STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In The Matter of the Application of
PROTECT THE ADIRONDACKS! INC.,

Plaintiff-Petitioner,

For A Judgment Pursuant to Section 5 of Article 14 of the New York State Constitution and CPLR Article 78,

-against-

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

Defendants-Respondents.

Supreme Court Albany County Article 78 Term
Hon. George B. Ceresia, Jr., Supreme Court Justice Presiding
RJI # 01-13-ST4541 Index No. 2137-13

Appearances: Caffry & Flower
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(Susan L. Taylor,
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Lawrence A. Rappoport,
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of Counsel)

DECISION/ORDER

George B. Ceresia, Jr., Justice

The plaintiff-petitioner (hereinafter "Petitioner") is a not-for-profit corporation dedicated to the protection and preservation of the lands of the Adirondack Forest Preserve. It has commenced the above-captioned combined action/proceeding to halt construction and development of new snowmobile trails within the Forest Preserve (known as "Class Two" and/or "Community Connector" Trails). The complaint-petition contains three causes of action. The first, in the form of a plenary action, generally alleges that construction and development of the snowmobile trails violates NY Constitution article XIV, § 1, which requires that the Forest Preserve remain forever wild. The petitioner alleges that a substantial amount of timber is being removed, and that the trails being constructed are not consistent with the wild forest nature of the Forest Preserve, all in violation of NY Constitution article XIV, § 1 The petitioner seeks declaratory relief and a permanent injunction to prevent damage to, and illegal use of the Forest Preserve. In the second cause of action, pursuant to CPLR Article 78, the petitioner objects to the practice of the New York State Department of Environmental Conservation (DEC) of issuing temporary revocable permits ("TRPs") to towns within the Adirondack Park to allow towns to maintain and groom snowmobile trails with tracked vehicles known as snowcats; and the practice of issuing an Adopt-A-Natural Resource agreement ("AANR") to local municipalities and snowmobile clubs to authorize such entities to groom snowmobile trails within the Forest Preserve. It is argued that under the Adirondack Park Master Plan the only motor vehicles allowed within the Forest Preserve are snowmobiles, and than snowcats are not authorized. Petitioner's third cause of action, again pursuant to CPLR Article 78, alleges that the operation of snowcats and other such vehicles on Forest Preserve trails for purposes of snow grooming violates the rules and

regulations of the DEC, specifically 6 NYCRR § 196.1 (a), and that the issuance of TRPs and AANR agreements for such purposes is therefore illegal.

The action/proceeding was commenced by the filing of the summons, notice of petition and complaint on April 15, 2013. The respondents made a motion to convert petitioner's first cause of action to a special proceeding under CPLR Article 78, and to dismiss the petitioner's second and third causes of action. The motion was rejected by the petitioner as untimely, prompting the respondents to make a motion to compel acceptance of the their motion. The petitioner cross-moved for a default judgment against the respondents or, in the alternative, for a preliminary injunction to halt construction of the snowmobile trails.

In a decision-order dated August 22, 2013 the Court granted respondents' motion to compel the petitioner to accept respondents' motion to convert and dismiss, denied respondents' request to convert petitioner's first cause of action to a special proceeding, denied respondents' request to dismiss the petitioner's second and third causes of action, and directed the respondents to serve and file an answer. Further, it denied petitioner's cross-motion for a default judgment and cross-motion for a preliminary injunction.

The petitioner has made a second motion for a preliminary injunction.[1] In its July 24, 2013 Environmental Notice Bulletin, the respondent DEC announced its plan to construct a new trail within the Class II Community Connector trail system, referred to as the Catamount Snowmobile Trail (located in the Taylor Pond Wild Forest). The petitioner

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[1]The first motion for a preliminary injunction was directed at trail-work and removal of trees in connection with development of three snow mobile trails: the Seventh Lake Mountain Connector Trail, the Wilmington Connector Trail and the Gilmantown Connector Trail.

indicates that construction of the trail will involve removal of 133 trees, and "unconstitutional clearcutting, removal of rocks, destruction of bedrock ledges, grading, bench cutting and tapering, and the overall building of a road-like trail, and other unconstitutional alteration of the Forest Preserve."

NY Constitution article XIV, § 1, entitled "[Forest preserve to be forever kept wild; certain highways and ski trails authorized]" contains the following provision:

> "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."

