**No. APL-2019-0166**

To Be Argued By: John W. Caffry
Time Requested: 15 Minutes

**STATE OF NEW YORK**
**COURT OF APPEALS**

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**PROTECT THE ADIRONDACKS! INC.,**

**Respondent-Appellant,**

**-against-**

**NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION and ADIRONDACK PARK AGENCY,**

**Appellants-Respondents.**

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# BRIEF OF RESPONDENT-APPELLANT IN RESPONSE TO THREE AMICUS CURIAE BRIEFS

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## INTRODUCTION

This appeal has attracted a total of six amicus briefs because it is only the third time in the 127-year history of Article 14, § 1 of the New York State Constitution, the "forever wild clause", that the courts have been called upon to protect the Forest Preserve from the on-the-ground actions of the legislative and executive branches. This brief is submitted pursuant to Rule 500.12(f) in response to three of the four amicus curiae briefs filed in support of the Defendants'[1] appeal herein (collectively "Amici"). Respondent-Appellant-Plaintiff Protect the Adirondacks! Inc. ("Plaintiff") has responded to the fourth amicus curiae brief, filed by Empire State Forest Products Association, Inc., in a separate brief.

This Court's decision herein has the potential to determine the fate of not only the few dozen miles of Class II Community Connector snowmobile trails that are directly at issue herein, but also the hundreds of additional miles of such trails that the Defendants intend to build.[2] Such an action would destroy hundreds of thousands of additional trees. The framers of Article 14 could never have imagined that after they "shut the

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[1] Defendants-Appellants-Respondents New York State Department of Environmental Conservation ("DEC") and Adirondack Park Agency ("APA") ("Defendants").

[2] See Brief of Plaintiff-Respondent-Appellant dated September 22, 2020 ("Plaintiff's Brief"), pp. 15-16, 22, 28.

door, and ... close[d] it tight ... to protect that great and magnificent forest from further spoilation" (R.[3] 613-614), such a level of destruction could be allowed to occur. Previously, any such action on the Forest Preserve has required a constitutional amendment. This Court should not change that now.

The three briefs responded to herein focus primarily on new issues which were not raised by the Defendants at trial, and have no support in the Record. Such arguments should not be considered by this Court. Point I, infra.

The three amicus briefs all argue that the Appellate Division erred by not applying a balancing test when it found that the Class II Community Connector snowmobile trails ("Class II trails") were unconstitutional. As explained at Point II below, and in the amicus curiae brief of the Adirondack Council and Adirondack Wild,[4] the clear mandate of the Constitution, and the seminal case of Association for the Protection of the Adirondacks v. MacDonald, 253 N.Y. 234 (1930), do not permit any such balancing. Any activity that requires the destruction of a material or substantial amount of timber on the Forest Preserve is unconstitutional, regardless of what merits it might otherwise have. Id. at 242.

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[3] References to pages of the Record on Appeal are preceded by "R.".

[4] Amicus curiae brief of Adirondack Council, Inc. and Adirondack Wild: Friends of the Forest Preserve dated January 29, 2021 ("AC/AW Brief").

The underlying concern in these amicus briefs seems to be that if the decision of the Appellate Division is affirmed, public access to the Forest Preserve will be annihilated. These fears are unfounded. As shown by the Record herein, the construction and maintenance of foot trails will be able to continue as they always have. Point V, infra. The hundreds of miles of existing snowmobile trails won't go away, and new ones can be created on old roads and in other locations that do not require the destruction of substantial or material amounts of timber, and do not prevent the preservation of the Forest Preserve in its wild state. Point IV, infra.

These three amicus briefs do not present any reason to reverse the decision of the Appellate Division. Its finding that the Class II trails are unconstitutional because the cutting of approximately 25,000 trees constituted the destruction of timber to a "substantial extent" and a "material degree" was soundly rooted in the Record and the law, and should be upheld.

## POINT I

## THE NEW ISSUES RAISED BY DEFENDANTS' AMICI, WHICH ALSO HAVE NO BASIS IN THE RECORD, SHOULD NOT BE CONSIDERED BY THIS COURT

The briefs of the Amici raise several new issues that were not presented to the trial court, and are not supported by any evidence in the Record. See Points IV, V, VI, and VII, infra.

Any issue which was not raised by the Defendants in the trial has not been preserved for appeal and may not be heard by this Court. U.S. Bank National Association v. DLJ Mortgage Capital, Inc., 33 N.Y.3d 84, 89-90 (2019); QBE Insurance Corp. v. Jinx-Proof Inc., 22 N.Y.3d 1105, 1108 (2014).

Likewise, pursuant to Rule 500.23(a)(4), new issues may not be raised by amici. Defendants' Amici could have moved to intervene in this case in the four years between the filing of the action in 2013, and the trial in 2017, in order to raise the issues that they now, four years later, belatedly claim are so critical. If they had done so, they could have attempted to raise these issues and introduce evidence into the Record then, but they chose not to. They are now barred from doing so in this appeal.

