No. APL-2019-00166

To be argued by:
JENNIFER L. CLARK
15 minutes requested

State of New York
Court of Appeals

PROTECT THE ADIRONDACKS! INC.,

Plaintiff-Respondent-Cross-Appellant,

v.

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

Defendants-Appellants-Cross-Respondents.

REPLY BRIEF FOR APPELLANTS-CROSS-RESPONDENTS

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

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PRELIMINARY STATEMENT

The limited issue in this appeal is whether the construction of 11 non-contiguous, 9- to 12-foot-wide, multi-use trails on 27 miles of Forest Preserve land in the Adirondack Park between January 2012 and October 2014, which required the cutting of trees, is consistent with Article XIV, § 1 of the New York State Constitution.[1] That section's first two sentences, also known as the "forever wild" provision, state: "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 Third Department held that although construction of the trails did not violate the first sentence of the provision, which

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[1] The subject trails are not "snowmobile trails," as plaintiff repeatedly, and misleadingly, labels them. (Plaintiff's Br. at 1, 2, 3, 15, 16, 69.) The trails are open year-round for recreational use by hikers, cyclists, cross-country skiers, *and* snowmobilers. (Record on Appeal ["R."] 1255; *see also* R. 177, 188, 1477, 1500.)

requires that Forest Preserve lands be "forever kept as wild forest lands," it violated the second sentence, which prohibits the destruction of "timber."

But as Point I of the State's opening brief amply demonstrates,[2] the Third Department in reaching its decision mistakenly equated the term "timber" in the forever wild provision with "all trees, regardless of size." The history of the forever wild provision compels a narrower interpretation of the term "timber"—one that excludes seedlings, saplings, and trees smaller than three inches diameter at breast height.

Plaintiff responds that the interpretation of the forever wild provision—and, specifically, the meaning of the term "timber"—presents a factual question. Under plaintiff's theory, this Court is thus bound by the trial court's determination, affirmed by the Third Department, that the drafters of the forever wild provision intended to prohibit the cutting of trees of all sizes in the Forest Preserve.

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[2] The defendants are the New York State Department of Environmental Conservation and the Adirondack Park Agency. They are referred to collectively herein as the "State."

Plaintiff is mistaken. Discerning the drafters' intent and the scope and interpretation of a constitutional provision is a quintessential question of law, fully reviewable by this Court. And properly interpreted, "timber" includes only trees at least three inches diameter at breast height.

As demonstrated in Point II of the State's opening brief, the Third Department's second mistake was its failure to engage in a contextual analysis in assessing the constitutionality of the timber cutting that occurred to construct the trails at issue. Where, as here, the cutting of timber does not impair the wild forest nature of the Preserve and is undertaken to provide increased opportunities for visitors of all recreational interests and abilities to enjoy the beauty of the Forest Preserve, the Court should find that it is not sufficiently substantial or material to violate the forever wild provision. This Court's decision in *Association for Protection of Adirondacks v. MacDonald,* 253 N.Y. 234 (1930), supports that conclusion.

Plaintiff argues in response that the second sentence of the forever wild provision contains an "independent quantitative

restraint" (Plaintiff's Br. at 48) on the cutting of timber in the Forest Preserve, and that the cutting of more than 2,500 trees—the number of trees at issue in *MacDonald*—is unconstitutional, regardless of context. The Court should reject this simplistic "numbers only" test, which is not supported by *MacDonald*, and confirm the "context" test that is consistent with its decision in *MacDonald*, provides a workable standard, and ensures that the purpose of the forever wild provision—to maintain the wild forest nature of the Preserve while providing recreational access for visitors with different interests and abilities—will not be thwarted. Viewed in context, construction of the trails at issue is consistent with the forever wild provision.

Finally, the arguments in Points IV and V of plaintiff's brief in support of its cross appeal can be quickly disposed of. Plaintiff's cross appeal does not lie, and thus should be dismissed, because plaintiff was not aggrieved by the Third Department's order. In any event, and contrary to plaintiff's contention, the factual findings underlying the trial court's holding that trail construction did not unconstitutionally impair the wild forest nature of the Preserve—

findings that were affirmed by the Third Department, are supported by the record, and are therefore unreviewable by this Court—were not "tainted" by consideration of inadmissible evidence.

