State of New York
Supreme Court Chambers
Albany County Courthouse
16 Eagle Street, Room 219
Albany, NY 12207
(518) 285-8592
Fax (518) 285-8394

GERALD W. CONNOLLY
Judge

TARA A. KERSEY, ESQ.
Law Clerk

PATRICIA WATERBURY
Secretary

January 26, 2017

John W. Caffry, Esq.
Claudia K. Braymer, Esq.
Caffry & Flower
100 Bay Street
Glens Falls, New York 12801

JAN 2 8 2016

Re: Protect The Adirondacks! Inc. v. NYS DEC and Adirondack Park Agency
Index No.: 2137-13

Dear Counselor:

Enclosed is the executed Decision and Order with regard to the above matter. The original is being forwarded to you for filing and service. A copy of the decision and order and the original supporting papers have been sent to the County Clerk for placement in the file.

Very truly yours,

Patricia Waterbury

Patricia Waterbury
Secretary to Judge

Enclosure

cc: Loretta Simon, Asst. Attorney General
Office of NYS Attorney General
Environmental Protection Bureau
The Capitol
Albany, New York 12224-0341

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.

DECISION AND ORDER
Index No. 2137-13

(Supreme Court, Albany County)

APPEARANCES: John W. Caffry, Esq.
Claudia K. Braymer, Esq.
Caffry & Flower
100 Bay Street
Glens Falls, New York 12801

Loretta Simon, Esq.
Meredith Lee-Clark, Esq.
NYS Office of the Attorney General
Environmental Protection Bureau
The Capitol
Albany, New York 12224-0341

Connolly, J.:

Plaintiff-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 hybrid action to halt construction and development of new snowmobile trails within the Adirondack Forest Preserve known as "Class II" and/or "Community Connector" Trails. The Combined Complaint and Petition contains three causes of action; the second and third, which sought relief pursuant to CPLR Article 78, were previously dismissed. The remaining cause of action alleges that construction

and development of the Class II Community Connector Snowmobile Trails and any similar trails violate New York Constitution, Article XIV, §1. The plaintiff-petitioner seeks a declaratory judgment and a permanent injunction enjoining "defendants from constructing, in the Forest Preserve, Class II Community Connector snowmobile trails, and other trails having similar characteristics or requiring like amounts of tree cutting, trails requiring construction techniques that are not consistent with the wild forest nature of the Forest Preserve, or trails that result in the creation of a man-made setting for the sport of snowmobiling"; and ordering defendants to rehabilitate the damage done to the Forest Preserve by the construction of said trails. The Defendants-Respondents New York State Department of Environmental Conservation ("DEC") and Adirondack Park Agency ("APA") have moved for summary judgment dismissal of plaintiff-petitioner's remaining cause of action. Plaintiff-Petitioner has moved for summary judgment granting it relief with respect to such cause of action.

Background

Plaintiff asserts that defendant DEC is in the process of constructing a community connector snowmobile trail network for the entire Adirondack Forest Preserve. Plaintiff argues that the construction of such network requires the destruction of trees in the Preserve, which action they allege would violate Article 14, §1 of the New York State Constitution. Specifically, the plaintiff alleges in its Combined Complaint and Petition that "[t]he Class II Community Connector snowmobile trails and any similar trails violate Article 14, §1 because: (a) a substantial amount of timber will be cut and destroyed in the construction of these trails; (b) these trails are not consistent with the wild forest nature of the Forest Preserve; and (c) the construction of these trails will result in the creation of a man-made setting in the Forest Preserve." (Complaint, ¶ 82). The plaintiff contends that the cutting, removing, or destroying of a substantial amount of trees in the Forest

Preserve violates Article 14 of the New York State Constitution and that the amount of trees cut or to be cut for these trails is substantial. Further, plaintiff contends that the proposed Class II Community Connector Snowmobile Trails are not consistent with preserving the Wild Forest Nature of the Forest Preserve. Plaintiff contends that grading, leveling and flattening the ground has been accomplished using large excavators, that the Class II Community Connector snowmobile trails are 9-12 feet wide as opposed to the normal 8 foot wide or less foot trails in the Forest Preserve, and that extensive bench cuts were dug along the side slopes of the trails, protruding rocks were removed or "armored" and hollows filled. Plaintiff asserts that construction of this type is not consistent with the wild forest nature of the Forest Preserve. Plaintiff further asserts that the "tree-cutting, clearcutting, removal of rocks, destruction of bedrock ledges, grading, bench cutting and tapering, and the overall building of road-like trails, and other alteration of the Forest Preserve required for the construction" of the trails, as well as planned snow-grooming, in violation of the Constitution results in an artificial, man-made setting..

In its complaint, plaintiff notes that the Adirondack Park State Land Master Plan ("Master Plan") controls the development and management of the Forest Preserve in the Adirondack Park (see Complaint, ¶25) and has the force and effect of law and is binding on the APA and DEC. The Master Plan divides the Adirondack Forest Preserve into various classifications, including Wilderness, Primitive, Canoe, Wild Forest and Intensive Use. Plaintiff acknowledges that the Master Plan permits the use of snowmobiles in Forest Preserve units classified as Wild Forest (of which there are over 1.2 million acres of land) and Intensive Use and limits the public use of snowmobiles in the Forest Preserve to certain roads and designated "snowmobile trails" which are defined as "a marked trail of essentially the same character as a foot trail designated by the [DEC]

on which, when covered by snow and ice, snowmobiles are allowed to travel and which may double as a foot trail at other times of the year".[1]

The Master Plan also requires that new structures or improvements in wild forest areas be constructed in conformity with a finally adopted unit management plan.

