



December 17, 2019

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Peter Bauer
Executive Director

Hon. Andrew Stewart-Cousins
Majority Leader
NYS Senate
28 Wells Avenue, Building #3
Yonkers, NY 10701

Hon. Liz Krueger
Chair, NYS Senate Finance Committee
211 E 43rd Street, Suite 1201
New York, NY 10017

Hon. Todd Kaminsky
Chair, NYS Senate Committee on Environmental Conservation
55 Front Street, Room 1
Rockville Centre, NY 11570-4040

RE: Appointments to the NYS Adirondack Park Agency

Dear Senator Stewart-Cousins, Senate Krueger, Senator Kaminsky:

At the end of the 2019 Legislative, the State Senate chose not to act on four names submitted by Governor Andrew Cuomo for nomination to the NYS Adirondack Park Agency (APA) Board. At the time, Adirondack conservation and environmental groups applauded the Senate for standing firm because these nominations did not represent the broad and diverse interests of the Adirondack Park community and all New Yorkers who are concerned about the management of the Adirondack

Protect the Adirondacks

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Park. The Senate's decision was a bold move, but it needed to be done. There were two main problems with the Governor's nominations.

First, Adirondack conservation groups had been calling for greater professional diversity on the APA Board. Adirondack conservation groups had called for nominations that included an independent environmental attorney, scientist, and an individual with regional planning experience. Individuals with these qualifications would immensely help the APA Board pursue its mission to balance the conservation and development of the Adirondack Park.

Second, this Governor submitted only a partial slate of nominees for the APA Board, preferring to retain other members who were serving expired terms in order to avoid scrutiny by the new Democratic majority. The Governor's partial slate would have left three other Board members serving in expired terms.

The decision not act on the partial slate of proposed Board members for the APA submitted by Governor Cuomo in the 2019 Legislative Session was vindicated on July 3, 2019 in a decision of the Appellate Division, Third Department, that found that the DEC and APA violated Article 14, Section 1, of the NYS Constitution, the famed "forever wild" clause. In *Protect the Adirondacks v Department of Environmental Conservation and the Adirondack Park Agency*, the Appellate Division found that the DEC and APA had violated the forever wild protections for the 3-million acre public Forest Preserve, the people's land in New York, in its decision to destroy over 25,000 trees to build a network of road-like class II community connector snowmobile trails. (See decision enclosed.)

Trees of the public Forest Preserve are protected by the NYS Constitution. Article 14, Section 1, reads: "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's decision in July 2019 ruled that Article 14 does not provide protection to some trees, but not to others. It provides protection to all trees. State agencies have been allowed to, and will continue to be able to, undertake any number of management activities on the Forest Preserve in order to maintain and protect it and to provide for public recreational activities, provided that the destruction of trees/timber does not occur "to a substantial extent" or "to a material degree." These are reasonable standards. The court found that the cutting of 25,000 trees to build a network of class II trails violated these standards, and consistent with longstanding legal precedents on Article 14 case law, the court found the state's recent actions to be unconstitutional.

Three members of the APA Board, all of whom are serving expired terms, including Lussi, Thomas and Wilt, have been enthusiastic supporters of Forest Preserve management policies that were struck down by the court. The APA Board should not have members who are on the wrong side of forever wild. Two of these Board members have been on the Board since 2006 and were Pataki appointees. It's time for a change.

The APA Board is comprised of 11 members. Eight are nominated by the Governor and confirmed by the State Senate. Three represent state agencies, including the Department of Environmental Conservation, Department of State, and Empire State Development Corp. Of the eight board members confirmed by the State Senate, five must be permanent residents of the Adirondack Park and three must be permanent residents of areas outside the Adirondacks. No more than five Board members can be from one political party and the Governor selects the Chair. Board terms are 4 years long and the terms are set in statute with two terms expiring each year. APA Board members have regularly served in expired terms. The status of the APA Board is listed below in a chart.

Currently, the APA Board has three vacancies. Among the five Board members from within the Adirondack Park, there are two vacancies and three members are serving expired terms.