ARGUMENT

POINT I

"TIMBER" AS USED IN THE FOREVER WILD PROVISION DOES NOT INCLUDE SEEDLINGS, SAPLINGS, AND TREES SMALLER THAN THREE INCHES DIAMETER AT BREAST HEIGHT

As a threshold matter, this Court is not, as plaintiff asserts (Plaintiff's Br. at 33-34), precluded from analyzing the meaning of the term "timber" in the forever wild provision. Plaintiff mistakenly insists that because the trial court found that the drafters intended to prohibit the cutting of trees of all sizes in the Forest Preserve, and the Third Department agreed, the issue involves an affirmed finding of fact that this Court cannot review. Discerning the drafters' intent and the scope and interpretation of a constitutional provision involves a pure question of law, fully reviewable by this Court. *See, e.g., Bransten v. State of New York,* 30 N.Y.3d 434, 438-

443 (2017) (interpreting term "compensation" in Article VI, § 25(a) of State Constitution); *Dalton v. Pataki,* 5 N.Y.3d 243, 264-265 (2005) (interpreting term "lottery" in Article I, § 9 of State Constitution); *Brukhman v. Giuliani,* 94 N.Y.2d 387, 393-397 (2000) (interpreting term "public work" in Article I, § 17 of State Constitution); *Anderson v. Regan*, 53 N.Y.2d 356, 359-364 (1981) (interpreting Article VII, § 7 of State Constitution, which governs the expenditure of State funds). Indeed, the State had an appeal as of right to this Court under C.P.L.R. 5601(b)(1) precisely because the Third Department's decision directly involves the proper construction of a state constitutional provision, a quintessential legal issue.

The lower courts' construction of the term "timber" in the forever wild provision thus does not constrain this Court. And as previously explained (State's Opening [Op.] Br. at 43-52), the history of the forever wild provision, DEC's long-accepted and conservative use of the three inches diameter at breast height

(dbh)[3] standard, and other New York statutes and regulations addressing tree cutting demonstrate that the term "timber" in the forever wild provision is properly interpreted to mean trees at least three inches dbh—not smaller trees, seedlings, or saplings. Under that proper interpretation, construction of the trails at issue required cutting 6,184 pieces of timber across 27 miles[4] of Forest Preserve land—an amount that is not sufficiently substantial or material to violate the forever wild provision considering the context in which the timber was cut and the public benefit that the cutting serves.

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[3] "Breast height" is four and a half feet above the ground. (R. 4090.)

[4] Plaintiff suggests an issue over the 27-mile number (Plaintiff's Br. at 19), but there is none. The parties' pre-trial stipulation shows that 6,184 trees at least three inches dbh had been approved to be cut to construct 32.11 miles of trail. (R. 544 ¶ 14.) However, as the parties stipulated (R. 543 ¶ 10), and as the trial testimony established (R. 4098, 4122), only 27 miles of trail had been constructed or were under construction in the time period covered by the trial (January 1, 2012 through October 15, 2014). The 27-mile number is thus accurate. The number of trees at least three inches dbh that were cut on those 27 miles of trail may thus be less than 6,184, but the State accepts that number for present purposes.

A. The History of the Forever Wild Provision Supports Interpreting the Term "Timber" to Exclude Seedlings, Saplings, and Trees Smaller Than Three Inches DBH.

As plaintiff acknowledges in its brief (Plaintiff's Br. at 9-13), the record of the 1894 New York Constitutional Convention demonstrates that multiple concerns motivated the drafters of the forever wild provision. Indeed, the drafters had three main goals—all of which addressed the widespread desecration of the Forest Preserve caused by commercial loggers.

One goal was to invalidate existing laws that allowed the State to sell timber and land in the Forest Preserve to commercial logging operations. *See* L. 1885, ch. 283, § 8; L. 1887, ch. 475; L. 1892, ch. 707, § 4. (R. 3202-3204.) Indeed, just one year before the 1894 Constitutional Convention, the Legislature had enacted a law affirmatively authorizing the State Forest Commission to "sell any spruce and tamarack timber, which is not less than twelve inches in diameter at a height of three feet above the ground, standing in any part of the forest preserve, and poplar timber of such size as the forest commission may determine." L. 1893, ch. 332, § 103. (R. 3209-3210.) In its 1893 Report to the Legislature, the

Forest Commission stated that on average, 343 million "board feet" of "sawing" timber were being cut in the Adirondack Park per year, and an additional 85 million board feet of "small spruces," "as small as four inches in diameter" were being cut per year for pulpwood. The Commission estimated that two-fifths of the forest had already been cut by lumbermen. *See* Annual Report of the Forest Commission for the Year 1893, Senate Documents of 1894, No. 85, at 207-208. By the time of the 1894 convention, public outrage over the extent of the desecration that had occurred as a result of commercial logging was vociferous. (R. 3203, 3210-3211.)