Plaintiff also notes that pursuant to the APA Act §816(1) and the Master Plan, the Adirondack Forest Preserve is divided into various geographic areas or "units" and that the Moose River Plains Wild Forest, Jessup River Wild Forest, Fulton Chain Wild Forest, Blue Mountain Wild Forest, Sargent Ponds Wild Forest, Black River Wild Forest, and Wilmington Wild Forest are among the Forest Preserve Wild Forest units at issue herein (see Complaint ¶ 50). Each unit must have an approved unit management plan ("UMP") which plans are initially developed by defendant DEC, receive approval by defendant APA, and final approval by DEC. The UMPS are subject to the requirements of ECL Article 8, the State Environmental Quality Review Act, and typically, when developing a UMP, DEC will combine the environmental impact statement (EIS) for the UMP into a single document with the UMP. Each UMP/EIS includes a draft that is subject to input by APA, public comment and a public hearing (*see* Complaint ¶¶ 53-58).

On or about November 10 and 12, 2006, defendant DEC and the New York State Office of Parks, Recreation and Historic Preservation approved a Final Snowmobile Plan for the Adirondack

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[1]Plaintiff notes in its complaint that the Master Plan provides that "[t]he primary wild forest management guideline [is] to protect the natural wild forest setting and to provide those types of outdoor recreation that will afford public enjoyment without impairing the wild forest atmosphere" and that wild forest lands "retain[] an essentially wild character". They note that the new construction of snowmobile trails would not be encouraged but that cutting of new trails to improve the snowmobile trail system may be pursued where the impact on the wild forest environment is minimized. (Complaint, pgs. 10-11).

Park/Final Generic EIS.[2] The Plan included recommendations for a system of snowmobile trail connections between communities in the Adirondack Park but did not designate any specific routes for the proposed new trails. The 2006 Plan stated that the "[c]reation of the Adirondack snowmobile system as envisioned by this Final Plan/GEIS involves the creation of Class III[3] (community connector) routes and shifting of snowmobile use from the interior of Wild Forest areas to the periphery and along transportation corridors. This proposed re-configuration of the Adirondack snowmobile route system will involve the designation of Class III trails/trail segments on the Forest Preserve in order to establish community connections and this is anticipated to result in additional Winter and Summer use of certain Forest Preserve lands" (2006 Plan pg. 46). Further, the 2006 Plan notes, *inter alia*, that such relocation of the trails should provide the interior areas of such units with less motorized traffic, lower exhaust emissions levels, lower noise levels, reduced user conflicts between motorized forms of recreation and decreased impacts on wildlife and that snowmobile trails that are re-designated for non-snowmobile use would re-vegetate to narrow widths and a more consistently closed canopy (*see* 2006 Plan, pg. 47).

Plaintiff alleges that at the time of the complaint, pursuant to the 2006 Final Snowmobile Plan, the defendants approved UMPs that included nearly 44 miles of new Class II Community Connector snowmobile trails which plaintiff alleged would result in "clearcutting of a minimum of 47.7 acres of the Forest Preserve, with all of the trees being removed from said acreage" (Complaint, ¶70), including in the [following wild forest areas]: Black River Wild Forest; Independence River Wild Forest; Jessup River Wild Forest; Moose River Plains Wild Forest; Shaker Mountain Wild

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[2]Plaintiff acknowledges that a draft for this plan was previously released for public comment in 2003 and public hearings were held on it.

[3]As noted by plaintiff, the Final Snowmobile Plan labeled the Class II trails at issue herein as "Class III" trails. They were re-designated as "Class II" trails in the "2009 Management Guidance" described further below.

Forest; Vanderwhacker Mountain Wild Forest; Watson's East Triangle Wild Forest; and Wilmington Wild Forest (*see* Complaint, pgs. 17-18).

In 2009, DEC and APA adopted the "Management Guidance" for "Snowmobile Trail Siting, Construction and Maintenance on Forest Preserve Lands in the Adirondack Park". It provides that the 2006 Final Snowmobile Plan presented a conceptual plan with the goal of creating a system of snowmobile trails between communities in the Adirondack Park and that the Management Guidance would establish the DEC snowmobile trail classification system with new standards and guidelines for snowmobile trail siting, construction and maintenance (*see* 2009 Management Guidance, pg 2). The Guidance provides a distinction between Class I and Class II trails and notes that Class II trails are "Community Connector Trails" which are defined as "[s]nowmobile trails or trail segments that serve to connect communities and provide the main travel routes for snowmobiles within a unit ...". (2009 Guidance, pg 3). The 2009 Guidance noted that the "establishment of a Park-wide community-connection snowmobile trail system will provide north-to-south and east-to-west routes that will link many Adirondack communities together" and that the use of the Class II trails would "result in a significant shifting of snowmobile use away from some remote interior areas of these lands to the periphery" (*Id.* at 4). The 2009 Guidance further provided standards and guidelines for snowmobile trail siting, construction and maintenance, including, *inter alia*, that Class II trails may be maintained to a 9-foot trail with the exception of sharp curves and steep running slopes where they may be maintained to a 12-foot maximum cleared trail width (*see Id.* at 10). Further, tree cutting should be minimized, the snowmobile trails may be kept clear to a height of 12 feet as measured from ground level and rock removal is permitted but should not be occur outside the cleared trail width (*see Id.* at 10-11).

Plaintiff alleges that the Class II trails require an unconstitutional level of tree cutting in the Forest Preserve, alleging that DEC has admitted that at the time of the complaint, it had cut or would

cut approximately: (i) 2200 trees of three inches or more in diameter at breast height ("dbh") in the Moose River Plains Wild Forest for the construction of the 11.9 miles of the new Seventh Lake Mountain Trail; (ii) 123 trees of 3" dbh or more in the Jessup River Wild Forest for the construction of the new .3 mile section of the Gilmantown snowmobile trail; and (iii) 398 trees of 3" or more dbh in the Wilmington Wild Forest for the construction of the 2.6 miles of the new Cooper Kill snowmobile trail. Plaintiff alleges that such cutting is unconstitutional and further, does not reflect the full extent of trees cut as it does not include trees smaller than 3" dbh. Plaintiff notes that there are 27 Wild Forest Areas designated in the Master Plan, 18 of which have UMPs and that 8 of such Wild Forest UMPs have approved Community Connector trails in them. Plaintiff asserts that additional Class II trails could be proposed on the 9 other Wild Forest units without UMPs and that older UMPs may be revised.