APA Terms: Current Status

In-Park Board Members

<u>Board Member</u>	<u>Status/Expiration</u>	<u>Year Appointed</u>
Art Lussi (D Essex)*	Expired (2017)	2006
Bill Thomas (R Warren)	Expired (2018)	2006
Daniel Wilt (R Hamilton)	Expired (2019)	2013
Vacancy	Expired (2019)	Open
Vacancy	Expires (2020)	Open

*Nominated by George Pataki as a R

Current Out-of-Park Board Member

<u>Board Member</u>	<u>Status/Expiration</u>	<u>Year Appointed</u>
Chad Dawson (D Tompkins)	Expires (2020)	2016
John Ernst (D New York)	Expired (2017)	2016
Vacancy	Expired (2018)	Open

Protect the Adirondacks urges the Democratic majority of the State Senate to hold strong and to demand that members of the APA Board bring a range of professional experiences and undertake their duties with independence. It's also important that the Governor submit nominations for a full slate to either replace Board members or nominate them for new terms. All members must be fully and publicly scrutinized. It's

vital the APA Board include people with expertise in environmental law, science and regional planning. There is a role and voice for local government officials on the APA, but the Board should not be dominated by local government officials.

On behalf of the Board of Directors of Protect the Adirondacks, please accept my gratitude for the opportunity to present our concerns on this important matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Peter Bauer". The signature is fluid and cursive, with a large initial "P" and "B".

Peter Bauer,
Executive Director

CC NYS Senators
NYS Senate Staff

State of New York
Supreme Court, Appellate Division
Third Judicial Department

Decided and Entered: July 3, 2019

527256

PROTECT THE ADIRONDACKS! INC.,
Appellant,

v

NEW YORK STATE DEPARTMENT
OF ENVIRONMENTAL
CONSERVATION et al.,
Respondents.

OPINION AND ORDER

Calendar Date: April 29, 2019

Before: Egan Jr., J.P., Lynch, Clark, Mulvey and Pritzker, JJ.

Caffry & Flower, Glens Falls (John W. Caffry of counsel)
and Braymer Law, PLLC (Claudia K. Braymer of counsel), for
appellant.

Letitia James, Attorney General, Albany (Loretta Simon of
counsel), for respondents.

Mulvey, J.

Appeal from a judgment of the Supreme Court (Connolly,
J.), entered December 4, 2017 in Albany County, upon a decision
of the court in favor of defendants.

Defendant Adirondack Park Agency is responsible for the
development and implementation of long-range planning on both
public and private lands in the Adirondack Park (see generally
Executive Law § 801). Defendant Department of Environmental
Conservation (hereinafter DEC) has custody and control over the

Forest Preserve and designs, constructs and maintains all trails in the Forest Preserve pursuant to its statutory authority to "[p]rovide for the care, custody, and control of the [F]orest [P]reserve" (ECL 3-0301 [1] [d]; see ECL 9-0105 [1]).¹ Defendants work collaboratively under a memorandum of understanding on aspects of land use in the Adirondack Park, including the trails at issue (see generally Executive Law § 816).

After years of planning by defendants, DEC began construction of more than 27 miles of Class II Community Connector trails (hereinafter Class II trails), primarily for use as snowmobile trails, in the Forest Preserve within the Adirondack Park. This resulted in the removal or planned removal of more than 6,100 trees that measure at least three inches in diameter at breast height (hereinafter DBH)² and approximately 25,000 trees in total from the Forest Preserve. In April 2013, plaintiff commenced this combined CPLR article 78 proceeding and action for declaratory judgment seeking, as relevant here, a declaration that construction of the new Class II trails violated NY Constitution, article XIV, § 1.³ In October 2014, Supreme Court (Ceresia Jr., J.) limited the scope

¹ The terms "Adirondack Park" and "Forest Preserve" are not synonymous. The Adirondack Park encompasses approximately six million acres of public and private land in various northern counties within certain boundaries designated by law (see ECL 9-0101 [1]). The Forest Preserve encompasses more than 2.5 million acres of state-owned land within the Adirondack and Catskill Parks (see ECL 9-0101 [6]).

² "Breast height" is 4½ feet above the ground and DBH is the standard measure used by DEC for projects involving the cutting, removal or destruction of trees.

