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.,

Respondent-Appellant,

v.

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

Appellants-Respondents.

REPLY BRIEF FOR APPELLANTS-RESPONDENTS TO BRIEF OF AMICI CURIAE ADIRONDACK COUNCIL, INC. AND ADIRONDACK WILD: FRIENDS OF THE FOREST PRESERVE

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Dated: February 26, 2020

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGE**

PRELIMINARY STATEMENT

Appellants-respondents submit this brief in response to the amicus brief of Adirondack Council, Inc., and Adirondack Wild: Friends of the Forest Preserve (amici). In their brief, amici repeatedly mischaracterize the State's[1] central argument that assessing the substantiality and materiality of the timber cutting required to construct the trails at issue in this case requires consideration of whether that cutting—viewed in the context of the project as a whole—impairs the wild forest nature of the Preserve. Contrary to amici's contention, this contextual analysis does not require the Court to weigh competing policy interests. Rather, it requires the Court to assure that any cutting of timber is not sufficiently substantial or material to undermine the single purpose of the forever wild provision—to protect the wild forest nature of the Preserve for the use and enjoyment of the public.

Amici also improperly urge this Court to consider the fact that snowmobiles will be used on these trails in assessing the constitutionality

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[1] This brief adopts the same shorthand nomenclature as used in appellants-respondents' opening brief in this matter.

of the project. Because plaintiff expressly waived that argument, however, it is beyond the scope of this case.

ARGUMENT

POINT I

ASSESSING SUBSTANTIALITY AND MATERIALITY OF TIMBER CUTTING REQUIRES CONSIDERING WHETHER THAT CUTTING IN CONTEXT IMPAIRS THE WILD FOREST NATURE OF THE PRESERVE

The State's briefs to this Court set forth the State's central argument that the constitutionality of the timber cutting required to construct the trails at issue—assessments that require consideration of whether the cutting was "to a substantial extent" or "material degree," *Association for Protection of Adirondacks v. MacDonald*, 253 N.Y. 234, 238 (1930)—"turn[s] not on a simple tree count, but rather on whether the number of trees cut in the context of a project as a whole impairs the wild forest nature of the Preserve." (State Opening Br. at 55.) In other words, simply considering in a vacuum the number of trees cut does not provide sufficient information to assess whether the wild forest nature of the Preserve has been impaired, and the Constitution thereby violated. As the State explained, the use of a contextual analysis in making the requisite assessment is supported by the text, structure, and history of

the constitutional provision itself, as well as by this Court's decision in *MacDonald*. (State Opening Br. at 53-56; State Reply Br. at 24-26.)

Amici repeatedly mischaracterize the State's argument as an exhortation to consider and balance "competing" policy interests, including increased public use and enjoyment of the Preserve. (Amici Br. at 13-21.) Increasing public use and enjoyment of the Preserve in a manner that maintains the Preserve's wild forest nature is not a competing policy interest, however, but rather is central to the very purpose of the forever wild provision. As the State explained, the very purpose of the provision is to protect the forever wild nature of the Preserve *for the use and enjoyment of the public.* (State Opening Br. at 60-62; *see also MacDonald*, 253 N.Y. at 238-39.)

To be sure, not every project proposed to be undertaken to provide the public with recreational opportunities in the Preserve will serve this purpose. A project that increases public access and enjoyment must do so in a manner that maintains the wild forest nature of the Preserve. The bobsled run and return at issue in *MacDonald*, which was intended for use in the Olympic Winter Games, would have required the installation of man-made equipment, including an electric- or gas-powered pull line.

(State Opening Br. at 55-56.) It was thus more akin to an amusement park attraction that could not have offered use and enjoyment in a manner consistent with the wild forest nature of the Preserve.

And the remaining factors relevant to the requisite contextual analysis are not policy considerations at all, but rather factual considerations that bear on the nature and impact of a project in the context of the Preserve's forest lands. The use of ecologically-sound trail building techniques—to cite an example put forth by amici (Amici Br. at 15)—is not a policy consideration in and of itself, but rather a factual consideration that bears on the question whether a project does or does not impair the wild forest nature of the Preserve. (State Reply Br. at 21-23.)

That the number of trees cut must be considered in light of a project's overall impacts upon the wild forest nature of the Preserve—the argument the State *does* make—is evident from the text, structure and history of the forever wild provision itself. As the State explained (State Opening Br. at 52-53; State Reply Br. at 20), arguably the tree cutting prohibition in the provision's second sentence simply states in explicit terms what would otherwise be only implicit in the provision's first

sentence. Indeed, amici agree with this reading, noting that "the Forever Wild clause was organized with the protection of the Forest Preserve as forever wild forest lands as the overarching rule; the second sentence prohibiting the disposition of state lands and the destruction of timber are expressly stated implementing principles of the forever wild rule." (Amici Br. at 25; *see also* Sierra Club Amicus Br. at 9.) At the very least, the second sentence of the forever wild provision must be read in light of the provision's overarching purpose: to maintain the wild forest nature of the Preserve for the use and enjoyment of the public.

The numbers-focused approach to tree cutting urged by plaintiff and supported by amici here fails to advance this overarching purpose. Cutting a small number of trees may have a greater impact on the wild forest nature of the Preserve than cutting a larger number, depending on, for example, the age of the trees, their species, or their role within the forest ecosystem. Here, affirmed findings of fact, amply supported by record evidence, show that before any tree was cut to construct the trails, DEC individually considered and marked each tree to be cut based on these and other factors, with an overall aim of reducing impacts on the Preserve. (State Opening Br. at 22-35, 58-59; State Reply Br. at 30.) For

this same reason, amici are wrong in asserting that the three inches diameter at breast height standard currently used by DEC would strip particular trees such as decades-old alpine trees[2] of all constitutional protection. (Amici Br. at 22.) Regardless of the applicability of the second sentence of the forever wild provision, the first sentence still applies: the wild forest nature of the Preserve must be maintained.

POINT II

SNOWMOBILE USE IS NOT AT ISSUE IN THIS CASE

It is undisputed that the trails at issue in this case are year-round trails designed to facilitate multiple kinds of recreational use, including cycling, hiking, snowmobiling, and cross country skiing. (State Opening Br. at 12; State Reply Br. at 1 n.1.) Yet amici not only repeatedly mischaracterize the trails as "snowmobile trails," but further argue that "snowmobile use, with the attendant noise, traffic, air pollution, and other impacts" renders the trails unconstitutional. (Amici Br. at 27.) The Court should disregard this argument because it lies beyond the bounds of this case. As Supreme Court expressly found, plaintiff waived any such

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[2] Plaintiff in this matter has made no assertion that any alpine trees were cut in the creation of these trails, nor is the State aware of any.

argument. (R.vii.) This ruling was not challenged by plaintiff either on appeal to the Third Department or in plaintiff's briefs to this Court, and remains undisturbed. Accordingly, the argument is not properly before this Court for consideration.

CONCLUSION

Because the State does not propose that this Court adopt an interpretation of the forever wild provision that balances policy interests, amici's concerns regarding such an interpretation are unfounded. Further, the Court should decline to consider for the first time in this matter the use of snowmobiles in assessing constitutionality.

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Respectfully submitted,

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