Because these issues were not raised during the trial, there is no evidence in the Record to support them. They are "based on pure speculation" and/or evidence not in the record, and so are beyond the review of this Court. QBE Insurance v. Jinx-Proof Inc., 22 N.Y.3d at 1108. "Matter contained in the briefs, not properly presented by the record, is not to be considered [and] points ... with no factual basis in the record [must] be rejected." Block v. Nelson, 71 A.D.2d 509, 511 (1st Dept. 1979). The only exception is evidence which is found to be appropriate for the Court to take judicial notice of. See Affronti v.

Crosson, 95 N.Y.2d 713, 718, 719-720 (2001). Hearsay, social media posts, and newspaper articles do not meet this standard. There is no testimony or other evidence in the Record to support these speculative new theories, and the Amici do not cite to any. The Court should not consider these new issues.

## POINT II

## ARTICLE 14, § 1 AND ASSOCIATION V. MACDONALD DO NOT ALLOW THE DEFENDANTS TO BALANCE THE ALLEGED BENEFITS OF THE CLASS II TRAILS AGAINST THE DAMAGE THEY WILL DO TO THE FOREST PRESERVE

Defendants' Amici complain that "[t]he Appellate Division failed to engage in [a] balancing exercise" between "protect[ion] of the Forest Preserve and permitting public access to the land for use and enjoyment". TNC Brief,[5] p. 6; see also ADK/OSI Brief,[6] pp. 7-12; AATV/NYSAC Brief,[7] pp. 9-18. Given that Constitution Article 14, § 1 mandates protection of the Forest Preserve "forever", the courts have consistently and strictly upheld the overarching protection afforded to it. They have not engaged in such a balancing process between otherwise desirable activities and its constitutional protection, no matter how much

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[5] Amicus brief of The Nature Conservancy ("TNC") dated January 27, 2021 ("TNC Brief").

[6] Amicus brief of Adirondack Mountain Club and Open Space Institute ("ADK/OSI") dated January 29, 2021 ("ADK/OSI Brief").

[7] Amicus Brief of Association of Adirondack Towns and Villages and N.Y.S. Association of Counties ("AATV/NYSAC") dated January 26, 2021 ("AATV/NYSAC Brief").

public access or benefits those activities may facilitate.

Plaintiff agrees with amici curiae Adirondack Council and Adirondack Wild that Association for the Protection of the Adirondacks v. MacDonald, 253 N.Y. 234 (1930) does not permit "a so-called 'contextual' or 'balancing' analysis in which substantial and material tree cutting is permissible because of other countervailing factors or considerations." AC/AW Brief, Point I, p. 21.

The balancing test or contextual analysis proffered by the Defendants' Amici must also be rejected because it would set an overly broad precedent for the interpretation of the forever wild clause. If this Court were to adopt such an amorphous standard, it would be virtually unenforceable. This type of ad hoc approach would mean that there would no longer be an effective check on development activities in the Forest Preserve promoted by the legislative and executive branches.

Although this Court's recent decision in Adirondack Wild v. N.Y.S. Adirondack Park Agency, 34 N.Y.3d 184 (2019), did not involve Article 14, the opinions therein provide strong reminders of the reasons for the creation and protection of the Forest Preserve. The majority opinion acknowledged that any balancing undertaken by agencies in their statutory decision-making processes as to how to provide "appropriate access to remote areas for visitors of varied interests and physical abilities"

must stay "within applicable constitutional ... constraints". Id. at 187.

As stated by Judge Fahey in his dissent, "[t]he goal of preserving the Adirondacks cannot be achieved by balancing competing interests that desire to use the land for economic or recreational purposes against the larger goal of strict preservation in order to protect the overall ecosystem of eastern New York State. This larger goal can only be accomplished if we have the courage to say no." Id. at 198.

As Judge Wilson stated in his dissent, "[b]y a unanimous vote, the [1894] Convention adopted the 'forever wild' provision to create an 'unpassable constitutional barrier' to executive branch actions facilitating the depredation of the forest reserve (Frank Graham, Jr., The Adirondack Park: A Political History, 127-31 [1978])." Id. at 206-207. "[I]t is precisely because the Forest Commission did not heed the legislature's directives that the 'forever wild' clause of our Constitution exists, namely, to prevent incursions" on the Forest Preserve. Id. at 219.

Yet what the Defendants' Amici want this Court to do, by creating a new balancing test, which would be implemented by the same legislative and executive branches that failed the Forest Preserve in the late nineteenth century, is to dismantle its constitutional protection. This would contradict more than 130 years of the courts "[u]nderstanding the tremendous import of the

‘forever wild’ clause, [and] constru[ing] it strictly". Id. at 207.

"The Constitution intends to take no more chances with abuses" by executive agencies exceeding their powers, and, therefore, this Court must "ke[ep] shut" the "open door through which abuses as well as benefits may pass". Association v. MacDonald, 253 N.Y. at 242. If an action would cause "injury and ruin of the Forest Preserve", or anything more than an immaterial degree of tree cutting, then it may not proceed, no matter how wonderful or "beneficial" the activity may seem at the time, unless the People vote to amend the Constitution to allow it. Id. at 238, 241-242. It must remain up to the People to decide whether the benefits of any significant project in the Forest Preserve are great enough to outweigh, and break, the protection given to it by the Constitution. See id. at 240.

Like the Appellate Division herein, this Court is “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". R. 5013. It is called upon to "define, and safeguard, rights provided by the New York State Constitution, and order redress for violation of them." Campaign for Fiscal Equity v. State of New York, 100 N.Y.2d 893, 925 (2003) (interpreting Article 11, § 1, the “Education Article").