Plaintiff further alleges that the Class II trails are not consistent with preserving the wild forest nature of the Forest Preserve (noting certain construction features utilized), and result in an impermissible man-made setting therein. Plaintiff requests that the Court declare the construction of the Class II Community Connector snowmobile trails (noted above), and any other trails having similar characteristics or requiring like amounts of tree-cutting, individually and collectively; of trails requiring similar construction techniques that are not consistent with the wild forest nature of the Forest Preserve; and of trails that result in the creation of a man-made setting; are in violation of Article 14, §1 of the New York State Constitution, and enjoin continued maintenance and construction of such trails (*see* Complaint, ¶117).

Summary Judgment

The Court is mindful that summary judgment is a drastic remedy which should only be granted when there clearly are no triable issues of fact (*see Andre v. Pomeroy*, 35 NY2d 361, 364 [1974]). It is well-settled that "the proponent of a summary judgment motion must make a prima

facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]). "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). If such right to judgment is established, the burden shifts to the opponent of the motion to establish by admissable proof, the existence of genuine issues of fact (*see Zuckerman v. City of New York*, 49 NY2d 557 [1980]). It is well established that on a motion for summary judgment, the court's function is issue finding, not issue determination (*see Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]), and all evidence must be viewed in the light most favorable to the opponent to the motion (*see Crosland v. New York City Transit Auth.*, 68 NY2d 165 [1986]). "Summary judgment is inappropriate in any case where there are material issues of fact in dispute or where more than one conclusion may be drawn from the established facts" *(Friends of Thayer Lake LLC v Brown*, 27 NY3d 1039 [2016][internal citation omitted]).

Article 14, §1 of the New York State Constitution provides, in pertinent part, as follows:

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

The Court of Appeals has held that, rather than prohibiting any cutting or removal of timber from the forest preserve, this provision must receive a reasonable interpretation, and accordingly such provision has been construed as "prohibiting [the] cutting or [the] removal of *** trees and timber to a substantial extent" (*Balsam Lake Anglers Club v Dept of Environmental Cons.*, 199 AD2d 852, 853 [3d Dept 1993]; *see also*, *Assoc. for the Protection of Adirondacks v MacDonald*, 253 NY 234 [1930]).

This specific constitutional issue has rarely been litigated *(see Balsam Lake Anglers Club v Dept of Environmental Cons.*, 153 Misc.2d 606 [Sup. Ct., Ulster Cty., 1991]). The Court of Appeals

and the Appellate Division in *Association for Protection of Adirondacks v MacDonald*, 253 NY 234, *affg.* 228 App Div 73 (3d Dept 1930), addressed legislation authorizing the construction of a bobsleigh run within the Adirondack Forest Preserve for the 1932 Winter Olympics and for public use thereafter. The Appellate Division addressed the legislative history of the subject Constitutional provision[4], noting, *inter alia*, that the "Forest Preserve" was created in 1885 and in 1892 a park known as the "Adirondack Park" was established within certain of the forest preserve counties. The lands were legislatively addressed; however, the Court noted that "[a] tendency to sell or lease such Forest Preserve lands by legislative authority early became evident" (*MacDonald*, 228 AD 73, 77 [1930]). Legislative action in 1893 gave to the newly established Forest Commission enlarged powers, including authority to sell certain timber standing in the Forest Preserve and the ability to sell Forest Preserve lands (*Id.* at 77-78). The Constitutional Convention met in 1894 and the Constitution of 1894 "established a new policy" (*Id.*) The provision, now designated as Article XIV, section 1 of the New York State Constitution was adopted. As to use of the word "timber" therein, the Appellate Division in *MacDonald* studied the records of the Convention and noted that "one purpose of the framers was to preserve the timber 'intact'" (*Id.*), but additionally noted however, that later proposed amendments to such provision were not adopted, including a proposal adding the words "trees and" before the word "timber".

Ultimately, the Appellate Division in *MacDonald* determined that the proposed bobsleigh run and return-way involved, *inter alia*, the "clearing of four or five acres of forest lands" and "the cutting of 2,600 trees which must unquestionably be regarded as of 'timber' size" (*Id.* At 82). They found significance in the term "wild forest" noting that "the idea intended was a health resort and playground with the attributes of a wild forest park as distinguished from other parks so common to our civilization" and that certain activities, such as mountain climbing, skiing and hiking "find

[4]At such time such provision constituted Article 7, Section 7 of the New York State Constitution.

ideal setting in nature's wilderness" while allowance of the proposed clearing for the bobsleigh run was more akin to constructing "public automobile race tracks, toboggan slides, golf courses, baseball diamonds, tennis courts and airplane landing fields, all of which are out of harmony with forest lands in their wild state" which additions, if desired, would require a constitutional amendment (*Id.*) Based upon the nature of the proposed project and the proposed destruction of timber, the Appellate Division held the legislation authorizing the project unconstitutional.

The Court of Appeals, in affirming such decision, rejected the contention that the New York State Constitution prohibited the removal of any trees within the Forest Preserve. The Court held that "[t]he words of the Constitution, like those of any other law, must receive a reasonable interpretation, considering the purpose and the object in view" (*MacDonald*, 253 NY 234, 238 [1930]) and that the

> purpose of the constitutional provision, 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 timbers 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. The Forest Preserve is preserved for the public; its benefits are for the people of the State as a whole. Whatever the advantages may be of having wild forest lands preserved in their natural state, the advantages are for every one within the State and for the use of the people of the State. Unless prohibited by the constitutional provision, this use and preservation are subject to the reasonable regulations of the Legislature. (*Id.* at 238-239).

