

Court of Appeals

STATE OF NEW YORK

PROTECT THE ADIRONDACKS! INC.,

Respondent-Appellant,

—against—

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

Appellants-Respondents.

BRIEF OF AMICUS CURIAE THE NATURE CONSERVANCY

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CORPORATE DISCLOSURE STATEMENT

In compliance with Rule 500.1(f) of the Rules of Practice for the Court of Appeals of the State of New York, proposed amicus curiae hereby discloses that it is a nonprofit organization organized under Section 501(c)(3) of Title 26 of the United States Code and it does not have any corporate parents, subsidiaries, or affiliates.

PRELIMINARY STATEMENT

The construction of the multi-purpose community connector trails at issue in this appeal, given the particular circumstances of this case, do not violate the “Forever Wild Provision” in Article XIV, Section 1 of the New York State Constitution. Since 1892, the Forever Wild Provision has constitutionally protected around 2.6 million acres of Adirondack Park and 287,000 acres of Catskill Park (the “Forest Preserve”)—not as a museum where one can “look but not touch” or as a private playground for those with abundant time and resources—but for the complementary purposes of land protection and sustainable, ecologically-sound recreation, use, and enjoyment by people of all means and abilities. The trails facilitate public access to the Forest Preserve while adhering strictly to the Forever Wild Provision, as envisioned by its framers.

The trails are the product of a decade-long collaboration among the Nature Conservancy (the “Conservancy”), local Adirondack communities, and the New York State Department of Environmental Conservation (“DEC”) to achieve the

largest addition to the Forest Preserve in over a century. In 2007, the Conservancy purchased from paper manufacturing firm Finch, Pruyn and Co. (“Finch Pruyn”) 161,000 acres, including the parcels on which the trails are located (the “Finch Pruyn lands”) and later transferred its interests in these lands to New York State. This was a once-in-a-lifetime opportunity, sought after for years, to bring these lands—161,000 acres, 415 miles of rivers and streams, 300 lakes and ponds, 90 mountain peaks, and 16,000 acres of wetlands—under the Constitution’s perpetual protection so that they could be conserved and made publicly accessible. As discussed, *infra*, the Conservancy undertook ecological assessments, and leveraged its longstanding experience owning and managing Adirondack Park land and understanding community needs, to develop a comprehensive disposition plan that ensured that the addition of the Finch Pruyn lands to the Forest Preserve would both protect nature and serve people. The trails were a critical component of this plan. The trails at issue were planned in a way that avoids the removal of timber to a “substantial extent” or “material degree,” consistent with this Court’s precedent in *Association for Protection of Adirondacks v. MacDonald*, 253 N.Y. 234 (1930). No old growth trees have been, or will be, removed and the forest canopy will remain closed and intact. Significantly, constructing these trails will enhance Forest Preserve conservation and mitigate user conflicts by relocating existing snowmobile trails from the Forest Preserve’s sensitive interior to its periphery or near existing highways. Moreover, the

trails at issue will serve as an important connector for numerous Adirondack towns and villages which could have vetoed, pursuant to New York Environmental Conservation Law, Section 54-0303(5), the use of Environmental Protection Fund (“EPF”) resources for this extraordinary transaction. The Conservancy and DEC’s joint community outreach efforts to ensure that all the constitutionally protected purposes of the Forest Preserve were served by the disposition plan, including the plans for the trails at issue, led to the towns waiving their veto rights, enabling the everlasting protection of an additional 161,000 acres of Adirondack Park for the benefit of all New Yorkers.

INTEREST OF AMICUS

Founded in 1951, the Conservancy is a nonprofit corporation whose mission is to conserve the lands and waters on which all life depends. The Conservancy has operations throughout the world and represents more than one million members globally, including approximately 85,000 in New York State. As part of its holistic conservation efforts, the Conservancy actively engages with local communities to acquire and transfer to public ownership select land parcels. The Conservancy’s first land transaction was in New York State in 1955. The Conservancy has helped to protect over 500,000 acres of land in the Adirondack Park, and in New York State, owns and manages 136 preserves, owns 37 other parcels to be conveyed for public open space, and on a daily basis partners with state and local governments and other

stakeholders on open space initiatives and solutions to environmental problems facing our communities. The Conservancy's work in New York State, therefore, is entirely consistent with that of the Forever Wild Provision: to protect New York's ecologically significant lands for the benefit of both nature and people.

