserve. Supreme Court has already determined that Defendants' policies and other documents:

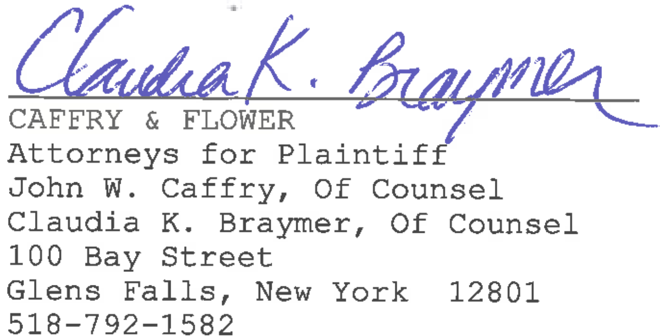
> defining a "tree" or "timber" as not including any vegetation less than three (3) inches in diameter at breast height ("3" dbh"), or as otherwise differentiating such vegetation under 3" dbh from a "tree" or "timber", as was discussed in the Defendants' prior papers served in this matter . . . are irrelevant.

Caffry Aff. Exhibit C, Supreme Court Decision and Order dated October 15, 2014, pp. 23-24. This decision was not appealed by DEC. The law of the case doctrine prevents DEC from arguing that its internal policies are relevant. See Martin v. City of Cohoes, 37 N.Y.2d 162, 165 (1975); Ramsay v. Mary Imogene Bassett Hosp., 158 A.D.2d 754 (3d Dept. 1990); see also Caffry Aff. Exhibit D, Supreme Court Decision and Order (Connolly, J.) dated October 20, 2015, p. 6 (applying law of the case doctrine).

CONCLUSION

Plaintiff has demonstrated that the First Cause of Action should be granted on the facts now before the Court, and its motion for summary judgment to permanently restrain the Defendants' violation of Article 14, § 1 should be granted.

Dated: August 31, 2016



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