In *Balsam Lake Anglers Club v DEC*, 199 AD2d 852 [3d Dept 1993], the Third Department held that the construction of five new parking lots, designation of two existing campsites as lawful campsites, relocation of existing trails, construction of a new hiking trail, and the construction of a cross-country ski trail loop on lands subject to NY Constitution, article XIV, §1, which construction called for certain specific amounts of cutting and then unknown amount of cutting for the proposed new trail and parking lots, was not constitutionally prohibited as the Court was unpersuaded that

such proposed activities constituted improper uses of the forest preserve and/or involved unconstitutional amounts of cutting (*Id.* at 854).

Specifically, the Third Department provided in *Balsam Lake, supra* at 853, in reviewing New York Constitution, article XIV, § 1, as follows:

> Although this provision 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, 170 N.E. 902 [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*).

The Appellate Division, Third Department in reaching such decision in Balsam Lake, noted that they were unpersuaded that the addition of the five new parking areas and relocation and construction of certain trails were improper uses of the forest preserve and/or involved unconstitutional amounts of cutting (*Id.* at 854).

Determination Standard

Upon the instant motions for summary judgment, the Court must determine whether the facts and conclusions/inferences to be drawn from such facts do not present any significant dispute such that the Court should issue a declaration for either party at this stage as to the constitutionality of the Class II Community Connector snowmobile trails at issue. Based upon *Balsam Lake*, this Court does not agree with plaintiff's counsel that the standard for this Court includes an analysis of whether the "proposed use" is "reasonably necessary to provide for public use of the Park" (Pl. Memo of Law, pg. 18) but rather finds that the standard to be applied to this case is whether the construction of trails at issue: (i) results in the cutting or removal of trees to an unconstitutional extent (i.e to a substantial

extent or any material degree), and/or (ii) constitutes an "improper use[]" of the forest preserve impairing such "wild forest lands" to an unconstitutional extent (*see MacDonald, supra; Balsam Lake v DEC, supra* at 853).

Scope of this Case

Initially, the parties dispute the scope of the Court determination in this litigation. Based upon the record, discovery was authorized with respect to "those Class II Community Connector Snowmobile Trails for which construction has either been completed or is currently under way, the Court will limit document discovery to final plans, approvals, and policies in effect as of January 1, 2012 and going forward, ..." (Decision/Order of October 15, 2014 (Ceresia, Jr., J.). Accordingly, despite the plaintiff's contentions, the ultimate determination rendered by a Court in the instant litigation will be limited via such discovery order.

Defendants' Contentions In support of their Motion

Defendants argue that they should be granted summary judgment dismissal of plaintiff's complaint as their plan to construct the multiple-use trails at issue is consistent with the use of Forest Preserve land and the number of trees to be cut for Class II trails does not constitute destruction of the Forest Preserve to a "substantial extent".

Tree Cutting

In support of the defendants' motion for summary judgment, they have submitted, *inter alia*, the affidavit of Maxwell Wolckenhauer, a DEC employee, who submits a Class II Trail Summary with respect to the sixteen specific trails or trail segments defendants' contend are at issue in this litigation noting the trail mileage listed in work plans for each trail and the number of trees approved to be cut for each trail.[5] Such "Tree Tally Class II Trails" list trails or trail segments, their

[5] He also notes that defendants have submitted affidavits of foresters responsible for the construction of said trails which in some instances note that trail mileages changed or the amount

approximate mileage, what Forest "Unit" such trails exist within, the trees approved to be cut (or that have been cut) and the estimated construction time period. Further, such submission distinguishes between the trees approved to be cut that were "Live" and "Dead". Defendants list the following as the trees (both live and dead) approved to be cut for the corresponding trails: (i) Gilmantown - 127 trees; (ii) Old Powerline Trail - 22 trees; (iii) Perkins Clearing - Lewey Lake Trail - 3; (iv) Steam Sleigh Trail - 43 trees; (v) North Crossover Trail - 46; (vi) Mt. Tom East Trail - 124; (vii) Taylor Pond to Wilmington Connector - 133; (viii) Wilmington Trail Segment 3 - 482; (ix) 7th Lake Mountain Trail segment 1 - 981; (x) 7th Lake Mtn Trail segment 2 - 340; (xi) 7th Lake Mountain Trail segment 3 - 762; (xii) Newcomb, Minerva & North Hudson Trails ("NMNH") (Santanoni to Lake Harris) - 363; (xiii) NMNH (Hyslop - Roosevelt Trail) - 1148; (xiv) NMNH (Boreas to Stony Pond Road) - 1253; (xv) NMNH (Stony Pond to Minerva Woods) - 423; and (xvi) NMNH (Palmer Pond Bridge Access) - 279.

Defendants initially contend that the Court, via its Decisions and Orders of September 4, 2015 and August 10, 2016, already determined that the cutting of trees for these trails does not constitute destruction of the Forest Preserve to a substantial extent or material degree. Such contentions are without merit as "the granting or refusal of a temporary injunction does not constitute the law of the case or an adjudication on the merits" (*Digitronics Inventioneering Corp. v Jameson*, 11 AD3d 783, 784 [3d Dept 2004][internal citations and quotations omitted]).

Defendants further contend that DEC's and APA's policies and practices ensure that Class II trail-siting, construction and maintenance properly comply with the standard set forth in *MacDonald* (i.e. that tree-cutting does not occur to a substantial extent or any material degree).

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of trees ultimately cut were fewer than those designated in the spreadsheet. It is unclear to the Court why defendants could not have noted the changes to the trail mileage and tree-cutting in the Class II Trail Summary.

Defendants assert that by individually assessing and marking each tree to be cut, as demonstrated via the submitted affidavits of the DEC foresters responsible for the construction of the trails at issue, DEC ensures that the minimum amount of timber is cut during the process and that DEC preserves trees that have been approved for cutting when on-the-ground conditions allow.