When the Appellate Division's decision is upheld, the public will continue to have access to the Forest Preserve for many recreational activities, such as snowmobiling, as well as "hunting, fishing, trapping, hiking and camping, [and] other forms of non-motorized recreation, such as horseback riding, cross-country skiing, snowshoeing, skiing, and skating". Claudia Braymer, Improving Public Access to the Adirondack Forest Preserve, 72 Alb. L. Rev. 293, 300 (2009). It is not necessary, or permitted, to balance the benefits of these activities against the protection of the Forest Preserve's timber and the preservation of its land in its wild state. Association v. MacDonald, 253 N.Y. at 240-241.

## POINT III

## THE TIMBER PROTECTED BY ARTICLE 14 HAS ALWAYS INCLUDED ALL TREES 1" DBH AND LARGER

For over 90 years, it has been settled law that for purposes of Article 14, § 1, there is no distinction between the words "timber" and "trees". "Taking the words of section 7[8] in their ordinary meaning, we have the command that the timber, that is, the trees, shall not be sold, removed or destroyed." Association for the Protection of the Adirondacks v. MacDonald, 253 N.Y. 234, 238 (1930).

Accordingly, all trees on the Forest Preserve are protected

[8] Now Article 14, § 1.

by the Constitution, not just those of 3" DBH[9] or greater. However, if this Court upholds the Appellate Division's decision, DEC will not be forced to count brush and seedlings under 1" DBH as trees for purposes of constructing and maintaining trails, as the Amici seem to fear. See Plaintiff's Brief, Point II.

Consistent with Association v. MacDonald and the precedent set almost 30 years ago in Balsam Lake Anglers Club v. DEC, 199 A.D.2d 852 (3d Dept. 1993), the Appellate Division affirmed the holding of the trial court herein and held that all Forest Preserve trees are "timber" that is protected by the Constitution. The records herein and in Balsam Lake show that in doing so, these courts used tree counts that only counted trees that were 1" DBH or greater as a tree.

The Amici argue that this holding was an erroneous change in the law that will create all manner of calamities if trees under 3" DBH are "timber". None of these arguments have any merit, because the decision did not change the law. The Amici seem to be unaware of the contents of the Record herein, and those portions of the Balsam Lake record which are in it, pursuant to a stipulation between the parties. R. 550, 4909-4923.

The Amici claim that the Appellate Division's ruling would require DEC to count, e.g., all "seedlings, saplings, and very small trees" (AATV/NYSAC Brief, p. 2) as being protected by the

[9] Diameter at breast height ("DBH").

Constitution's prohibition on the destruction of the Forest Preserve's timber, and that this would somehow impede the maintenance of existing trails and the construction of new trails. This argument ignores the testimony in the Record herein and in Balsam Lake. The tree counts used in both of these cases only counted a "tree" if it was 1" in diameter or greater, and did not include vegetative growth under 1" in diameter.

The Balsam Lake court found that:

> [t]he record before us indicates that approximately 350 trees have been or will need to be cut to accommodate the trail relocation; the remaining cutting (312 saplings) concerns vegetative growth that DEC does not classify as trees. ... [T]he amount of cutting necessary is not constitutionally prohibited.

Balsam Lake Anglers Club v. DEC, 199 A.D.2d at 853-854. That court's decision itself did not say where the line between a "tree" and a "vegetative growth" was drawn, but the Record on Appeal therein (R. 550, 4826-4827, 4909-4923) shows that DEC had counted 350 "trees with stumps 1 inch or more in diameter" (R. 4913).[10] Although DEC had claimed therein that the trees from 1" to 3" in diameter were not countable as trees (R. 4912), the court did not accept that claim. It included all of them in its count of the 350 destroyed "trees", while also excluding the 312 stems of smaller growth under 1". Id.

Here, the Record shows that Plaintiff's expert counted trees

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[10] The 350 trees consisted of 300 trees ≥ 1" cut, plus 5 trees ≥ 3", and 45 trees ≥ 1" to 3", planned to be cut. R. 4913.

of 1" diameter and above on the trails at issue herein. See Plaintiff's Brief, pp. 16-19, Point II. His ability to do so showed that, contrary to the claims of the Amici, it is not impractical to do this. Consistent with this expert testimony and the Balsam Lake decision, the Appellate Division determined that 25,000 trees would be destroyed by the Class II trails. R. 5018. As shown below at Point V, upholding the use of this standard will not inhibit the construction and maintenance of typical Adirondack foot trails.

The AATV/NYSAC Brief (p. 11) relies upon the Defendants' use of a 3" DBH definition for "timber". In interpreting the Constitution, the Court owes no deference to DEC's internal practices. Plaintiff's Brief, Point VI. DEC's policy was not created contemporaneously with the adoption of the forever wild clause in 1894, so it sheds no light on the intentions of its framers. *Cf.*, Kolb v. Holling, 285 N.Y. 104, 112-113 (1941)(construction of constitutional provision by agency is entitled to great weight when it is created contemporaneously with that provision). Moreover, as shown above, DEC's approach was rejected by the Balsam Lake court almost 30 years ago.