A second goal of the drafters—closely related to the first—was to protect the watersheds in the Forest Preserve from the adverse effects of soil erosion caused by commercial logging. The drafters noted that commercial logging had so denuded some wooded areas of the forest that melting snow and rainfall were causing excessive soil runoff that was settling in mountain streams and lakes and lowering their water levels. (R. 594-595, 600, 609-610.) Maintaining the vitality of the watersheds was important for many reasons: they fed navigable commercial arteries like the Hudson River and Erie

Canal, provided water to fight fires, and provided potential sources of drinking water. (R. 590-592, 604-606; *see also* R. 3210-3211, 3225-3226.)

And a third goal was to maintain the wild forest nature of the Preserve for recreational use and enjoyment by the public—the goal that both plaintiff and the State have emphasized throughout this litigation. (R. 589-590, 601, 605.) Indeed, in discussing the "public and general uses" of the Forest Preserve, the delegate who introduced the amendment—Delegate McClure—led off by mentioning the use of the Preserve as "a great resort for the people of this State. When tired of the trials, tribulations and annoyances of business and every-day life in the man-made town, they offer to man a place of retirement." (R. 589; *see also* R. 3226-3227.)

The initial version, and every subsequent version, of the forever wild provision presented to the delegates at the 1894 Constitutional Convention reflected a careful effort to balance these three goals. To support its broad reading of the prohibition on the destruction of timber, plaintiff relies on the fact that the subject prohibition was specifically added to the initial version. While the

initial version specifically prohibited only the "sale" of timber on Forest Preserve lands,[5] the version ultimately enacted also prohibited the destruction of timber. (Plaintiff's Br. at 12; *see* R. 599, 616). But the record of the convention makes clear that the added prohibition on the destruction of timber had a narrow purpose: to preclude commercial logging companies from constructing dams at the outlets of lakes in the Forest Preserve to "feed their mills" at the expense of flooding that drowned and destroyed trees. (R. 599-601; *see also* R. 3228-3229.) As plaintiff's expert historian Dr. Philip G. Terrie acknowledged at trial (R. 3270), nothing in the discussion at the convention surrounding the addition of the word "destroyed" indicates that the delegates intended to prevent the cutting of very small trees, seedlings and saplings for all purposes. If the delegates intended to impose such a broad prohibition, they would have said so.

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[5] The initial proposed version provided that: "The lands of the State now owned or hereafter acquired, constituting the forest preserves, shall be forever kept as wild forest land. They shall not, *nor shall the timber thereon, be sold*. (R. 582.) (Emphasis added.)

In arguing that a broader prohibition was nonetheless intended, plaintiff mischaracterizes (Plaintiff's Br. at 38-39) Dr. Terrie's trial testimony. Dr. Terrie testified that, beginning in 1870, commercial loggers cut "very small trees" in the Adirondack Park for pulpwood, in addition to cutting timber to use as "lumber" for construction. (R. 3204.) But when asked to quantify what he meant by "very small" (R. 3204), Dr. Terrie could not provide a historically-based reference point. He simply stated that he had personally observed trees that measured one inch dbh in the general area where pulpwood had been cut until the 1920s (R. 3208)—an observation that sheds no light on what the drafters meant by the term "timber."

Plaintiff's reliance on Forest Commission reports pre-dating the 1894 Constitutional Convention (Plaintiff's Br. at 39-40) is similarly misplaced. Plaintiff cherry-picks from several reports that refer to the destruction of saplings and trees one and one-half inch dbh or larger. But these reports at most only highlight the significance of the drafters' subsequent, deliberate selection of the term "timber" instead of "trees" or "saplings" in the forever wild

provision, and thus support the State's interpretation of the term "timber."

Finally, plaintiff is mistaken in attempting to set aside the history of the subsequent 1915 Constitutional Convention as a guide to the meaning of the term "timber" in the forever wild provision.[6] (Plaintiff's Br. at 44-46.) That history is relevant because the 1915 convention provided the first opportunity for the State to revisit the forever wild provision since its adoption in 1894, and the discussion of proposed amendments at the 1915 convention showed a general understanding that the prohibition on "timber" being "removed or destroyed" left room for both expansion and contraction. The debate was about whether it should be adjusted, not whether there was room to do so.