Defendants assert that the number of trees authorized to be cut *on each trail segment*, as set forth in the tree tally, is not substantial and is fewer than the 2,600 trees at issue in *MacDonald.* Defendants argue that in *MacDonald*, as reflected in the submitted record on appeal, the proposed bobsleigh run or slide, to be constructed in preparation for the 1932 Winter Olympics, would be approximately one and one-quarter miles long and the width would be approximately sixteen feet where the course is straight and 20 feet where the course curves. The return way would be either a roadway approximately one mile long and eight feet wide or a line approximately 5/8ths of a mile long and six feet wide. Further, such bobsleigh run would require the land to be cleared. (*see MacDonald,* Record on Appeal at 9-10). For such one and one quarter mile long bobsleigh run an estimated 2,500 trees would be cut (*see MacDonald*, 253 NY 234 [1930]), while here approximately 27 miles of trails are being created and, approximately 5000-6000 trees were approved to be cut.

Further, they assert, via affidavits of DEC Foresters, photographs submitted, and Defendant's expert Dr. Howard, that such tree-cutting does not constitute "clear-cutting". Dr. Howard contends, based upon his limited review of the trails at issue, that clear-cuts contain wide open spaces with no tree canopy overhead and forest edges with an abrupt change in vegetation, however, he opines that, having visited some of the trails at issue, Class II trails do not have these characteristics.

Defendants also assert that the tree tallies reflect the full extent of tree-cutting even though they exclude saplings and trees under 3 inches diameter at breast height ("DBH"). Defendants argue that the Constitution prohibits the sale, removal or destruction of "timber" and the DEC policy and

forestry standards do not consider tree under 3 inches DBH to be timber. Further, they assert that in *MacDonald* and *Balsam Lake*, the Courts discussed only trees 3 inches dbh or greater, as opposed to saplings and other vegetative growth, and that this interpretation is supported by the legislative history of the 1915 Constitutional Convention at which an amendment including "trees" in Section 1 of Article 14 was not adopted.

Finally, defendants assert that the acreage of all Class II trails is a small and insignificant portion of the Forest Preserve acreage as the total acreage of Class II trails constructed between 9 to 12 feet would range from 29.5 acres to 39.3 acres while the State Forest Preserve land in the Adirondack Park consists of 2,551,699 acres of State Forest Preserve land with 1,161,257 acres expressly excluding the construction of snowmobile trails. As such, they contend that the amount of trees cut, in context, is not substantial or material.

Use of the Forest Preserve

Defendants also contend that there is no merit to plaintiff's argument that Class II trails violate the "forever wild' clause because, *inter alia*, trail construction includes grading, leveling, flattening of trails, trail tread widths of nine to twelve feet rather than eight, and bridge construction. Defendants assert that terrain modification facts are set forth in the work plans for each trail and rely on the affidavits of DEC Forester Ripp, and Connor who aver, *inter alia*, that foot trails and snowmobile trails utilize many of the same construction and erosion control techniques. Mr. Ripp avers that both trails require professional determinations to route the trail and employ trail features that will result in the least possible impact on the forest. He avers that DEC's construction of snowmobile trails is guided by the 2009 Guidance document which contains extensive construction and maintenance standards. As noted above, such document requires Class II trails to be sited close to motorized travel corridors and will be sited, when possible, along existing routes or previously

existing old routes, such as foot trails, woods roads, utility rights of way and abandoned railroad beds and to site such trails with an objective to avoid locations that present safety hazards and environmentally sensitive areas. Further, tree-cutting should be minimized.

Mr. Ripp further avers that he is the Forester coordinating planning and construction of the Newcomb to Minerva to North Hudson Class II community connector trail system which has four sections to be constructed over the next several years but subject to the instant litigation. He avers that in selecting the route for such trail system, he walked the area several times, scouted possible routes with APA staff and ultimately designed the trail to identify a route that best avoided large trees and environmentally sensitive areas, and minimized rock removal and bench cutting in order to select a sustainable safe path that preserved the wild forest character of the area.

Defendants also assert, based upon the 2009 Guidance, that the difference between Class I and Class II trails, at a minimum is 1 foot and at a maximum is 3 feet wide and that such Class II trails are designed and constructed with the same features and characteristics as foot trails and Class I trails as averred by Tate Connor, a DEC forester. Mr. Connor has averred that "whether the trail to be constructed is a hiking trail, a cross-country ski or snowshoe trail, within a circuit of connected trails, or a long distance community connector trail suitable for snowmobiling or mountain biking, the considerations remain the same. Each trail corridor requires a well-defined tread, management of vegetation along the trail, proper water drainage, and bridges or walkways over water courses, wetlands, and similar types of obstacles, all in a manner that blends the trail into the adjacent natural environment and makes the trail as maintenance-free as possible." Mr. Connor further avers that in order to construct safe trails certain steps may be necessary such as bench cuts (constructing a trail across the side slope of a hill which might require cutting into a slope and removal of the cut material), rock reduction, removal of stumps, and the hardening of trail tread.

Defendants argue that the "forever wild" clause was not interpreted in *Balsam Lake* to preclude all cutting of timber for the creation of trails nor that the construction of trails and parking lots were an unconstitutional proposed use that was incompatible within the forest preserve. Accordingly, they assert that their construction of the multiple-use trails at issue are not constitutionally prohibited.

Plaintiff's Contentions in Support of its Motion

Initially, both defendants and the Court note that plaintiff, in making its motion for summary judgment did not note that it was moving only for partial summary judgment with respect to its contention that the cutting of trees for the Class II trails at issue in the Forest Preserve violates the Constitution; however, the Court will address plaintiff's motion as such. Plaintiff contends that it is entitled to summary judgment based (i) upon DEC's cutting of trees in the Forest Preserve to accommodate an outdoor sport and (ii) upon the number of trees being cut for the creation of such trails.