DEC's testimony revealed that this practice was based on its written policy on tree cutting on the Forest Preserve, for which there was no scientific or other basis. R. 4086, 4264, 4823-4827. Aside from its lack of scientific credibility, this policy

can not be used as evidence regarding the interpretation of Article 14, because the Defendants stipulated at trial that it could not be used for that purpose. See p. 29, infra.

Even if this Court finds that trees under 3" DBH are not considered to be "timber", the destruction of 6,900+/-[11] larger trees for the construction of the Class II trails is a "substantial" and "material" (Association v. MacDonald, 253 N.Y. at 238) amount of timber. See Plaintiff's Brief, Point II.E.

The Appellate Division's ruling did not change the law. It merely applied the existing precedents to the evidence in the Record to conclude that the Class II trails are unconstitutional. This ruling should be affirmed.

## POINT IV

## AFFIRMING THE APPELLATE DIVISION'S HOLDING WILL NOT IMPEDE REASONABLE ACCESS TO THE FOREST PRESERVE

The framers of Article 14 intended that the Forest Preserve offer "a great resort for the people of this State" and a "place of retirement" for those "desiring peace and quiet". R. 589-590. This Court, in Association v. MacDonald, 253 N.Y. at 240-241, confirmed that it was "for the reasonable use and benefit of the public", by "campers and those who seek recreation and health in the quiet and solitude of the north woods". The Amici claim that the Appellate Division's decision will make it impossible for

[11] See Plaintiff's Brief, pp. 16-17.

this to occur. Nothing could be further from the truth. Affirming that decision will only restrain construction on the Forest Preserve which does not serve that purpose, or which exceeds the permissible level of damage to its timber or its wild forest nature.

As shown below at Point V, affirming the decision by the Appellate Division will not prevent the construction or maintenance of foot trails. As for snowmobile trails, there are hundreds of miles of them in the Adirondack Forest Preserve (R. 3953-3954, 4127-4129) and on other lands in the Adirondack Park. These vehicles can also be used on some roads that cross the Forest Preserve.

The Appellate Division's decision will affect only new Class II snowmobile trails and other projects that cause similar amounts of damage to the Forest Preserve. It will not affect existing snowmobile routes. New trails can be built, so long as they are appropriately located and constructed, in accordance with Article 14. During the pendency of this litigation, the construction of such snowmobile trails, which did not require destruction of material amounts of timber, has continued. See p. 21, infra. Additional trails can be created by converting old roads to that purpose. See e.g. Adirondack Wild v. N.Y.S. Adirondack Park Agency, 34 N.Y.3d 184 (2019). And, as discussed at Point VII, infra, and Plaintiff's Brief (pp. 13-14), Article

14 could be amended to allow whatever types of snowmobile trails the People of the State find to be appropriate.

However, the Class II Community Connector snowmobile trails at issue herein are not intended to serve those "who seek recreation and health in the quiet and solitude of the north woods". Association v. MacDonald, 253 N.Y. at 240. Instead, "the trails at issue will serve as an important connector for numerous Adirondack towns and villages". TNC Brief, pp. 2-3. The underlying purpose of these trails is to promote local economies, by "linking communities" and supporting local restaurants and stores. See AATV/NYSAC Brief, p. 15. These were not among the framers' intended purposes for protecting the Forest Preserve. Point VII, infra.

Nor were the Class II trails intended for "appropriate access to remote areas". Adirondack Wild v. APA, 34 N.Y.3d at 187. Instead, they are intended to "link[] together communities". Adirondack Council v. N.Y.S. Adirondack Park Agency, 92 A.D.3d 188, 190 (3d Dept. 2012). They are specifically required to be routed along the periphery of the Forest Preserve, rather than through its remote areas. See TNC Brief, p. 2. As the Defendants admitted in their post-trial filing, the Class II trails "serve to connect communities [and] are located on the periphery of Wild Forest or other Forest Preserve Areas". R. 4962.

There is already a highway network that links Adirondack communities and provides access to their businesses. Destroying thousands of trees on the Forest Preserve to connect these communities to one another by snowmobile travel, rather than for providing permissible recreational access to the Forest Preserve, violates Article 14.

The TNC Brief (p. 12) cites to this Court's statement in Adirondack Wild v. APA, 34 N.Y.3d at 187, regarding the need to provide "appropriate access to remote areas for visitors of varied interests and physical abilities" in the Adirondacks. Plaintiff does not disagree with the Court on that issue. However, at trial Defendants did not present this need as a rationale for building the Class II trails. Nor is there any evidence in the Record that these trails were designed to, or intended to, meet this need, or are otherwise capable of doing so. Thus, this issue is not before the Court and may not be considered on this appeal. Point I, supra.

Moreover, the Adirondack Wild decision recognized that such access to the Forest Preserve must be consistent with constitutional restraints. Id. Regardless of the purpose, timber may only be cut on the Forest Preserve if the amount of cutting is neither material or substantial. Association v. MacDonald, 253 N.Y. at 242. For instance, the bobsleigh run at issue in 1930 was expected "to be available for general use"

after the Olympics, yet it was still found to be unconstitutional. Association for the Protection of the Adirondacks v. MacDonald, 228 A.D. 73, 75 (3d Dept. 1930).