The Conservancy is uniquely situated to participate as amicus in this case. The Conservancy has played a central role in expanding the Forest Preserve. In 2007, the Conservancy purchased the Finch Pruyn lands. At the time, this was the Conservancy's largest land transaction in its history. The Conservancy, in active engagement with the DEC, and in close consultation with more than 25 towns and villages spanning 6 counties, developed a comprehensive disposition plan to transfer this remarkable land to New York State based on ecological assessments and real world experience owning, managing, and stewarding Forest Preserve land. This plan was entirely guided by science and its goal was preserving the "forever wild" nature of the land. The Conservancy's land transfer, accomplished through granting a combination of easements and fee interests to New York State, constituted the largest additions to the Forest Preserve in more than a century. The Conservancy's interest is, therefore, not philosophical, academic or theoretical: it is based on getting hands dirty and feet wet while assessing and stewarding these remarkable lands.

The trails at issue were a key component of the Conservancy's carefully thought-out disposition plan. As a result of the Conservancy and DEC's extraordinary

outreach efforts to the many affected communities, which included attending numerous meetings—in fire houses, at kitchen tables, and in the field—with town officials and local stakeholders for many months, not a single town vetoed the use of EPF funds pursuant to New York Environmental Conservation Law, Section 54-0303(5). As the originator, facilitator, and implementer of the underlying transaction, the Conservancy has a clear stake in the outcome of this case, which will impact the ability of environmental conservation nonprofits to continue to advance the goals of the Forest Preserve.

ARGUMENT

I. THE TRAILS DO NOT REQUIRE THE REMOVAL OF TIMBER TO A SUBSTANTIAL EXTENT OR TO ANY MATERIAL DEGREE AND, ACCORDINGLY, WERE PROPERLY PERMITTED

The Forever Wild Provision mandates that Forest Preserve lands be “forever kept as wild forest lands” and prohibits the destruction of “timber.” Art. XIV, § 1. This Court has long recognized that this is not an absolute prohibition on tree cutting; rather “[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 N.Y. at 238 (emphasis added). Accordingly, the cutting of “timber” in the Forest Preserve is prohibited only if it occurs “to a substantial extent” or “to any material degree.” *See id.* This Court’s explicit rejection of an absolutist standard in *MacDonald* ensured that the Forest Preserve would be protected into perpetuity,

not simply for its own sake, but for the “use of the people of the State.” *See id.* at 239. Thus, for over 90 years, this Court has ensured that the right balance is struck between protecting the Forest Preserve and permitting public access to the land for use and enjoyment.

The Appellate Division failed to engage in this balancing exercise, instead employing a novel approach that is inconsistent with both precedent requiring a reasonable interpretation of the Forever Wild Provision and principles of ecological preservation. The Appellate Division appears to have approached the issue as a counting exercise, relying heavily on a calculation of the number of trees to be cut.¹ In so doing, the Appellate Division failed to make the requisite assessment of materiality holistically and contextually.

A. The Planning and Construction of the Trails Was Guided by Science and Ensured Timber was not Removed to a Material Degree

The ecological diversity of the Forest Preserve demands a case-by-case, scientific determination of materiality. In 2006, one year before the Conservancy bought the Finch Pruyn lands, DEC began to develop a plan to construct a trail

¹ Although the Conservancy is not addressing the question of what constitutes “timber,” DEC’s brief to this Court makes clear that a simple counting exercise is unworkable if the term “timber” includes seedlings, saplings, and trees smaller than three inches diameter at breast height. Reply Brief for Appellants-Cross-Respondents, at 17-20. The Conservancy’s position is that materiality cannot be determined just by counting the number of trees removed. Regardless of how “timber” is defined, the actual cutting to take place, in the circumstances of this case, does not rise to the level of material or substantial.

system to connect communities located within the Adirondack Park. DEC's plans were formalized in the 2009 "Management Guidance: Snowmobile Trail Siting, Construction and Maintenance on Preserve Lands in the Adirondack Park" (the "2009 Guidance"). See R.1253. The 2009 Guidance established ecologically sound standards for constructing trails with minimal environmental impact and ensured that trail construction avoided "areas considered environmentally sensitive." R.1261.