Plaintiff argues that DEC cannot cut any trees in the Forest Preserve to accommodate an outdoor sport (as opposed to some tree cutting necessary to properly preserve the park). (*see* Pl. Memo of Law, pgs 8-9). Plaintiff also argues that the cutting of trees in the Forest Preserve violates the Constitution and has submitted the affidavit of its expert, Steve Signell, who asserts, *inter alia*, that in determining whether the amount of cutting for such trails is or is not constitutional, the Court should not limit itself to a tabulation of trees over 3"dbh. Plaintiff further contends, however, that whether the Court solely looks to DEC's numbers of trees to be cut which total for all 16 trails/trail segments over 6,000 trees or includes trees smaller than 3"dbh, such amount violates the Constitution as no tree cutting for the purpose asserted (snowmobile trails) is constitutional and as, in any event, such amount is greater than the approximately 2,500 trees (3"dbh or greater) that would

have been cut for the bobsleigh run and return trail in *MacDonald*.[6]

In support of plaintiff's contention that trees smaller than 3"dbh should be counted, Mr. Signell submits the USFS Forest Inventory Analysis (which he notes is the most widely-accepted and used standard forest inventory in the United States) which provides, *inter alia*, that a "tree" is defined as "Data describing saplings with a diameter 1.0 inch through 4.9 inches, and trees with diameter greater than or equal to 5.0 inches" and describes a sapling as "[t]rees with a diameter at least 1.0 inch but less than 5.0 inches". He further notes that he visited the trails in question to count or estimate the number of trees that were cut or planned to be cut and used one of three protocols to do this. He avers that (i) where trees had already been cut, he measured tree diameter at stump height and he approximated the tree diameter at breast height; (ii) in uncut sections, diameter at breast-height was used to measure trees and he only counted trees that were painted or unpainted but within the cutting corridor; and (iii) in assessing ecosystem/habitat characteristics and trail impacts he established observation control points every 0.10 miles along each trail section to collect information.

Mr. Signell avers that, including trees both less than and greater than 3"dbh, over 31,000 trees have been or will be cut with respect to the trails plaintiff alleges are at issue in this action which he contends include, but are not limited to (i) the Newcomb to Minerva to North Hudson Trail, (ii) Seventh Lake Mountain Trail, (iii) Polaris Bridge Trail, (iv) Cooper Kiln Trail; and (v) Gilmantown Trail.[7]

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[6] Plaintiff in later submissions appears to rely solely on the issue that the tree-cutting violates the Constitution as it is "substantial and material".

[7]While the parties both seek summary judgment with respect to the alleged constitutionality of the tree-cutting at issue, the parties disagree as to the trails at issue. As to the Polaris Bridge Trail, however, plaintiff acknowledges that this trail was approved as part of the Essex Chain Lakes Complex Unit Management Plan in early 2016 and has not been noticed in the Environmental Notice Bulleting. Accordingly, it is clearly outside of the scope of the instant

Plaintiff also asserts that, rather than evaluate each trail or trail segment as identified by defendants, the entire system of Class II trails should be taken into account when evaluating the constitutionality of the tree-cutting. Plaintiff asserts that DEC's own planning documents and the deposition transcript evidences that the system of Class II Community Connector snowmobile trails constitute a single system of trails.

Use of the Forest Preserve

To the extent the Court does not grant plaintiff summary judgment with respect to tree-cutting, plaintiff opposes defendants' motion for summary judgment on other grounds, asserting that there are numerous material triable issues of fact on the questions of whether the construction of the trails will create a man-made setting and interfere with the wild forest nature of the Forest Preserve. Plaintiff asserts that triable issues of fact exist regarding, *inter alia*, forest fragmentation, the trails' effects on forest canopy, edge effects, erosion issues and whether such trails result in the introduction of invasive species which plaintiff asserts unconstitutionally interfere with the wild forest nature of the Forest Preserve. In support of its arguments, plaintiff has submitted competing expert affidavits (of Mr. Signell, Dr. Sutherland and Mr. Amadon) to that of defendants' expert Dr. Howard and the DEC Foresters.

Analysis

Initially, Plaintiff has not demonstrated its prima facie entitlement to summary judgment with respect to its contention that DEC's cutting of trees in the Forest Preserve to accommodate an outdoor sport is unconstitutionally impermissible. Plaintiff has failed to demonstrate its entitlement to such relief as it has failed to sufficiently distinguish the trail-building activities and purpose herein from the Appellate Division, Third Department's determination in *Balsam Lake* that tree cutting for,

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litigation.

inter alia, the construction of five new parking lots and the construction and relocation of certain trails, which included the construction of a cross-country ski trail loop, were not constitutionally prohibited. Accordingly, plaintiff has failed to demonstrate its entitlement to summary judgment as a matter of law with respect to such claim.

With respect to the remainder of the parties' arguments, in this case, at this juncture, while the parties dispute the constitutionality of the Class II trails at issue, the Court notes that the parties each seek summary judgment relief with respect to the constitutionality of the proposed tree-cutting, contending that the material facts are fully and accurately presented in the record and not in significant dispute (*see generally, Friends of Thayer Lake, LLC v. Brown*, 27 NY3d 1039 [2016]). Moreover, as in *Friends of Thayer Lake, LLC*, the parties agreed herein at oral argument that they believed summary judgment for one side or the other was appropriate. Nevertheless, the Court declines, at this juncture, to award summary judgment to either party.

Summary judgment "is inappropriate in any case where there are material issues of fact in dispute or where more than one conclusion may be drawn from the established facts" (*Id.* at 1043 [internal citation omitted]). Whether the cutting or removal of the trees and timber in the Forest Preserve is contemplated to a substantial extent or any material degree is a highly fact-specific determination that cannot always be resolved as a matter of law (*see id*). While the parties cite to *MacDonald*, *supra*, and *Balsam Lake*, *supra*, a review of such determinations demonstrate that each was made based upon the specific facts presented in such cases. The facts of this case differ from *MacDonald* and *Balsam Lake* based upon the number of trees at issue as well as the context and purpose for the construction (i.e. an Olympic bobsleigh run, construction of parking areas and relocation and construction of certain trails and the construction of snowmobile trails).

Neither the courts in *MacDonald* or *Balsam Lake* determined whether such proposed human

alteration of the Forest Preserve rose to an unconstitutional level solely based upon the proposed number of trees to be cut, as argued by plaintiff but such determination was made based upon a factual analysis of the trees to be cut in the context of the proposed construction project at issue.