NY Constitution article XIV, § 5, entitled "[Violations of article; how restrained]", authorizes a citizen suit to enjoin a violation:

> "A violation of any of the provisions of this article may be restrained at the suit of the people or, with the consent of the supreme court in appellate division, on notice to the attorney-general at the suit of any citizen." (NY Const art XIV, § 5)[2]

In furtherance of the foregoing, the state legislature, in 1971, enacted the Adirondack Park Agency Act to, inter alia, preserve and protect the natural resources of the Adirondack Park (see Executive Law § 801).. The legislation created and empowered the Adirondack Park Agency ("APA") to regulate development in the Adirondack Park region (see Hunt Bros., Inc. v Glennon, 81 NY2d 906 [1993] at 909). As part of the foregoing enactment, it authorized the APA to prepare a plan for the management of state lands, in consultation with

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[2]The petitioner was authorized to seek an injunction by order of the Appellate Division dated March 28, 2013.

DEC and as approved by the governor, known as the Adirondack Park State Land Master Plan ("APSLMP" (see Executive Law § 816 [1]). In addition, the DEC was delegated the responsibility of developing management plans for units of land within the Adirondack Park ("Unit Management Plans" or "UMPs", see Executive Law § 816 [1]). The APSLMP and UMPs are required to be reviewed periodically (Executive Law § 816 [2]).

A preliminary injunction may be granted under CPLR article 63 when the party seeking such relief demonstrates: (1) a likelihood of ultimate success on the merits; (2) the prospect of irreparable injury if the provisional relief is withheld; and (3) a balance of the equities tipping in the moving party's favor (Nobu Next Door, LLC v Fine Arts Hous., Inc., 4 NY3d 839, 840 [2005]; Confidential Brokerage Services, Inc. v Confidential Planning Corporation, 85AD3d 1268, 1269 [3d Dept., 2011]; Emerald Green Property Owners Association, Inc. v Jada Developers, LLC, 63 AD3d 1396, 1397 [3rd Dept., 2009]; SYNC Realty Group, Inc. v Rotterdam Ventures, Inc., 63 AD3d 1429, 1430-1431 [3rd Dept., 2009]; Green Harbour Homeowners' Association, Inc. v Ermiger, 67 AD3d 1116, 1117 [3rd Dept., 2009]). It is a drastic remedy, which should be used sparingly (Trump on the Ocean, LLC v Ash, 81 AD3d 713 [2d Dept., 2011], at 715; Clark v Cuomo, 103 AD2d 244, 246 [3rd Dept., 1984]; Welcher v Sobol, 222 AD2d 1001, 1002 [3rd Dept., 1995]). The party seeking the preliminary injunction has the burden of proof of demonstrating his or her entitlement to such relief (see SYNC Realty Group, Inc. v Rotterdam Ventures, Inc., supra; Schulz v State, 217 AD2d 393 [3rd Dept., 1995]; Aetna Ins. Co. v Capasso, 75 NY2d 860 [1990]).

The leading case with respect to article XIV of the New York Constitution is Association for Protection of Adirondacks v MacDonald (253 NY 234 [1930]), which

involved an enactment of the state legislature to authorize construction of a bobsled run on State lands within the Forest Preserve (see L 1929, c 417). The purpose of the legislation was to provide a bobsled facility for the 1932 Winter Olympics held in Lake Placid. The bobsled structure itself was to be approximately six and one half feet in width, one and one-quarter miles in length, with a return road. The land on which it was to be constructed was to be between sixteen and twenty feet in width. It was estimated that approximately 2,500 trees would need to be removed within an aggregate area of four acres of land. The Court noted that NY Constitution article VII, § 7 (now NY Const art XIV, § 1) was adopted in 1894 to prevent the cutting, destruction and sale of timber "to the injury and ruin of the Forest Preserve". As the Court stated,

> "*The words of the Constitution, like those of any other law, must receive a reasonable interpretation, considering the purpose and the object in view*. (State of Ohio ex rel. Popovici v Agler, 280 US 379.) Words are but symbols indicating ideas and are subject to contraction and expansion to meet the idea sought to be expressed; they register frequently according to association, or like the thermometer, by the atmosphere surrounding them. The purpose of the constitutional provision, as indicated by the debates in the Convention of 1894, was to prevent the cutting or destruction of the timber or the sale thereof, as had theretofore been permitted by legislation, to the injury and ruin of the Forest Preserve. To accomplish the end in view, it was thought necessary to close all gaps and openings in the law, and to prohibit any cutting or any removal of the trees and timber *to a substantial extent*. The Adirondack Park was to be preserved, not destroyed. Therefore, all things necessary were permitted, such as measures to prevent forest fires, the repairs to roads and proper inspection, or the erection and maintenance of proper facilities for the use by the public which did not call for the removal of the timber *to any material degree*." (id., at 238-239, emphasis supplied)

The Court of Appeals held that by virtue of NY Constitution article VII, § 7 (now XIV, § 1)

the trees could not be cut and removed to construct the bobsled run.