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[6] Plaintiff's trial expert, Dr. Terrie, has previously opined that although the 1894 convention is often identified as the crucial moment in the preservation of the Forest Preserve, the inclusion of the forever wild provision in the constitution proposed in 1915 "was a second, perhaps equally critical event in Adirondack history." *See* Philip G. Terrie, *Forever Wild Forever: The Forest Preserve Debate at the New York State Constitutional Convention of 1915*, New York History, Vol. 70, No. 3, 256 (July 1989), available at http://www.jstor.org/stable/43460261 (last accessed November 30, 2020).

In the two decades after the adoption of the forever wild provision, pressure had mounted to allow the harvesting of timber in the Forest Preserve in a manner consistent with accepted principles of scientific forestry. Proponents argued that selective harvesting would protect the Preserve from dangerous forest fires and serve as a potential source of revenue. *See* Philip G. Terrie, *Forever Wild Forever: The Forest Preserve Debate at the New York State Constitutional Convention of 1915*, New York History, Vol. 70, No. 3, 257-262 (July 1989), available at http://www.jstor.org/stable/43460261 (last accessed November 30, 2020). Several amendments that would have loosened the protections of the forever wild provision were proposed at the 1915 convention and debated at length. Indeed, the debate over the forever wild provision during the 1915 convention was many hours longer than the debate during the 1894 convention.

Ultimately, the delegates at the 1915 convention approved three amendments to the forever wild provision. 2 Rev. Rec., 1915 N.Y. Constitutional Convention at 1445, 1539-1540. One amendment changed the words "timber thereon" to "trees and

timber thereon."[7] *Id.* at 1340, 1445. Had the amendment been approved by the voters—and it was not—the second sentence of the forever wild provision would have stated that Forest Preserve lands "shall not be leased, sold or exchanged, or be taken by any corporation, public or private, nor shall the *trees and timber* thereon be sold, removed or destroyed." (Emphasis added.) The delegates' discussion makes clear that the addition of the words "trees and" was not seen as a mere clarification, but rather as an expansion of the protection provided.

Delegate Dow, the Chairman of the Conservation Committee, specifically stated that the words "trees and" were added "for the purpose of making *more inclusive* the scope of the provision" (2 Rev. Rec., 1915 N.Y. Constitutional Convention at 1340 [emphasis added])—that is, to broaden the protection previously afforded only to "timber." To be sure, as plaintiff points out (Plaintiff's Br. at 45-46), Delegate Dow later commented that "[t]his is not in spirit new

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[7] The State's opening brief mistakenly states at page 9 that the delegates at the 1915 convention did not adopt this amendment. In fact, the delegates approved it but the voters rejected the entire 1915 Constitution. (R. 3260-3261.)

matter." *Id.* But that comment is properly read to refer to his immediately preceding statement regarding the second amendment that the delegates ultimately approved: the addition of a third sentence to the forever wild provision empowering the Department of Conservation to reforest Forest Preserve lands, construct fire trails, and remove "dead trees and dead timber"—again, distinguishing between the two—that presented a fire hazard or an obstacle to reforestation.[8] Delegate Dow explained that this amendment would "obviate some of the narrow constructions which have been placed upon the present Constitution." *Id.*

The proposed amendment of the forever wild provision to encompass "trees" in addition to "timber" had its critics, and the debate casts light on the meaning of the provision. For example, Delegate Angell favored instead retaining the existing constitutional provisions which were "very narrow in their limitations as to timber." *Id.* at 1448. He feared that expanding the

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[8] The third amendment approved by the delegates authorized the construction of a new highway from Saranac Lake to Old Forge. 2 Rev. Rec., 1915 N.Y. Constitutional Convention at 1539.

forever wild provision to prohibit cutting "trees" would make Forest Preserve lands "more inaccessible … to the people of the State of New York than they have ever been before" by precluding the cutting of even a "tent pole" or "tent stick." *Id.* In the end, the 1915 Constitution was voted down in its entirety, and the prohibition against the destruction of "timber"—and timber alone—remained unchanged.

In short, the history of the forever wild provision, including the consistently clear distinction between "trees" and "timber" that was drawn during debates at the 1915 Constitutional Convention, strongly supports an interpretation of the term "timber" that excludes seedlings, saplings, and trees smaller than three inches dbh.

B. DEC's Longstanding Practice Further Supports Interpreting the Term "Timber" to Exclude Seedlings, Saplings, and Trees Smaller Than Three Inches DBH.

Because the proper interpretation of the term "timber" in the forever wild provision presents a pure question of law, the State agrees with plaintiff (Plaintiff's Br. at 65-68) that the Court need

not defer to DEC's construction of that term. However, to the extent the Court finds that the history of the forever wild provision fails definitively to resolve the interpretive question here, the Court should afford some weight to DEC's longstanding interpretation. *See Kolb v. Holling*, 285 N.Y. 104, 112 (1941) ("The practical construction put upon a constitutional provision, as well as upon a statute, by the Legislature or by departments of State government, is entitled to great weight, if not controlling influence, when such practical construction has continued in operation over a long period of time.").