In this case, the parties have not submitted a stipulated statement of facts, and while such may not be necessary to the determination, its absence is noted as the parties respective submissions concerning the trails at issue in this litigation and trees to be cut are in dispute (*compare* Signell Aff., 8/25/2016 exhibit D and Plaintiff's Wolckenhauer Aff., Exh. Tree Tally). The parties herein have provided conflicting evidence with regard to a number of material facts and the inferences they wish to be drawn from such facts (*see Friends of Thayer Lake, supra*).

In lieu of a stipulated statement of facts concerning the proposed tree-cutting and whether it is occurring to a substantial extent or material degree, the parties have submitted an extensive and expansive record containing, among other things, documents, maps, photographs, testimony and affidavits and seek determinations as a matter of law based on alleged agreed-upon facts that the Court may, in searching the record, extract therefrom (*see Friends of Thayer Lake, LLC*, 27 NY3d 1039 [2016]). The record is not conclusive with regard to, *inter alia*: (i) what trails are subject to the Court's determination (for example, plaintiff includes reference to the 3.3 mile Cooper-Kiln trail while defendants' have only included the 2.96 Wilmington Trail Segment 3 in their Tree Tally), (ii) the number of trees cut, even limiting such tree-cutting counts to trees 3" DBH or greater (for example, defendants have estimated a greater number of trees as to a segment of the NMNH trail than those proposed by defendant DEC and have made allegations as to additional trees being damaged due to the construction process that have not been counted by DEC), (iii) the length of such trails, (iv) what constitutes "timber" for purposes of the Constitution, (v) whether only trees 3"dbh or greater should be counted and, (vi) whether the closing of trails in remote interior areas has

occurred and to what extent. Collectively, such factual issues present material considerations that permit more than one conclusion to be drawn concerning whether or not the proposed tree-cutting is substantial or material. Accordingly, neither party has demonstrated *prima facie* entitlement to summary judgment (*see generally, Id.*). Moreover, the determination of the appropriate inferences and conclusions to be drawn from the undisputed facts herein, particularly in light of the fact-specific standard set forth in *MacDonald* and *Balsam Lake*, is not appropriate at the summary judgment stage. While there may, of course, be cases where factual disputes do not preclude summary judgment as such disputes are upon issues not relevant to such determination, the disputes herein, including those referenced above, create issues precluding summary judgment for either party.

As to whether the construction of Class II trails constitutes an "improper use[]" of the forest preserve impairing such "wild forest lands" to an unconstitutional extent, based upon the record defendants have acknowledged the existence of triable issues of fact sufficient to preclude dismissal of the complaint with respect to such issue.

The Court of Appeals in *MacDonald* noted, *inter alia*, that the maintenance of proper facilities for the use of the public which did not call for the removal of timber to any material degree are permitted and left open the question of removal to "open up" the forest preserve for the public. The Appellate Division, Third Department held in *Balsam Lake*, that, *inter alia*, the construction and relocation of trails and the construction of five parking lots appeared compatible with the use of forest preserve land and was not unconstitutional thereby demonstrating initially, as defendants contend, that the creation of the instant snowmobile trails and relocation of trails is not unconstitutional. Accordingly, such decisions do not indicate that any and all human alteration or modification of the Forest Preserve, including non-substantial [or not to a material degree] tree-cutting is completely precluded.

Defendants have submitted affidavits of DEC foresters which assert that the construction of the trails at issue are similar to that of a foot trail and they have submitted the expert affidavit of Dr. Howard, a Director of Science with the New York Natural Heritage Program, a program of the Research Foundation for the State University of New York College of Environmental Science and Forestry, concerning the issue, *inter alia*, of forest fragmentation. Dr. Howard asserts that in the Management Guidance of 2009 a clear goal was to close snowmobile trails that penetrate to the more interior portions of the Wild Forest and locate new trails along existing roadways. He avers that a primary reason for such trail reconfiguration goal was to minimize forest fragmentation (noting that roads and other features that divide a forest have detrimental impacts on the plants and animals making up the forest ecosystem). He opines that minimizing forest fragmentation increases the ability of forest ecosystems to withstand natural weather and climate and that designing a snowmobile trail system that minimizes forest fragmentation lessens the potential threat of transporting invasive species into the interior of the forest. He avers that he reviewed historical and current information about the network of snowmobile trails in the Adirondacks to evaluate whether the actions planned or taken would actually lessen forest fragmentation with respect to roads and snowmobile trails. Additionally, he evaluated whether trail system restructuring that had already been undertaken had changed the level of forest fragmentation at three sites, Gilmantown, Seventh Lake Mountain and Wilmington, focusing on the primary forest block through which each of the Class II trails pass. He utilized data which catalogued all snowmobile trails as the APA knew them to be to determine the trail network prior to the construction of the Class II trails, while acknowledging several methods available to evaluate changes in forest fragmentation, he utilized the metric of change to the size of the roadless blocks. He asserts that with the changes in the Gilmantown, Seventh Lake Mountain and Wilmington Snowmobile trails, trails that penetrated the

forest interior have been closed to snowmobiles, changing the fragmentation status of the Focus Areas and in all cases there were fragmentation measures that improved with the new trail system. He opined that in his abbreviated assessment, "it appears that trail reconfiguration is mostly improving the fragmentation state of these forests, suggesting that the wild forest state is improving with respect to snowmobile trails" (Howard Aff., par. 23).

Defendants acknowledge, however, that plaintiff has submitted competing expert affidavits with respect to, *inter alia*, the issues of forest fragmentation and the nature of the trails. Resolution of competing expert affidavits is not to be undertaken by the Court upon summary judgment, but necessitates a trial. In opposition, plaintiff has submitted the affidavits of its experts, Mr. Signell, a forest ecologist, and Dr. Sutherland, a Conservation Scientist with the Wildlands Network, and Mr. Amadon, a professional trails manager in the Adirondack Park, who contend that the construction methods utilized by defendants with respect to the Class II trails at issue unconstitutionally impair such wild forest lands. Mr. Signell disputes defendants' experts' conclusion regarding forest fragmentation, opining that the new trails will not reduce forest fragmentation and that Dr. Howard's analysis was flawed and based on incomplete data. Mr. Signell opines that certain of the trails that DEC asserts are closed to snowmobiles remain open for other purposes.