Subsequently, the Third Department Appellate Division had occasion to rule upon the issue in Balsam Lake Anglers Club v Department of Envtl. Conservation (199 AD2d 852 [3d Dept., 1993]). In Balsam Lake Anglers Club, DEC had issued a negative declaration (pursuant to Environmental Conservation Law article 8) with regard to a project within the Catskill Forest Preserve that included construction of five parking lots, the relocation of two trails, the construction of a new hiking trail, and construction of a cross-country ski trail loop, on lands within the Catskill Forest Preserve. The construction plans called for the removal of approximately 350 trees to accommodate the trail relocation, together with removal of an unknown number of additional trees for the proposed new trail and parking lots. The petitioner commenced a combined action/proceeding to challenge the approval, arguing (in part), that the tree removal violated NY Constitution article XIV, § 1. The Appellate Division quoted the Court of Appeals in commenting:

> "Although [NY Constitution art XIV, § 1] would appear, as petitioner argues, to prohibit *any* cutting or removal of timber from the forest preserve, the Court of Appeals, noting that the words of the NY Constitution must receive a reasonable interpretation, has construed this provision as 'prohibiting [the] cutting or [the] removal of * * * trees and timber *to a substantial extent*' (Association for Protection of Adirondacks v MacDonald, 253 NY 234, 238, [emphasis supplied]). Thus, the court has indicated that only those activities involving the removal of timber *'to any material degree'* will run afoul of the constitutional provision (id., at 238). Although petitioner may question the soundness of this interpretation, particularly in view of what it has characterized as the unambiguous and absolute prohibition contained in NY Constitution, article XIV, § 1, we elect, absent authority to the contrary, to follow the interpretation advanced by the Court of Appeals in Association for Protection of Adirondacks v MacDonald (supra)." (Balsam

as Forester I. Mr. Levy indicates that construction of the Taylor Pond-Catamount Community Connector Trail commences at the trail head of the Catamount Mountain Foot Trail and continues over the Foot Trail for .5 Miles. It then proceeds over private property for 2.5 miles; and then returns to Forest Preserve land a distance of one hundred feet to join trails constituting the Taylor Pond Loop Trail. A total of one hundred thirty-three trees are proposed to be cut. One hundred sixteen of the trees are four inches or less in diameter at breast height[3]. Seventeen of the trees are between five and eight inches dbh. The trail is designed to be generally nine feet wide, and to have the character of a foot trail (see Snowmobile Trail Project Work Plan dated June 4, 2013).

Mindful that the number of trees at issue here is relatively minor, that most such trees are six inches or less dbh and dispersed along the snowmobile trail, the Court finds that the petitioner has failed in its burden to present facts to demonstrate how or in what respect work on the Taylor Pond Community Connector Trail will result in removal of trees, and/or impairment of the Forest Preserve to a substantial extent or to any material degree. For this reason, the Court finds that the petitioner failed to demonstrate a likelihood of ultimate success on the merits. Nor on this record has it demonstrated the infliction of irreparable injury, or that the equities balance in its favor.

The Court concludes that the motion for a preliminary injunction must be denied.

This shall constitute the decision and order of the Court. The original decision/order is returned to the attorney for the respondents. All papers (other than Paper No. 1 below) are

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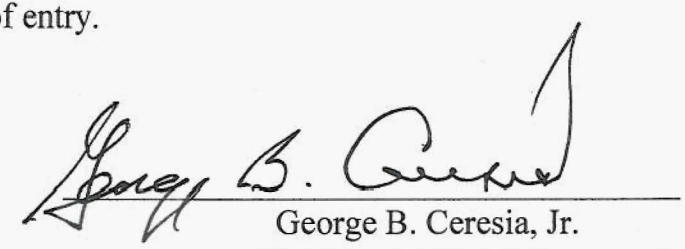
[3]Diameter At breast height ("dbh") is 4 ½ feet from the ground surface.

being delivered by the Court to the County Clerk for filing. The signing of this decision/order and delivery of this decision/order does not constitute entry or filing under CPLR Rule 2220. Counsel is not relieved from the applicable provisions of that rule respecting filing, entry and notice of entry.

ENTER

Dated: November 19, 2013
Troy, New York



George B. Ceresia, Jr.
Supreme Court Justice

Papers Considered:

1. Summons, Notice of Petition, and Combined Complaint and Petition Verified April 12, 2013
2. Petitioner's Notice of Motion dated September 13, 2013, Supporting Papers and Exhibit
3. Affirmation of Lawrence A. Rappoport dated September 24, 2013, Supporting Papers and Exhibits