This case is not about preventing public access to the Forest Preserve, and if the Appellate Division is affirmed, it will not have that effect. But there are limits to how much timber can be destroyed in order to make the Forest Preserve more amenable to "the use of the park by campers and those who seek recreation and health" in the forest. Association v. MacDonald, 253 N.Y. at 240, 242. The Appellate Division properly found that the Class II trails crossed that line.

## POINT V

## THE ISSUE OF FOOT TRAILS IN THE FOREST PRESERVE IS NOT BEFORE THIS COURT; WORK ON THEM WILL NOT BE AFFECTED BY THE APPELLATE DIVISION'S DECISION

Affirming the Appellate Division's decision will not prevent Defendant DEC and its Amici from maintaining or building foot trails in the Forest Preserve. This case is about the constitutionality of Class II snowmobile trails and not about the constitutionality of foot trails. AATV/NYSAC and ADK/OSI have improperly attempted to raise a new issue by speculating that if this Court affirms the Appellate Division that will somehow stop Defendant DEC and others from building new hiking trails and maintaining existing ones because it will be inconvenient for DEC

and its contractors such as ADK to do so. There is no proof whatsoever in the Record that this will happen. This specious new argument should be rejected. See Point I, supra.

If the Court were to nevertheless address this new issue, the only precedent,[12] and the Record herein, show that it is possible to build foot trails while only destroying very few trees. In the only prior case to have directly addressed this issue, building a 2.3 mile long cross-country ski trail required cutting 350 trees of 1” or more in diameter, and was found to be constitutional. Balsam Lake Anglers Club v. DEC, 199 A.D.2d 852, 853-854 (3d Dept. 1993). Vegetation under 1" diameter was not counted by that court. Id; see p. 11, supra. Contrary to the hyperbole of the Amici, Defendants have never been required by the courts to do otherwise.

At the trial herein, Plaintiff’s forestry expert Stephen Signell[13] used a standard for counting trees of 1" and larger, based on U.S. Forest Service research and the impracticality of counting trees smaller than that. Plaintiff’s Brief, pp. 17-18. Using that standard, he testified that building the new 1.25-mile Goodman Mountain hiking trail in the Forest Preserve circa 2014

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[12] Association for the Protection of the Adirondacks v. MacDonald, 228 A.D. 73, 81 (3d Dept. 1930), cited with approval an Attorney General’s opinion that “seedlings being only a half inch in diameter were not timber”.

[13] The trial court credited Mr. Signell’s testimony on this issue. R. xli.

required cutting just 64 trees of 1" or more DBH, and the circa 2016 rerouting of a mile-long section of the Coney Mountain hiking trail cut only 13 trees of all sizes in the Forest Preserve. R. 636, 682-683, 3694-3697, 3704-3707. Both of these trails included multiple switchbacks. R. 682-683. Thus, while ADK/OSI speculate that the Appellate Division's ruling will prevent the relocation of trails and the use of switchbacks to create more sustainable trails, the Record herein shows otherwise. See also Plaintiff's Brief, Point I.B(2).

The testimony of Plaintiff's trail-building expert William Amadon,[14] supported by photographs, showed that properly designed foot trails have a "minimal scale", are typically under two feet wide, and meander around trees, rather than the trees being cut down. R. 745-753, 3906-3907, 3913-3916, 3922-3923. See also Plaintiff's Brief, p. 30, Point V.A; Plaintiff's Reply Brief,[15] Point III.A.

Thus, contrary to the speculation of the Amici, for decades, DEC has been able to construct and maintain thousands of miles of trails in the Adirondack Forest Preserve for a variety of purposes without running afoul of Article 14, consistent with Balsam Lake and Association v. MacDonald. See Plaintiff's Brief,

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[14] The trial court credited Mr. Amadon's testimony on this issue. R. xlvi-xlvii.

[15] Reply Brief of Plaintiff-Respondent-Appellant dated January 27, 2021 ("Plaintiff's Reply Brief").

pp. 30-31. It is the Class II trails, which require the destruction of thousands of trees, that are unconstitutional, not foot trails. The Appellate Division's decision has not changed the law, and will not unduly impede that work in the future, nor the public's access to the Forest Preserve.

The claim by ADK/OSI (Brief, p. 7), that construction and maintenance of the existing hiking trails in the Adirondacks required the removal of hundreds of thousands of trees is speculative and not supported by the Record. The Court should not credit this argument. Point I, supra. Instead, the Record shows that many existing trails are converted logging roads and the like. R. 1070-1072, 1075-1077, 1219-1224, 1233-1234. And, as described above, building new hiking trails does not require the destruction of a material or substantial amount of trees.

The claim by ADK/OSI that the decision by the Appellate Division herein has already all but halted work on Forest Preserve trails in 2020 is false. Ironically, the only (hearsay) proof they cite for this claim are newspaper articles which were published in 2019, almost a year prior to the 2020 trail work season. ADK/OSI Brief, p. 11.

