130 Years and Counting Into Forever — New York's Forever Wild Constitutional Amendment and Lessons for Modern Green Amendments

Timothy E. Cox

Follow this and additional works at: https://digitalcommons.pace.edu/pelr

Part of the Energy and Utilities Law Commons, Environmental Law Commons, and the Natural Resources Law Commons

Recommended Citation
Timothy E. Cox, 130 Years and Counting Into Forever — New York's Forever Wild Constitutional Amendment and Lessons for Modern Green Amendments, 41 Pace Envtl. L. Rev. 127 ()

Available at: https://digitalcommons.pace.edu/pelr/vol41/iss2/3

This Article is brought to you for free and open access by the School of Law at DigitalCommons@Pace. It has been accepted for inclusion in Pace Environmental Law Review by an authorized administrator of DigitalCommons@Pace. For more information, please contact dheller2@law.pace.edu.
ABSTRACT

In the 135 years of New York’s Forever Wild Amendment’s existence, it has been challenged by a range of court cases and thereby interpreted by courts throughout New York. The results of these cases frequently have upheld the heart of Forever Wild: to protect New York’s Forest Preserve land. This Article provides a history of the Forever Wild Amendment, an analysis of the courts’ and New York Attorney General’s interpretations of the Amendment, and a discussion of how this information can guide the future of New York’s Green Amendment.
INTRODUCTION

In 2022, New York State voters approved a “Green Amendment” guaranteeing residents’ right to “clean air and water, and a healthful environment.” In the same manner in 1894, New York State, through a constitutional convention, amended the state constitution to permanently protect and set aside forest lands in both the Adirondacks and Catskills portions of the state. The “Forever Wild” Amendment, as it would become known, forbade any tree cutting or development on New York State-owned Forest Preserve lands within each of these defined regions. The legal future of the Green Amendment and its interpretation, manner of interpretation, and implementation likely will be similar to the Forever Wild Amendment.

In the over 135 years since its passage, the Forever Wild Amendment has been the subject of court cases and challenges, as well as numerous opinions of the New York State Attorney General. With the movement to amend state constitutions to secure environmental rights for citizens, New York’s Forever Wild Amendment possesses a rich history to offer in terms of how such amendments fare and are interpreted by courts and implementing agencies. The Forever Wild Amendment’s basic tenet that Forest Preserve lands remain untouched has largely survived unscathed in the intervening century of interpretations. Only a limited exception for immaterial timber removal for public purposes has been found by courts to not violate the Forever Wild Amendment.

I. THE ADIRONDACKS AND CATSKILLS

The Adirondack and Catskill Mountains in New York State are part of the Appalachian Mountain Range. At present, over 280,000 acres in the Catskills, and 2,700,000 acres in the Adirondacks are classified as Forest Preserve.

The ecological differences between the Catskills and Adirondacks are notable as well, in more than just the size of each park. Forty-six percent of
the Adirondacks are fully deciduous forest, with the Catskills at a much larger seventy-one percent. Open water makes up five percent of the Adirondacks’ landmass, while the smaller Catskills have two percent of the same. The open waters of the Adirondacks contain the sources of water for both the Hudson River and the Erie Canal. The waters of the Catskills feed the Hudson, Mohawk, and Delaware Rivers through a series of fabled trout streams. Several of the streams have been dammed by the City of New York and serve as one of the largest unfiltered drinking water supplies in the United States.

II. FORCES THAT LEAD TO THE 1894 CONSTITUTIONAL AMENDMENT

The Adirondack and Catskill Mountains in New York State in the 1870s and 1880s bore the scars of decades of logging to feed the nation’s industrialization. One of the first industries to utilize the natural resources of these mountains were tanneries cutting down old growth hemlock. The hemlock trees were felled and their bark was removed and treated to procure

---

8. N.Y. STATE ADIRONDACK PARK AGENCY, supra note 6.
The tannin was then used to process animal hides, including those of prevalent beaver. At this industry’s height, over 1,500 tanneries and 7,000 lumber mills were located in the State of New York. Many settlements of the Catskills and Adirondacks in the early 1800s were founded around the locations of these tanneries and mills. In fact, by 1850, New York State led the country in the amount of lumber it produced as a state. As the tanneries closed, paper mills filled the void, many still operating through the 1970s. As a result of the exploitation, the Adirondacks and Catskills were denuded of old growth forest.

A burgeoning tourist industry also contributed to the loss of solitude. Stagecoach lines connected the far-flung settlements. In the Catskills, steamships plied the Hudson River with tourists for large new hotels, each built larger than the last. Some of the hotels were easily visible from the cliff tops from steamboats filled with guests on the Hudson River.