As previously explained (State's Op. Br. at 48-50), DEC has long utilized a three inches dbh standard in its construction and maintenance projects in the Forest Preserve—a standard that is practical and much more protective than the eight inches dbh standard employed by modern-day logging companies outside of the Preserve. (R. 4677-4678.) Moreover, DEC has utilized the three inches dbh standard at least as far back as the time of this Court's 1930 decision in *MacDonald*. (R. 4899 [*MacDonald* Record on Appeal].) And no legislation or constitutional amendment has been

enacted that would preclude use of such a standard. It is therefore appropriate for the Court to look to DEC's construction of the term "timber" in the forever wild provision as an interpretive aid.

Contrary to plaintiff's contention (Plaintiff's Br. at 42), the State presented scientific evidence at trial that supported the use of the three inches dbh standard for the "timber" protected from destruction by the forever wild provision. The State's expert, Dr. Timothy G. Howard, acknowledged that seedlings, saplings, and trees smaller than three inches dbh have ecological significance in the Forest Preserve (R. 4540), but he explained that where there is a closed forest canopy—like the one present over the trails here—only a few seeds get enough sunlight to germinate into seedlings, only a few seedlings grow into saplings, and only a few of those saplings will grow into mature trees (R. 4526). Because seedlings, saplings, and trees smaller than three inches dbh are less likely than larger trees to grow to maturity, there is an ecological basis for DEC's standard. However, as the State has made clear (State's Op. Br. at 58 n.14), that is not to say that DEC ignores the impact its projects might have on seedlings, saplings, and trees smaller

than three inches dbh. To the contrary, DEC considers those impacts carefully when planning and routing trails like those at issue. (R. 4686; *see also* R. 160-161, 1263.)

POINT II

COURTS SHOULD CONSIDER CONTEXT IN DETERMINING WHETHER AN AMOUNT OF CUT TIMBER IS SUFFICIENTLY SUBSTANTIAL OR MATERIAL TO VIOLATE THE WILD FOREST PROVISION

As previously explained (State's Op. Br. at 52-58), the second sentence of the forever wild provision—the prohibition against destroying timber—is reasonably read as a restriction that serves the first sentence, which requires that the wild forest nature of the Forest Preserve be maintained. Thus, the cutting of timber is prohibited only if it occurs to such an extent that it impairs the wild forest nature of the Preserve. Accordingly, in determining whether a proposed project is constitutional, a reviewing court must consider factors other than the number of trees to be cut, including ecological impacts and the character and purpose of the project at issue.

This "contextual," or multi-factor, standard is consistent with the overarching purpose and history of the forever wild provision,

as discussed above. It is also supported by this Court's decision in *MacDonald*, which held that the timber-cutting prohibition is not absolute. In holding that timber cutting is prohibited only if it occurs to a "substantial extent" or "material degree"—both of which are relative terms—the *MacDonald* Court endorsed a contextual analysis. 253 N.Y. at 238.

Under a contextual analysis, the timber cutting at issue passes constitutional muster, even if the Court includes all 25,000 trees, seedlings and saplings, rather than 6,184 trees of at least three inches dbh. That is so because the record amply supports the trial court's affirmed factual findings that old growth trees were not adversely impacted[9], there was no clearcutting, the trails retained

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[9] Plaintiff mistakenly asserts (Plaintiff's Br. at 41) that the trial evidence—specifically the testimony of its expert Stephen Signell—established that "many" of the small trees cut by DEC to construct the trails were "as old as 80 years." Not so. Mr. Signell stated only that when he inspected the trees that were cut on *one trail*—the Hyslop Trail—he observed that "most" of the cut trees that measured two to three inches dbh "were *in the 30-to-80-year range*." (R. 3410 [emphasis added].) The trial court thus correctly found (R. xv) that plaintiff "did not prove that more than a *de minimus* [sic] number of 'old growth' trees had been cut in the construction" of the trails.

a closed canopy throughout, the newly constructed trails are more like hiking trails than roads, adverse environmental impacts including erosion were minimized by using bench cutting and turnpiking (which are also used to construct hiking trails [R. 2735-2737 (photos), 4225-4230]), and construction did not result in the infiltration of invasive species. (R. 5014-5015; *see* State's Op. Br. at 22-35.)