³ Plaintiff's second and third causes of action – the causes of action brought pursuant to CPLR article 78 – were dismissed by Supreme Court (Ceresia Jr., J.) prior to trial, leaving only the declaratory judgment cause of action. The dismissal of those two causes of action is not at issue on appeal.

of this action to Class II trails constructed or under construction beginning January 1, 2012 through October 15, 2014. Supreme Court (Connolly, J.) subsequently denied the parties' motions for summary judgment. Following a nonjury trial, the court dismissed plaintiff's first cause of action and declared that the "construction in the Forest Preserve of the Class II trails that were planned and approved as of October 15, [2014⁴ did] not violate [NY Constitution, article XIV, § 1]." Plaintiff appeals.

In reviewing a judgment rendered after a nonjury trial, this Court may independently review the evidence and, "while according appropriate deference to the trial [court's] credibility assessments and factual findings, grant the judgment warranted by the record" (Weinberger v New York State Olympic Regional Dev. Auth., 133 AD3d 1006, 1007 [2015] [internal quotation marks and citation omitted]; see Schultz v Sayada, 163 AD3d 1218, 1219 [2018]). Although courts "defer to the Legislature in matters of policymaking, . . . it is the province of the Judicial branch to define, and safeguard, rights provided by the [NY] Constitution" (Campaign for Fiscal Equity v State of New York, 100 NY2d 893, 925 [2003]). NY Constitution, article XIV, § 1 states, in relevant part, that "[t]he lands of the state, now owned or hereafter acquired, constituting the [F]orest [P]reserve 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." We are not called upon to decide whether defendants' construction of the Class II trails constitutes a reasonable action or beneficial use of the Forest Preserve for the public good. Pursuant to plaintiff's arguments – which are based on two separate clauses of the constitutional section at issue – we are called upon to determine only whether such construction violates

⁴ Although Supreme Court's declaration used the date of October 15, 2015, we presume that the year listed was incorrect because the documents referred to in the decision as the basis for that date indicate that the correct year was 2014. Additionally, the parties' stipulation noted that the time period covered by this action ended on October 15, 2014.

NY Constitution, article XIV, § 1 in either of two ways: (1) the land is not being kept forever wild, or (2) timber in the Forest Preserve is being destroyed.

Regarding the first contention, we agree with Supreme Court's conclusion that construction of the Class II trails did not violate the "forever wild" clause. DEC recommended creating a system of community connector snowmobile trails in the Adirondack Park, with a goal of minimizing environmental impacts by shifting existing snowmobile trails to the periphery of the Forest Preserve and away from interior and "sensitive" areas, and "re-designating existing snowmobile trails in the interior for non-motorized use" or abandonment. Defendants determined that the new trails would generally be nine feet wide, although they would be 12 feet wide on some curves and slopes. Defendants' guidance documents provided for the removal of trees, brush, rocks, stumps, ledges and other natural features, the grading and leveling of the trails, and the cutting of side slopes by means of "bench cuts," as part of the construction of Class II trails.

Plaintiff asserts that the construction violated the "forever wild" clause because the trails are akin to roads, old-growth forest was disturbed, and the construction could affect erosion, permitted the introduction of invasive species and opened the forest canopy causing sunlight to reach the forest floor. The parties' witnesses presented divergent testimony regarding the effects of the construction, and we defer to Supreme Court's credibility and factual findings. Although the width of Class II trails falls between the width of foot trails (which vary from two to eight feet wide) and forest roads (which are typically between 12 and 20 feet wide), the trails are not paved or covered in gravel and are not crowned to divert water. Thus, record evidence supports the determination that the trails are more similar to hiking trails than to roads. Some of plaintiff's experts testified that the construction opened the forest canopy, which allows greater evaporation from the forest floor, increases the presence of invasive species, alters the forest ecosystem along the trails and fragments the forest. One of those experts admitted on cross-examination that he had

previously testified that these same trails generally retained a closed canopy; defendants' experts agreed with that opinion. Defendants' expert witnesses testified that the bench cuts and other techniques prevented erosion and shed water, thereby keeping users on the trail and off sensitive surrounding areas. Evidence indicated that the construction did not disturb old-growth forest to any meaningful degree, and the plant species identified by plaintiff either were not deemed invasive or predated the construction. Defendants' proof also indicated that the shifting of snowmobile trails to the periphery of the Forest Preserve had decreased forest fragmentation. Overall, plaintiff failed to demonstrate how the construction of Class II trails, which have similar aspects to foot trails and ski trails and have less impact than roads or parking lots, impairs the wild forest qualities of the Forest Preserve.