To the contrary, numerous notices from DEC's Environmental Notice Bulletin ("ENB")[16] show that work on Forest Preserve projects has continued apace since the Appellate Division's 2019

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[16] See footnotes 15 and 16 of Plaintiff's Brief. As set forth therein, the Court may take judicial notice of these notices.

ruling:

- Region 5 ENB notice for 7/17/2019 – 69 trees cut for 3 “hand carry” boat launches;
- Region 5 ENB notice for 9/11/2019 – 7 trees cut for well replacement at campground;
- Region 5 ENB notice for 10/2/2019 – 6 trees cut for lean-to construction;
- Region 6 ENB notice for 10/2/2019 – 43 trees ≥ 3" DBH and 523 trees < 3" DBH cut for campground water system;
- Region 5 ENB notice for 2/5/2020 – 3 trees ≥ 3" DBH and 2 trees < 3" DBH cut to convert trail for snowmobile use;
- Region 5 ENB notice for 2/5/2020 – 1 tree ≥ 3" DBH and 43 trees < 3" DBH cut for snowmobile trail re-route;
- Region 5 ENB notice for 2/12/2020 – 2 trees ≥ 3" DBH and 118 trees < 3" DBH cut for interpretative trail.

These notices show that beginning in October 2019, DEC began counting the trees under 3" DBH, without its work coming to a screeching halt. Beginning in February 2020, the notices include a statement that “[t]ree cutting will be in accordance with the July 3, 2019 ... Appellate Division decision on tree cutting in the forest preserve.” DEC has already figured out how to manage the Forest Preserve, ensure protection of public health and safety, and improve public access, while complying with the Appellate Division’s ruling.

If the Court were to venture outside the Record, as the ADK/OSI amici have done (ADK/OSI Brief, Point II), it would find ample proof that a great deal of foot trail work was done on the Forest Preserve after the Appellate Division’s decision, in 2019

and 2020:

- In one of the 2019 newspaper stories quoted by ADK/OSI, the executive director of one Adirondack trail-building organization was quoted as saying "[i]f the judges' decision stands, we're committed to figuring out how to work within the new system". www.adirondackexplorer.org/stories/trail-progress-halts-along-with-tree-cutting-after-article-14-decision (last visited 2/21/2021).
- In 2020, 4.5 miles of new "Class V trunk trail", with a tread width of 18"-26", were built to re-route the overused hiking trail to Cascade Mountain in the High Peaks. See wnyt.com/investigative-news/dec-gives-look-at-new-cascade-mountain-trail/5899190 (last visited 2/15/2021). Previously, in 2019, three different crews, from DEC, ADK, and a private contractor, worked on that trail. See www.adirondackalmanack.com/2019/10/assessing-a-new-model-for-high-peaks-hiking-trail-construction.html (last visited 2/20/2021). According to DEC, those crews were "going like gangbusters". See www.adirondackexplorer.org/stories/new-cascade-trail-delay (last visited February 15, 2021).
- In June 2020, ADK's trail crew relocated a .3 mile section of trail at Avalanche Lake in the High Peaks. See www.adk.org/trail-work-report-avalanche-lake-lake-colden (last visited 2/15/2021).

- In 2020, DEC's 10-person trail crew from the Student Conservation Association's ("SCA") Adirondack Corps "spent four months accomplishing many trail projects around Adirondack Park." See www.thesca.org/connect/blog/trail; see also www.facebook.com /NYSDEC/videos/it-was-another-successful-though-more-unique-season-for-our-student-conservation/3585105364938008 (last visited 2/15/2021).
- At least one of these SCA projects involved sidecutting overgrown brush from the trail, an activity which ADK/OSI (Brief, p. 9) and AATV/NYSAC (Brief, pp. 2-3) claim would be barred. See www.facebook.com/NYSDEC/posts/10158814094070956 (last visited 2/15/2021).
- To the extent that ADK's trail crews did less work in 2020 than in prior years (ADK/OSI Brief, citations at p. 11), that was due to COVID-19 precautions and "revenue shortfalls", and not by this case. See www.adk.org/adk-covid-19-faq (last visited 2/15/2021).
- The SCA is already advertising positions for its 2021 Adirondack program, to do work including "trail clearing". See www.thesca.org/serve/position/2021-sca-adirondack-corps/po-00731244 (last visited 2/15/2021).

The claim that if this Court were to uphold the decision of the Appellate Division, trail work in the Forest Preserve would grind to a halt are not properly before this Court and should not

be considered. Point I, supra. This argument by the Defendants' Amici is a speculative scare tactic and is utterly false. Trail construction and maintenance has continued since July 2019 and there is no rational reason why they will not do so in the future after the decision of the Appellate Division is affirmed.

## POINT VI

## THE ISSUE OF STATE LAND ACQUISITION IS NOT BEFORE THIS COURT AND IS NOT RELEVANT TO THE INTERPRETATION OF ARTICLE 14

Affirming the Appellate Division's decision will not prevent TNC from acquiring land and conveying it to Defendant DEC for inclusion in the Adirondack Forest Preserve, as is claimed by TNC. This purely speculative, newly raised, issue is not supported by any evidence in the Record, and the Court should not consider it. Point I, supra.