In particular, the record contains no evidence that the trails have caused significant soil erosion or had other adverse effects on watersheds in the Forest Preserve, such as by causing low flows in downstream waterways during dry periods or creating flooding of downstream areas in times of snowmelt or heavy rain. The lack of any such evidence supports a finding of constitutionality because protecting watersheds was a primary goal of the drafters of the forever wild provision.

Two other contextual factors further support a finding of constitutionality. First, the construction plan shifted several existing trails to the periphery of Forest Preserve areas and closed 46 miles of preexisting trails running through the sensitive interior

areas of the forest to snowmobile use. (R. 4412-4442, 4485-4495, 4501-4525, 4614-4638, 4648-4657, 4665; *see also* R. 1480-1481 [list of trail closures].) The construction thus served the purpose of the forever wild provision by affirmatively promoting conservation of those sensitive interior areas, and the regrowth and revegetation of the forest in those areas. (*See* R. 4485-4486, 4519-4520, 4648-4649.) And second, the newly-constructed trails will enable members of the public of all recreational interests and abilities to enjoy the wild forest nature of the Preserve—another of the drafters' primary goals.

Plaintiff disputes that the forever wild provision should be read as a whole, instead characterizing the second sentence of the provision as a "stand-alone" prohibition and an "independent quantitative restraint" on tree cutting in the Forest Preserve. (Plaintiff's Br. at 48.) It thus argues (Plaintiff's Br. at 24-28, 47, 49, 55) that *MacDonald* established an upper limit of 2,500 on the number of trees that may constitutionally be cut in the Forest Preserve, regardless of context. On that view, the cutting of *any* number higher than 2,500—whether 6,184 or 25,000—would be

unconstitutional for the simple reason that the number is "substantial" and "material" standing alone. (Plaintiff's Br. at 26.) In other words, the "purpose and benefits of the cutting are irrelevant." (Plaintiff's Br. at 49.)

Plaintiff's simplistic "numbers only" test—which the Third Department embraced—is not supported by any reasonable reading of *MacDonald* and this Court should reject it.

In *MacDonald,* this Court rejected the argument that the second sentence of the forever wild provision imposes a fixed numerical restriction on the number of trees that may be cut in the Forest Preserve. Instead, the Court adopted a more "reasonable interpretation," and prohibited only the cutting or removal of timber "to a substantial extent" or "to any material degree." 253 N.Y. at 238. To be sure, in determining whether the construction of the bobsled run at issue was constitutional, the Court weighed the fact that as many as 2,500 trees would be cut. But the Court also had before it all the other aspects of the project, including the 16- to 20-foot width of the bobsled course, the acreage of the land involved (four and one-half acres), the need to construct

a "go-back" road, and the project's purpose to provide facilities for the upcoming Olympic winter games. 253 N.Y. at 236. And it was in that context that the Court found that the cutting of 2,500 trees was sufficiently substantial or material to violate the forever wild provision.

Moreover, and contrary to plaintiff's contention (Plaintiff's Br. at 53), *MacDonald* does not hold that the purpose behind the cutting is irrelevant. To the contrary, the Court in *MacDonald* explicitly stated that the forever wild provision "must receive a reasonable interpretation, *considering the purpose and the object in view*." 253 N.Y. at 238 (emphasis added). Nor did the Court minimize the importance of public use of the Forest Preserve. The Court noted that the drafters intended to permit "all things necessary," including "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.* And the Court cautioned that the case before it did not require it to decide what may be done on Forest Preserve lands to "open them up for the use of the public" or to facilitate "the use of the park by campers and those who seek

recreation and health in the quiet and solitude of the north woods." 253 N.Y. at 240.

Thus, *MacDonald* supports the State's contention that public access is one of many factors, including the number of cut trees, that courts should consider in determining whether tree cutting in the Forest Preserve is consistent with the forever wild provision.

Moreover, plaintiff's single-minded focus on the total number of cut trees provides no workable standard for determining whether tree-cutting is sufficiently substantial or material to violate the forever wild provision. Indeed, a "numbers only" test is not practicable. Under such a test, the State would be precluded from cutting more than 2,500 trees in total to construct or maintain minor facilities that improve public access to the Preserve or maintain public safety within the Preserve—even if its plan implicated no more than 10 trees on each of 250 widely dispersed locations throughout the over 2.5 million acres of Preserve in the Adirondack Park. The Court should reject such an inflexible, unworkable standard.