Regarding plaintiff's second contention, we disagree with Supreme Court and conclude that the construction constitutes an unconstitutional destruction of timber. While addressing the same constitutional section at issue here, the Court of Appeals noted 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" (Association for Protection of Adirondacks v MacDonald, 253 NY 234, 238 [1930]). "The primary object of the [Adirondack P]ark, which was created as a forest preserve, was to save the trees for the threefold purpose of promoting the health and pleasure of the people, protecting the water supply as an aid to commerce and preserving timber for use in the future" (People v Adirondack Ry. Co., 160 NY 225, 248 [1899], affd 176 US 335 [1900]). Demonstrating the intention of the Constitutional Convention of 1894 – which adopted the section at issue – that the section be strictly interpreted, a delegate stated the concern that "'[t]he moment you put in any provision that anybody can cut timber [in the Forest Preserve], then you destroy the effect of the whole amendment'" (Association for Protection of Adirondacks v Macdonald, 228 App Div 73, 78-79 [1930], affd 253 NY 234 [1930], quoting 4 Revised Record 1894 Const Convention at 152; accord Helms v Reid, 90 Misc 2d 583, 592 [Sup Ct, Hamilton County 1977]). The convention further rejected a series of amendments that were

seen as weakening this protection – even including amendments to allow the state to sell timber to state residents for campfires within the park or to allow potential thinning of the Forest Preserve based on scientific advice – finding such allowances "exceedingly dangerous" and fearing that they would "open[] the door to a great danger" (Association for Protection of Adirondacks v Macdonald, 228 App Div at 78-79 [internal quotation marks and citation omitted]).

There is a dearth of appellate court precedent concerning NY Constitution, article XIV, § 1. In Association for Protection of Adirondacks v MacDonald (253 NY 234 [1930], supra), the Court of Appeals addressed the state's intention to construct a bobsled run for the 1932 Olympic winter games (id. at 236). The construction necessitated the removal of trees from 4½ acres of land, for a "total number of trees, large and small, estimated at 2,500" (id.). The Court noted that a reasonable interpretation of the constitutional provision required consideration of its object and purpose, which was to prevent "any cutting or any removal of the trees and timber to a substantial extent" so that the Forest Preserve was "preserved, not destroyed"; "[t]herefore, 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). Based on the foregoing considerations, the Court of Appeals held that, for a project in the Forest Preserve to be constitutionally permissible, it must comply with the two goals of the section – "to stop the willful destruction of trees upon the forest lands, and to preserve these in the wild state now existing" (id. at 242). Ultimately, the Court rejected the state's proposal for a bobsled run, stating that "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" (id.).

In Matter of Balsam Lake Anglers Club v Department of Env'tl. Conservation (199 AD2d 852, 852 [1993]), this Court

considered a challenge to "the construction of five new parking lots, the designation of two existing campsites as lawful campsites, the relocation of existing trails and the construction of a new hiking trail, and the construction of a cross-country ski trail loop." "The relocated trail [was] in excess of two miles long and [was] approximately six feet wide" (Matter of Balsam Lake Anglers Club v Department of Env'tl. Conservation, 153 Misc 2d 606, 609 [Sup Ct, Ulster County 1991], mod 199 AD2d 852 [1993]). The relocation required the cutting of approximately 350 trees, as well as "312 saplings," with "[t]he amount of cutting needed for the proposed new trail and parking lots" undetermined (Matter of Balsam Lake Anglers Club v Department of Env'tl. Conservation, 199 AD2d at 853-854). Despite the final numbers being unclear, this Court, applying the "substantial extent" and "material degree" test to the timber removal, was "unpersuaded that the [plan constituted] improper uses of the [F]orest [P]reserve and/or involve[d] unconstitutional amounts of cutting" (id. at 853).⁵

Prior to trial here, the parties stipulated that the length of the 11 trails at issue was 27 miles and the construction would result in the cutting of 6,184 trees that measured at least three inches DBH. We agree with Supreme Court's determination, based on the expert historian's testimony as well as other evidence, that the use of the word "timber" in the constitutional provision at issue is not limited to marketable logs or wood products, but refers to all trees, regardless of size. Although tree size and maturity may be considered in determining whether a proposed project's tree cutting is substantial or material, plaintiff presented expert testimony debunking the assumption that smaller trees are necessarily young or immature; some forest trees measuring less than three inches DBH can be more than 100 years old, and smaller mature trees play an important role in the continuing ecology of the forest. The court generally accepted the tree counts proffered by plaintiff, including for trees less than

⁵ Because it appears that the record did not include data regarding the amount of cutting required for certain aspects of the proposed project, the Court was required to render a decision based only on the data provided.

three inches DBH.⁶ Accepting those factual findings, approximately 25,000 trees either had been or would be cut to construct the trails.