The 2009 Guidance governed the trail construction at issue here. R.1255. DEC foresters carefully inventoried and analyzed the potentially affected trees, saplings, and seedlings. Based on DEC's analysis, the trail construction plan involves the minimum tree cutting necessary to construct the trails and facilitate public access to the Forest Preserve. The plan avoids cutting old growth trees, large trees, or "overstory" trees, and ensures that the closed forest canopy will remain undisturbed. R.1263. The plan enhances protection of the Forest Preserve's sensitive interior by relocating many pre-existing snowmobile trails to its periphery and routing new trails as close as possible to the periphery or to highways. R.1257-1259. The plan also includes measures to control erosion and ensure the sustainability of the trails. R.1261-62. The plan is not static: even after trail construction commenced, DEC foresters assessed the plan to minimize tree cutting. R.1263. This carefully-executed strategy, which assiduously avoided the removal of timber to any material degree, ensured the trails' construction would neither fundamentally change the Forest

Preserve's natural topography nor create gaps in the forest canopy. It is well within the scope of permissible intervention established by precedent. *Compare MacDonald*, 253 N.Y. at 241-242 (prohibiting a 4.5 acre clear-cut to create a bobsled run for the 1932 Winter Olympics) with *Balsam Lake Anglers Club v. Department of Env'tl. Conservation*, 605 N.Y.2d 795, 853-854 (3d Dep't 1993) (permitting the cutting of mature trees to accommodate trail relocation, new trail and parking lot construction).

B. The Number of Trees Cut to Construct and Relocate the Trails Cannot Be the Sole Determinant of Materiality

Determinations of substantiality and materiality do not hinge on the number of trees cut. This is just one factor to be considered as part of an ecological and contextual analysis undertaken in the context of ensuring both preservation of nature and public use, access, and enjoyment. In *MacDonald*, this Court struck down a plan to clear-cut 4.5 acres in order to build a bobsled run for the 1932 Winter Olympics in Lake Placid. *MacDonald*, 253 N.Y. at 241. The Court reasoned that though supporting Olympic sports was a noble purpose, the Constitution's framers did not create the Forest Preserve so that the public could enjoy sporting events, but so that the public could enjoy the forests themselves. *See id.* In *Balsam Lake*, by contrast, the Third Department held that a project to construct five new parking lots, construct a new hiking trail, construct a new cross-country ski trail loop, and relocate existing trails was constitutional despite not even knowing the total number of mature trees that would be cut in order to construct the new trails and parking lots. *Balsam Lake*,

605 N.Y.2d at 853-854. All of the proposed projects in *Balsam Lake* improved public access to the Forest Preserve without violating the materiality standard for tree removal, and the court noted that these uses were consistent with the Forest Preserve's purpose. *See id.* at 854. The lesson from *Balsam*, as applied here, is that courts should consider the extent to which tree removal facilitates ecologically-sound public access and enjoyment, on a case-by-case basis, to determine whether the Forever Wild Provision's intent is served.

Comparing these two precedents, it is clear that the materiality of timber removal hinges on the extent to which the project, as a whole, impairs the wild forest nature of the Forest Preserve and whether the scope of the tree removal and the uses are consistent with the framers' intent. A clear-cut to create a bobsled run was unconstitutional because it did not serve the general public, but removing trees for the public purposes of trail relocation and parking lots to facilitate access was determined to be consistent with the Constitution given the entirety of the circumstances.

MacDonald, 253 N.Y. at 241-242; *Balsam Lake*, 605 N.Y.2d at 853-854. Indeed, this was precisely the Supreme Court's approach in the instant case: "*circumstances and effect* of the cutting are, in addition to the amount of cutting, relevant issues to the constitutional 'substantial extent' question." R.xiv (emphasis added).

In assessing the circumstances of the trail construction, the Supreme Court gave due weight to the fact that the tree cutting involved "the creation of a narrow

trail through a wooded area” which would create “significantly more trail for usage by the public.” R.xvii. In assessing the effect of the tree cutting, the Supreme Court correctly credited the following evidence adduced at trial: that the DEC foresters made significant efforts to minimize the cutting of trees by carefully considering which trees would be removed, notably avoiding particularly large and old growth trees; that the DEC foresters made efforts to ensure that the impact on the forest canopy would not be material; and that the construction did not involve “clearcutting.” R.xv-xvi.