Plaintiff additionally objects to the use of a contextual analysis on the ground that it is based on an improper melding of two independent clauses of the forever wild provision and a "logical fallacy." (Plaintiff's Br. at 50.) But the principle that courts should consider context when assessing the constitutionality of tree cutting in the Forest Preserve comes from *MacDonald* itself. There the Court held that the tree cutting prohibition in the forever wild provision is not absolute, but rather should be given a reasonable construction, and the constitutional analysis turns on whether the cutting is "substantial" or "material." A contextual analysis provides a basis for determining how much cutting is too much.

Plaintiff suggests that, whatever may be the rule on destruction of timber, sale or removal of timber are absolutely prohibited under any circumstances. (Plaintiff's Br. at 50.) But this Court has not so held, and that question is not presented by this case in any event. Under *MacDonald*, the Constitution plainly permits the use of a contextual analysis to assess the constitutionality of timber destruction.

Finally, plaintiff mistakenly characterizes as "unprecedented" the tree cutting that occurred to construct the trails at issue. (Plaintiff's Br. at 30-32.) Indeed, some of the projects plaintiff points to (Plaintiff's Br. at 31) required the cutting of a greater number of trees per mile or acre than the trails at issue—yet they were constructed without challenge by plaintiff. For example, the 95 trees that DEC clearcut to construct the parking lot for the Poke-O-Moonshine Mountain foot trail in August 2013 were cut on one-quarter of an acre—which equates to 380 trees per acre. The 98 trees that DEC clearcut to construct the Pharaoh Road parking area in June 2017 were cut on one-third of an acre—which equates to 326 trees per acre. And the 108 trees that DEC cut to reroute the Beaver Flow hiking and biking trail were cut on .46 mile—which equates to 234 trees per mile.[10]

By comparison, no clearcutting was required to construct the trails at issue. And the 6,184 trees that had to be cut were spread

[10] The Environmental Notice Bulletin that was issued for each of these projects contains a description of the acreage or mileage involved.

out across 27 miles of trails (or 29 acres) (R. 4098-4099, 4122), which equates to 229 trees per mile (or 213 trees per acre). Plaintiff's own evidence showed an even smaller number of trees per mile and per acre: 6,596 trees across 32.45 miles and 35.4 acres, amounting to 203 trees per mile and 186 trees per acre. (R. 681.) Under either calculation, fewer trees were cut per mile or acre to construct the trails here than were cut to construct many of the approved projects on which plaintiff now relies. And many fewer trees were cut per mile to construct the trails here than would have been cut to construct the bobsled project in *MacDonald;* there, 2,500 trees would have been cut on 2.25 miles and 4.68 acres (R. 4896-4897, 4899-4901), which equates to 1,111 trees per mile and 534 per acre.

POINT III

PLAINTIFF'S CROSS APPEAL DOES NOT LIE AND SHOULD BE DISMISSED

Plaintiff cross-appealed from the Third Department's holding that construction of the trails at issue in this litigation did not unconstitutionally impair the wild forest nature of the Forest

Preserve. While the Court retained the cross appeal following its jurisdictional inquiry, its decision to do so at that preliminary stage does not bind it now.[11] And as previously explained (State's Op. Br. at 60 n.10), the Court should dismiss the cross appeal because plaintiff is not aggrieved by the Third Department's order. To the contrary, that order reversed the trial court's judgment in favor of the State and declared that construction of the trails violated the forever wild provision.

If the Court nonetheless decides to separately address the merits of plaintiff's cross appeal, it should sustain the Third Department's holding that construction of the trails at issue did not, when considered independently from the number of trees cut, unconstitutionally impair the wild forest nature of the Forest Preserve. As previously explained, the Third Department's holding is not reviewable by this Court because, unlike the legal question

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[11] The Court's retention of the cross appeal has, however, given plaintiff an unwarranted opportunity to submit a second brief in this matter—although the scope of that brief is limited to issues raised on the cross appeal. *See* 22 N.Y.C.R.R. § 500.12(g) (prohibiting surreply briefs).

discussed in Point I, *supra,* it is based on multiple affirmed findings of fact that are amply supported by evidence in the record. (State's Op. Br. at 22-35, 58-59.) And neither of the two contrary arguments plaintiff advances to this Court has merit.

First, the Court should reject plaintiff's argument (Br. at 55-58) that the affirmed findings of fact should be reviewed because they are "tainted" by the lower courts' consideration of inadmissible evidence. According to plaintiff, despite the parties' stipulation to "prohibit[] the consideration of the Defendants' various policies, guidances and plans in deciding the merits of the case" (Br. at 57), the lower courts relied on those documents in deciding whether the trails impaired the wild forest nature of the Preserve. But plaintiff mischaracterizes the nature of the courts' reliance on those documents, as well as the scope of the stipulation. Plaintiff's argument therefore fails.