The TNC Brief (pp. 2-5, 12-16) discusses at length TNC's work to acquire 161,000 acres from Finch, Pruyn & Co. ("Finch") and convey that land, or partial interests in it (i.e. conservation easements), to the State, in collaboration with local communities. This is completely irrelevant to the case before the Court. The 34.1 miles of the eight trails at issue herein (R. 544, 4830-4832) are not on former Finch lands,[17] nor

[17] In Adirondack Wild v. NYS Adirondack Park Agency, 34 N.Y.3d 184 (2019), this Court addressed the legality under the so-called "Rivers Act" of a snowmobile trail segment proposed by DEC on a

is there any evidence in the Record that any such trails are planned by DEC for the Finch lands in the future. TNC's alleged planning process for the disposition of the Finch lands, the role of local municipalities in that process, and the types of recreational uses and business opportunities that may occur on those lands in the future, are all discussed in its brief. However, they are not documented by citations to any evidence in the Record, as there is none. The irrelevancy of this argument is exemplified by the discussion of the Boreas Ponds tract, which does not address Class II trails. TNC Brief, pp. 14-15.

TNC's main concern seems to be that local municipalities might veto future land purchases for the Forest Preserve if the courts impede the construction of new snowmobile trails on those lands. Such concerns, even if proven to be realistic, can not override the Constitution. Local governments' powers to veto some, but not all, land purchases in the Adirondacks are a statutory creation under ECL § 54-0303(5). The Legislature can not override Article 14, no matter how well-intentioned it may be. Association v. MacDonald, 253 N.Y. at 242 (1929 legislation authorizing bobsleigh run found to be unconstitutional).

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preexisting logging road on former Finch land. Because that trail is on a preexisting road, it is not affected by the present case.

## POINT VII

## THE ISSUE OF ECONOMIC EFFECTS ON LOCAL COMMUNITIES IS NOT BEFORE THIS COURT AND IS NOT RELEVANT TO THE INTERPRETATION OF ARTICLE 14

The alleged economic effects on local communities of the Appellate Division's decision are not relevant to the Article 14 analysis. This new issue was not raised below, and is raised by AATV/NYSAC for the first time on this appeal. It should not be considered by this Court. Point I, supra. The Appellate Division should be affirmed.

The claims of AATV/NYSAC are speculative. As discussed above at Point V, despite AATV/NYSAC's fears, trail construction and maintenance on the Forest Preserve, and providing safe drinking water at its campgrounds, will be able to continue, even if DEC has to count trees under 3" DBH and avoid destroying an unconstitutional, material, number of trees in undertaking such projects. There is no evidence in the Record before this Court that the economies of Adirondack communities will suffer if the Appellate Division is affirmed. For all of these reasons, this claim should be disregarded by the Court.

Contrary to the insinuations of AATV/NYSAC (Brief, pp. 13-15), in 1894 the framers of Article 14 never considered economic benefits to local communities as one of the reasons to protect the Forest Preserve. While they certainly discussed the potential benefits to New Yorkers of recreating in the Forest

Preserve, their focus was on the benefits to the travelers. They never mentioned trickle-down benefits to nearby communities. R. 581-621; see also Plaintiff's Brief, pp. 9-13; Point II.B. Indeed, at the time, it was anticipated that the State would acquire all of the land within the Adirondack Park for the Forest Preserve, as one vast wilderness. Adirondack Wild v. N.Y.S. Adirondack Park Agency, 34 N.Y.3d 184, 205 (2019); see R. 602-603. Had this happened, it would have left no room for the local communities that now exist.

In deciding Association v. MacDonald, 253 N.Y. 234, 242 (1930), this Court was cognizant of the benefits of tourism to Adirondack communities, but it nevertheless found that the law authorizing the construction of the Olympic bobsleigh run on the Forest Preserve was unconstitutional under then-Article 7, § 7, which forbade "the cutting down of [Forest Preserve] trees to any substantial extent for any purpose."

> Tobogganing is not the only outdoor sport. Summer sports in the Adirondacks attract a larger number of people than the winter sports, simply for the reason, if no other, that the summer time still remains the vacation period for most of us. The same plea made for the toboggan slide in winter might be made for the golf course in summer, or for other sports requiring the use or the removal of timber. In other words, 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. at 242.

This is not to say that the Forest Preserve can never be

allowed to incidentally create ancillary economic benefits. But where doing so would require the destruction of a substantial number of trees, a constitutional amendment is required. This has been done three times, for the downhill ski areas at Whiteface, Gore, and Belleayre Mountains, where ski trails may be cleared up to 200 feet wide. See Constitution Article 14, § 1.

Those ski areas remain in the Forest Preserve, and are now managed by the Olympic Region Development Authority ("ORDA"), pursuant to Public Authorities Law §§ 2606, 2607, 2611, and 2614. See Slutzky v. Cuomo, 114 A.D.2d 116 (3d Dept. 1986). ORDA is specifically charged with optimizing "the economic and social benefit of the olympic region". Public Authorities Law § 2606. But this is only permissible because the People of the State were given the opportunity to vote on constitutional amendments and approved these facilities. Here, there has been no such amendment authorizing the Class II snowmobile trails, and substantial destruction of timber for their construction is not permitted, regardless of what their purported economic benefits may be. See Association v. MacDonald, 253 N.Y. at 242.