Moreover, a strictly numerical approach to materiality may have the unintended and undesirable consequence of enabling small, but disproportionately harmful timber removal to occur. As an example, removal of a small number of trees on a steep slope could result in significant erosion. And cutting a small number of trees around streams could result in runoff pollution that is harmful to the waterbody. If this Court followed the Appellate Division’s logic and primarily focused on counting trees in analyzing both of those examples, it could reach the conclusion that because the number of trees cut is small, the environmental impact will be small, which clearly is not true. The number of trees by itself is a vanity metric: easy to measure but not meaningful in terms of gauging ecological outcomes. Deciding on materiality by focusing on the number of trees cut, and not the actual impact, sets a problematic precedent.

II. FAILING TO PERMIT THE TRAILS WILL UNDERMINE THE PRESERVATION OF THE FOREST PRESERVE FOR THE PEOPLE AND DISCOURAGE COLLABORATIVE APPROACHES TO MAXIMIZE SUSTAINABLE USE AND ENJOYMENT

A. The Forever Wild Provision Was Enacted to Protect the Forest for the People

The 6 million-acre Adirondack Park and the 2.6 million-acre portion within it designated as the Forest Preserve were never conceived to be an off-limits wilderness accessible only to those with abundant time and money. In 1892, the State legislature called for the Adirondack Park to be “forever reserved, maintained and cared for as ground open for the free use of all the people for their health and pleasure, and as forest lands necessary to the preservation of the headwaters of the chief rivers of the state . . .” L. 1892, ch. 707 § 1. In 1885, the State legislature mandated that the Forest Preserve be “forever kept as wild forest lands.” L. 1885, ch. 283. In 1915, Olin Henry Landreth, a delegate to the Constitutional Convention of the State of New York, discussed the need to facilitate greater public access to the Forest Preserve, stating that “the State as the agent of the people is holding [the Forest Preserve] *in trust* for the benefit of the real owners, the people.” 2 Rev. Rec., 1915 N.Y. Constitutional Convention at 1473 (emphasis in original). He urged,

It is said that the presence of roads and camps would mar the scenic beauty of the natural forest. . . . Is it not better that a *large number* of our people should be able to visit and enjoy a forest of even a slightly marred scenic beauty, than that only a *privileged few* should be able to enjoy an unmarred forest?

Id. at 1475 (emphasis in original). In 1930, this Court spoke for the first time on this issue and recognized that “[the Forest] Preserve is preserved for the public; its benefits are for the people of the State as a whole.” *MacDonald*, 253 N.Y. at 238. More recently, this Court recognized the need to “balance, within applicable constitutional, statutory and regulatory constraints, the preeminent interest in maintaining the character of pristine vistas with ensuring appropriate access to remote areas for visitors of varied interests and physical abilities.” *Matter of Adirondack Wild: Friends of the Forest Preserve v. New York State Adirondack Park Agency*, 34 N.Y.3d 184, 187 (2019).

Thus, the Forest Preserve has a unique public-private status, where natural resources and communities exist in dynamic interplay. Its success requires ensuring both a constitutional level of protection of the natural environment and enjoyment by the public that is consistent with that protection.

B. The Collaborative Approach Adopted by the DEC and the Conservancy to the Land Transaction Ensured that the Forest Preserve is Protected While Providing Increased Access for Public Use and Enjoyment

The towns directly affected by the addition of these lands to the Forest Preserve had the power to effectively block the addition of the land to the Forest Preserve, pursuant to New York Environmental Conservation Law, Section 54-0303(5). Consistent with historic local government concerns about state ownership of

land in the Adirondack Park, many of these towns were not inclined to support adding additional land to the Forest Preserve. In order to ensure community support, the Conservancy and DEC engaged in extensive outreach to these towns, over the span of about 18 months, to gather their input and address their concerns with respect to adding these lands to the Forest Preserve. This outreach involved several visits to each of the towns to meet with local politicians, leaders and stakeholders, to listen to and address their suggestions, requests and concerns relating to the land transaction. The towns' interests were then extensively discussed and reviewed with the Conservancy and DEC's conservation experts, to find a balance that ensured that the goal of protecting this magnificent landscape could be successfully reconciled with public use and enjoyment. The meetings were initially very tense and the Conservancy and DEC had to address concerned towns which were not inclined to support the Conservancy and DEC's efforts to bring the Finch Pruyn lands into the Forest Preserve. The carefully considered, forward-looking approach of the Conservancy and DEC to balancing the interests of preservation with compatible public access and use through authentic and thoughtful community engagement ultimately succeeded: not a single town exercised its veto power.