The documents at issue were discussed at trial during the testimony of the State's witness Peter Frank, who referred to them when he described the construction techniques that DEC utilized to construct the trails at issue. Plaintiff's counsel objected to the

documents' introduction into evidence because they were not "relevant to the interpretation of Article XIV." (R. 4080.) Although the trial judge overruled the objection and received the documents in evidence, the judge repeatedly stressed that the documents did not resolve the question "whether the Class II community connector trails fit within the mandates, the restrictions of the Constitution," and had limited relevance. (R. 4082; *see also* R. 4117 ["[I]t is certainly the court's position that no statements inside any of those documents with regard to the constitutionality of the defendants' actions are in any way binding, or even such conclusory statements are even relevant evidence with regard to the actual constitutionality."].)

The stipulation that the parties executed reflects the limited purpose for which the documents were received into evidence. The stipulation states that:

> 1. Defendants' policies, guidances, guidelines and plans including Exhibits A, B, double A, C, J and I were not offered or admitted as evidence on the question of whether Class II community connector trails individually or collectively or any aspect of the design, siting or construction are constitutional under the New York State Constitution Article XIV, Section 1.

> 2. Any statements therein as to their constitutionality will not be considered by the Court.
>
> 3. These exhibits were offered and admitted into evidence on the subject of the internal procedures and standards upon which Defendants' staff relied, among other items, in their design siting and construction of Class II community connector trails.
>
> 4. In particular these exhibits are not admitted on the question of whether the policies, procedures and standards contained in the exhibits are constitutional under Article XIV, Section 1 or whether Defendants' employees alleged following of those policies, procedures and standards was constitutional under Article XIV, Section 1. (R. 4120-4121, 4224.)

In short, neither the language of the stipulation nor the trial transcript supports plaintiff's contention that the documents at issue were utilized to establish that construction of the trails was constitutional. To the contrary, the stipulation and trial transcript unequivocally establish that the documents were used for no more than the limited purpose of establishing the way the trails were constructed, a factor that was, in turn, relevant to deciding the legal question whether the trails' construction would impair the wild forest nature of the Preserve.

There is similarly no merit to plaintiff's second, narrow challenge to the Third Department's holding that construction of

the trails did not violate the wild forest nature of the Preserve. Plaintiff points to the allegedly "aggressive construction techniques" used to build the trails, the potential threat of future spread of invasive species, the impact on old growth forests, and the supposed similarity between the trails and roads. (Plaintiff's Br. at 60-63.) But as previously explained (State's Op. Br. at 58-59), the Third Department expressly affirmed the trial court's factual findings that the use of bench cutting and turnpiking techniques during construction minimized adverse environmental impacts, that construction did not result in the infiltration of invasive species, that old growth trees were not adversely impacted, and that the newly constructed trails are more like hiking trails than roads. (R. 5014-5015.) These findings are not reviewable by this Court because they are amply supported by record evidence. (*See* State's Op. Br. at 22-35.)

As for plaintiff's contention that the Third Department erred in finding that the trail construction would decrease forest fragmentation (Plaintiff's Br. at 64-65), that finding, too, is supported by record evidence and should not be overturned. The

State established that DEC's decision to shift several existing trails to the periphery of Forest Preserve areas and close 46 miles of preexisting trails running through interior areas of the forest to snowmobile use had already decreased forest fragmentation. (R. 4412-4442, 4485-4495, 4501-4525, 4614-4638, 4648-4657, 4665; *see also* R.1480-1481 [list of trail closures]). Even plaintiff's expert Mr. Signell acknowledged that some of these closures decreased forest fragmentation. (R.3860-3861.) The Third Department's finding regarding decreased forest fragmentation thus provides no basis for a reversal.

CONCLUSION

This Court should reverse the Third Department's decision and order and declare that construction of the trails at issue does not violate article XIV, § 1 of the New York Constitution.

Dated: Albany, New York
December 7, 2020

Respectfully submitted,

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AFFIRMATION OF COMPLIANCE

Pursuant to the Rules of Practice of the New York Court of Appeals (22 N.Y.C.R.R.) § 500.13(c)(1), Julie M. Sheridan, an attorney in the Office of the Attorney General of the State of New York, hereby affirms that according to the word count feature of the word processing program used to prepare this brief, the brief contains 6,557 words, which complies with the limitations stated in § 500.13(c)(1).

Julie M. Sheridan