Although this project did not involve clear-cutting or the removal of a large swath of trees (compare Association for Protection of Adirondacks v MacDonald, 253 NY at 236), but instead necessitated destruction of narrow corridors of trees for many miles, we need to consider the entire project when determining its effects. The destruction of a substantial number of trees can be problematic whether those trees were together or spread out along one or more portions of the Forest Preserve. For example, the construction of these trails required the destruction, on average per mile, of over 200 trees at least three inches DBH and approximately 925 trees of all sizes. It would be anomalous to conclude that destroying 925 trees per mile of trails, or approximately 25,000 trees in total, does not constitute the destruction of timber "to a substantial extent" or "to any material degree" (id. at 238; see 1954 Ops Atty Gen 157 [concluding that the constitutional provision prohibits relocating a portion of existing highway in the Forest Preserve that would involve the cutting of approximately 5,000 trees]). Thus, the construction of the Class II trails resulted in, or would result in, an unconstitutional destruction of timber in the Forest Preserve.

Egan Jr., J.P., Clark and Pritzker, JJ., concur.

Lynch, J. (dissenting).

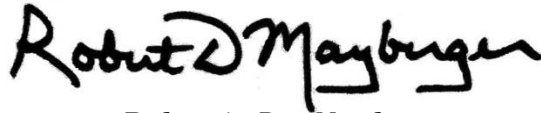
I respectfully dissent. To begin, I agree with the majority that construction of the Class II Community Connector trails (hereinafter Class II trails) does not violate the "forever wild" clause of NY Constitution, article XIV, § 1. I do not agree, however, that the construction of these trails constitutes an unconstitutional destruction of timber.

⁶ DEC's tree-cutting policy does not require it to count trees less than three inches DBH, so defendants did not provide tree counts for such trees.

Considered in context, I agree with Supreme Court's assessment that the removal of approximately 25,000 trees – including 6,100 trees having at least a three-inch diameter – over a system of trails covering 27 miles is neither substantial nor material in the context of NY Constitution, article XIV, § 1 (see Matter of Balsam Lake Anglers Club v Department of Env'tl. Conservation, 199 AD2d 852, 854-855 [1993]; Helms v Reid, 90 Misc 2d 583, 594 [Sup Ct, Hamilton County 1977]; see generally Association for Protection of Adirondacks v McDonald, 253 NY 234, 242 [1930]). With respect to the large number of seedlings and other small trees, an ecologist who testified on defendants' behalf explained that the survival rate of such trees is low in view of the closed forest canopy. A forester also confirmed that the Department of Environmental Conservation inventories the trees prior to undertaking a work plan and avoids cutting large trees. Each of these factors lessens the impact of the tree removal. Implementation of the Class II trails is also "reasonable" in the context of NY Constitution, article XIV, § 1 for "[w]hatever the advantages may be of having wild forest lands preserved in their natural state, the advantages are for every one within the [s]tate and for the use of the people of the [s]tate" (Association for Protection of Adirondacks v McDonald, 253 NY at 238-239). Although these trails are designed for snowmobile use during the winter season, the State Land Master Plan points out that the trails are "of essentially the same character as a foot trail" and "may double as a foot trail at other times of the year." These trails effect a reasoned balance between protecting the Forest Preserve and allowing year-round public access. As such, it is my view that Supreme Court properly determined that plaintiff failed to establish a constitutional violation, and, therefore, its judgment should be affirmed.

ORDERED that the judgment is reversed, on the law, with costs, and it is declared that construction in the Forest Preserve of the Class II Community Connector trails that were planned and approved as of October 15, 2014 violates NY Constitution, article XIV, § 1.

ENTER:

A handwritten signature in black ink that reads "Robert D. Mayberger". The signature is written in a cursive, slightly slanted style with a large initial 'R'.

Robert D. Mayberger
Clerk of the Court