The proposed trail plan is an important component of the culmination of the Conservancy and DEC's collaborative process for the addition of the Finch Pruyn lands to the Forest Preserve. The potential for public access by community members

and visitors to the former Finch Pruyn lands was a key concern of the local governments and residents. From the inception of the transaction, creating these trails was extremely important to the communities, as they would not only enable local residents to enjoy increased travel and interchange between their communities, but would also attract outdoor enthusiasts looking to experience the Adirondack Park forests year-round.

When the State completed the final acquisition of the Finch Pruyn lands from the Conservancy, Governor Cuomo highlighted that the decade long project provided “the resources necessary to protect this treasured resource and its remote character, while expanding outdoor recreation opportunities including hunting, hiking, paddling and wildlife observation.” The Official Website of New York State, *Governor Cuomo Announces Completion of Largest Addition to Adirondack Forest Preserve in More Than a Century*, <https://www.governor.ny.gov/news/governor-cuomo-announces-completion-largest-addition-adirondack-forest-preserve-more-century> (last visited Jan. 25, 2021). Locals and visitors can now fish, hunt, and explore new areas of the forests of pristine beauty and ecological significance which had been privately-owned and off-limits since the Civil War to everyone who did not belong to a private hunting or fishing club. Small businesses can now offer boutique rafting, camping and hiking trips to visitors. The plan also incorporates new trails accessible to people with disabilities at Boreas Ponds, opening this area of the Forest Preserve to

people who previously had little or no opportunity to experience it. The benefit to the people is summed up well by a lifelong Adirondack resident who thanked the Conservancy for transferring the Finch Pruyn lands to public ownership: he had always dreamed of fishing in the Essex Chain Lakes, a simple endeavor that previously required a membership to a private fishing club. This is what the founders of the Forest Preserve intended.

Blocking the trails' construction, by focusing solely on the number of trees over a vast 161,000 acre expanse, is inconsistent with precedent and would undo the Conservancy and DEC's collaborative work with communities that made possible the incorporation of the Finch Pruyn lands into the Forest Preserve. Furthermore, it is of crucial importance to encourage, not discourage, such collaborations because they are the key to facilitating future additions to the Forest Preserve. Despite the decade of effort, very significant investment, and the sweat and tears that went into this transaction, the Conservancy is proud to have worked with Adirondack communities and the State to secure these remarkable lands—161,000 acres, 415 miles of rivers and streams, 300 lakes and ponds, 90 mountain peaks, and 16,000 acres of wetlands—to be constitutionally protected and available to the public.

Far from being unconstitutional, under the circumstances of this case the inclusion by the Conservancy, DEC, and local Adirondack communities of trail construction in the Finch Pruyn land transaction very much serves the Forest

Preserve’s purpose. The trails do not require timber removal to a “substantial extent” or a “material degree” under this Court’s standard, nor is there any justification for disturbing the thoughtful, deliberate, collaborative balancing of interests that sets a precedent for the future success of the Forest Preserve. Given the particular facts of this case, the trail construction plan is consistent with the goals of the Forever Wild Provision. It ensures critical conservation and that the lands will be for the free use of all people, as the Forest Preserve founders intended. It should be allowed to proceed.

CONCLUSION

For the foregoing reasons, amicus curiae respectfully requests that this Court reverse the Third Department’s decision and order that the construction of the trails at issue does not violate Article XIV, Section 1 of the New York Constitution.

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AFFIRMATION OF COMPLIANCE

I hereby certify that, as required by the Rule of Practice of the New York Court of Appeals 22 N.Y.C.R.R. § 500.13(c)(1), the total word count for all printed text in the body of the brief is 3926 words, which complies with the 7,000-word limit for amicus briefs provided in that rule.



Haimavathi V. Marlier