Mr. Signell and Dr. Sutherland both opine that the new trails have created large areas of non-forest vegetation in contrast to the representation of DEC Forester Tate Connor that the 7th Lake Mountain Trail is consistent with the wild forest nature of the adjoining lands. Dr. Sutherland also asserts that the new trails are leading to erosion due to the construction process and allegedly arguable routing of the trails. Mr. Amadon disputes defendants assertion that the connector trails have the character of a foot trail, noting, *inter alia*, that the materials used to construct the trails differ from that of a foot trail, including, among other things, with respect to bridge construction, the

width of the trails, the flattening of the surface of the trail, the bench cuts into side slopes.

While at trial plaintiff will bear the burden of demonstrating that construction of the Class II trails at issue constitutes an "improper use[]" of the forest preserve impairing such "wild forest lands" to an unconstitutional extent, as opposed to altering and modifying such wild preserve lands to a constitutional extent (as some of the triable issues of fact appear to be the logical effects of (i) tree-cutting and/or (ii) trail construction - both of which are not wholly impermissible within the Forest Preserve), such issue is not for Court resolution as a matter of law at this juncture.

As to plaintiff's "man-made setting" and "interference with the wild forest nature" claims, such claims must be considered solely in the context of whether such trails constitute an improper use of the forest preserve. The Court of Appeals in *MacDonald* did not adopt such tests as separate tests, nor will the Court do so herein.

Otherwise, the Court has reviewed the parties' remaining arguments and finds them either unpersuasive or unnecessary to consider given the Court's determination.

Accordingly, based upon a review of the record, it is hereby

ORDERED that parties' motions for summary judgment are in all respects denied.

This Memorandum constitutes the Decision and Order of the Court. This original Decision and Order is being returned to the attorney for the plaintiff. A copy of the decision and order and the supporting papers are being delivered to the County Clerk for placement in the file. The signing of this Decision and Order shall not constitute entry or filing under CPLR §2220. Counsel is not relieved from the provision of that rule regarding filing, entry or notice of entry.

Dated: Albany, New York
January 25, 2017

Gerald W. Connolly
Acting Justice of the Supreme Court

Papers Considered:

1. Notice of Motion for Summary Judgment dated August 31, 2016; Affirmation of Loretta Simon, Esq. dated August 30, 2016 with accompanying exhibits A-G which includes a list of the Return Documents included as part of the record (Exhibits 1-58) and as Exhibit E the accompanying affidavits in support of Defendants' motion for summary judgment including those of Peter Frank, Kathleen Regan, Maxwell Wolckenhauer, Joshua Clague, Dr. Timothy Howard, Tate Connor, Robert Ripp, Steven Guglielmi, Benjamin Thomas, Jonathan DeSantis, Daniel Levy, Keith Rivers and James Sessions; Memorandum of Law dated August 31, 2016; *Exhibits 52-58 are attached to affidavits which the Court has not been asked to accept as part of the record and accordingly such affidavits have not been considered;
2. Order of the Court of January 17, 2017; Amended Answering Affidavit of John W. Caffry dated November 16, 2016 with accompanying exhibits A-I; Answering Affidavit of Steve Signell dated October 26, 2016 with accompanying exhibits A-I; Affidavit of Dr. Sutherland dated September 27, 2016 with accompanying exhibits A-C; Supplemental Affidavit of William Amadon and Peter Bauer dated November 15, 2016; Affidavit of William Amadon dated September 27, 2016 with accompanying exhibits A-P; Answering Affidavit of Peter Bauer dated November 1, 2016 with accompanying exhibits A-N; Affirmation of Robert Glennon dated September 23, 2016; Affidavit of Dr. Terrie dated September 23, 2016 with accompanying exhibit A; Copy of Deposition transcript of Karyn Richards; Memo of Law dated November 16, 2016;
3. Reply Affidavits of Peter Frank dated November 17, 2016; Tate Connor dated November 16, 2016 with accompanying exhibits A-C; Robert Ripp dated November 7, 2016 with accompanying exhibits A-B; Jonathan DeSantis dated November 15, 2016 with accompanying exhibits A-C; and Dr. Howard dated November 17, 2016; Reply Memorandum of Law dated November 18, 2016;
4. Notice of Motion dated August 31, 2016; Corrected Affidavit of John W. Caffry dated September 19, 2016 with accompanying exhibits A-S; Affidavit of Dr. Terrie dated August 30, 2016 with accompanying exhibits A-K; Affidavit of Peter Bauer dated August 31, 2016 with accompanying exhibits A-G; Affidavit of Steve Signell dated August 25, 2016 with accompanying exhibits A-Z; Memorandum of Law of August 31, 2016;
5. Affirmation of Loretta Simon, Esq. dated October 26, 2016 with accompanying exhibits 1-8; Affidavit of Dr. Howard dated October 26, 2016; Affidavit of Tate Connor dated September 26, 2016; Affidavit of Maxwell A. Wolckenhauer dated September 26, 2016 with accompanying exhibit; Affidavit of Robert Ripp dated September 27, 2016; Affidavit of Joshua D. Clague dated October 26, 2016 with accompanying exhibit; Memorandum of Law in Opposition dated November 1, 2016;
6. Reply Affidavit of John W. Caffry, Esq. dated November 18, 2016 with accompanying exhibits A-D; Reply Affidavit of Peter Bauer dated November 18, 2016 with accompanying exhibits A-C; Reply Affidavit of Steve Signell dated November 18, 2016 with accompanying exhibits A-C; Reply Memorandum of Law dated November 18, 2016;
7. Transcript of December 5, 2016 oral argument;
8. Plaintiff's Reply of October 15, 2013 (the other pleadings were provided by defendants in their motion for summary judgment).