Because the issue was not raised at trial, there is no evidence in the Record to support the claim that the Class II trails will provide an economic benefit to local communities. The AATV/NYSAC Brief (p. 15) does cite to certain Forest Preserve unit management plans and the 2006 Final Snowmobile Plan for the

Adirondack Park, which are in the Record. However, because the parties stipulated at trial that "Defendants' policies, guidances, guidelines and plans ... were not offered or admitted as evidence on the question of whether Class II community connector trails ... are constitutional" (R. 4120-4121, 4223-4224), these plans may not be considered on this appeal for the purpose of determining whether the Class II trails are constitutional. See Plaintiff's Brief, Point IV; Plaintiff's Reply Brief, Point II. Thus, on this Record, this claim is speculative, as there is no evidence to support it. It should be disregarded by the Court. Point I, supra.

## POINT VIII

## THE AMICI HAVE MISCONSTRUED THE SCOPE OF THE PROJECT THAT WAS AT ISSUE IN *ASSOCIATION V. MACDONALD*

Some of the Amici have misconstrued the facts laid out in this Court's decision in Association for the Protection of the Adirondacks v. MacDonald, 253 N.Y. 234 (1930). They argue that the planned bobsleigh run at issue therein would have required a clear-cut of 4.5 acres, so that the linear Class II trails are not comparable to the Olympic project which was found to be unconstitutional. See e.g. TNC Brief, p. 8; AATV/NYSAC Brief, p. 16. That argument ignores the facts, as laid out in the 1930 decision of this Court.

> The bobsleigh run will be approximately one and one-quarter miles in length and six and one-half feet wide, with a return route or go-back road. As additional land will have to be cleared on either side of the run, the width in actual use will be approximately sixteen feet, and twenty feet where the course curves. It is estimated that the construction will necessitate the removal of trees from about four and one-half acres of land, or a total number of trees, large and small, estimated at 2,500. Association v. MacDonald, 253 N.Y. at 236.

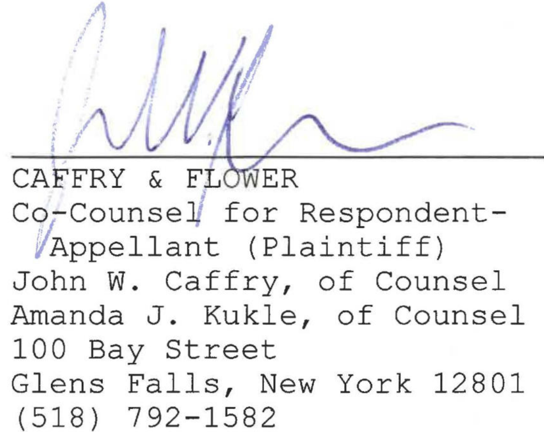
As further shown by the report of the Appellate Division decision therein, the legislation authorizing this construction required that "[n]o wider or longer clearing shall be made than is actually needed for such run or slide". Association for the Protection of the Adirondacks v. MacDonald, 228 A.D. 73, 74-75 (3d Dept. 1930). The return route was planned to be either an 8 foot wide road, constructed mostly on old lumber roads, or a cable that would haul the bobsleighs to the top, which would require clearing only a 6 foot wide path. Id. at 75. See also Record on Appeal in Association v. MacDonald at R. 4896-4897.

A 6 to 20 foot wide bobsleigh run and returnway do not match the Defendants' own witnesses' definition of a clear-cut. R. 4456-4485; 4538-4539. Instead, the run would have been a linear feature, comparable to the Class II trails, which are 9 to 12 feet wide (R. 5014), but in some places resulted in wider corridors being cleared (R. 4765), up to 20 feet wide (R. 3618, 4846). See Plaintiff's Brief, p. 20. Like the bobsleigh run, the Class II trails are unconstitutional.

## CONCLUSION

The Appellate Division properly held that due to the destruction of over 6,000 large trees (R. 5017), and approximately 25,000 trees of all sizes, "the construction of the Class II trails resulted in, or would result in, an unconstitutional destruction of timber in the Forest Preserve." R. 5018. None of the arguments advanced by the Defendants' Amici warrant reversing that decision, and it should be affirmed.

Dated: February 25, 2021



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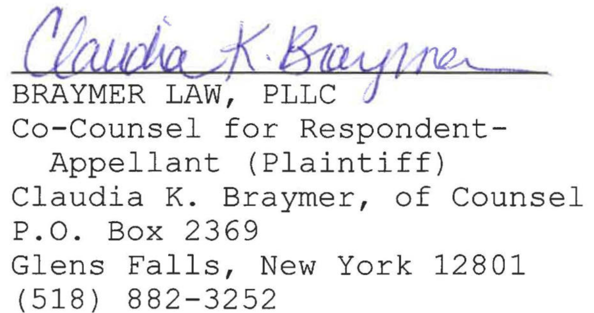

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## CERTIFICATION OF COMPLIANCE WITH RULE 500.13(c)(1)

John W. Caffry, an attorney for the respondent-appellant, hereby certifies as follows: the foregoing reply brief was prepared on a computer word-processing system. A monospaced typeface was used, as follows:

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The total number of words in the body of this brief, inclusive of point headings and footnotes, and exclusive of the signature blocks, table of contents, table of citations, and certification of compliance, is 6,977. Pursuant to Rule 500.13(c)(1) a brief in response to an amicus curiae brief is limited to 7,000 words. Therefore, this brief is in compliance with Rule 500.13(c).

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