The poor industry practices of cutting all the trees on a parcel of land, known as clear cutting, and leaving the open land to be returned back to

14. Id.
18. GRAHAM, supra note 16.
New York State ownership for unpaid taxes did not go unnoticed. Verplanck Colvin, a surveyor working for New York State witnessed first-hand the devastation in the 1870s and 1880s. While surveying the Adirondacks and the elevations of its peaks for the New York State Museum, he observed the denuded mountainsides left behind after logging of timber but also the expansiveness of the wild wilderness remaining. His report was included in the New York State Museum of Natural History’s 1870 annual report to the state legislature. In that report, he highlighted his concern of the water quality of the Erie Canal, which required constant replenishment of waters from the Black River, whose basin included the Adirondacks:

Before closing this report, I desire to call your attention to a subject of much importance. The Adirondack wilderness contains the springs which are the sources of our principal rivers, and the feeders of our canals. Each summer the water supply for these rivers and canals is lessened, and commerce has suffered. The United States government has been called upon, and has expended vast sums in the improvement of the navigation of the Hudson: yet the secret origin of the difficulty seems not to have been reached.

The immediate cause has been the chopping and burning off of vast tracts of forest in the wilderness, which have hitherto sheltered from the sun’s heat and evaporation the deep and lingering snows, the brooks and rivulets, and the thick, soaking, sphagnous moss which, at times knee-deep, half water and half plant, forms hanging lakes upon the mountain sides; throwing out constantly a chilly atmosphere, which condenses to clouds the warm vapor of the winds, and still reacting, resolves them into rain. . . .

With the destruction of the forests, these mosses dry, wither, and disappear[.] . . . The remedy for this is the creation of an ADIRONDACK PARK or timber preserve[.] . . . The interests of commerce and navigation demand that these forests should be preserved, and for posterity should be set aside, this Adirondack region, as a park for New York, as is the Yosemite for California and the Pacific states.

---

26. Id. at 70.
III. THE 1894 CONSTITUTIONAL AMENDMENT

Per its constitution, New York State is required every twenty years to consider holding a constitutional convention.29 The convention in 1894 was called to consider changes to the judiciary.30 Instead, preservation of the Adirondacks and Catskills took center stage. The focus of the discussion was the preservation of water quality and land due to the clear cutting by logging practices of the day.31 As noted, a large part of the western Adirondacks contained the source waters for the vital Erie Canal.32 Verplanck Colvin himself led the charge with his first-person accounts of the devastation.33

The final text of the amendment as approved by the voters is as follows:

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 . . . . 34

The remainder of the amendment defined the Adirondacks and Catskills regions in an almost metes and bounds description of the boundaries of the new parks, similar to what is found in deeds.35 Neither wild forest lands nor timber is defined by the amendment. Surprisingly, at the time of its passage, many of the proponents believed that “forever” would only last as long as the next constitutional convention, believing that forest recovery and more protective practices would again allow for commercial logging on

29. At the general election to be held in the year nineteen hundred fifty-seven, and every twentieth year thereafter, and also at such times as the legislature may by law provide, the question “Shall there be a convention to revise the constitution and amend the same?” shall be submitted to and decided by the electors of the state; and in case a majority of the electors voting thereon shall decide in favor of a convention for such purpose, the electors of every senate district of the state, as then organized, shall elect three delegates at the next ensuing general election, and the electors of the state voting at the same election shall elect fifteen delegates-at-large.

N.Y. CONST art. XIX, § 2.
30. GRAHAM, supra note 16, at 127.
31. Id. at 127–29.
32. Id. at 76; The Hudson: America’s River, supra note 10.
33. See GRAHAM, supra note 16, at 72–73, 128.
34. N.Y. CONST. art. XIV, § 1.
35. Id.
Most did not believe that the proposal for lands to be kept forever wild would remain in the constitution for now 135 years.\textsuperscript{37} “Forest Preserve lands,” restricted by the Forever Wild Amendment, are managed by the New York State Department of Environmental Conservation and constitute the vast majority of the state-owned land in the Adirondacks and Catskills. At present, 2,700,000 acres of the Adirondacks and 288,000 acres in the Catskills are classified as Forest Preserve.\textsuperscript{38} Many of the early holdings were the result of tax condemnations where the lands were abandoned by timber companies following a clear cut of all timber on the property.\textsuperscript{39} The erosion of the now bare mountainsides and valleys quickly followed.\textsuperscript{40} Per a State Land Master Plan for the Adirondack Park, intensive use is preferred to occur on private, not state land, to “permit both a broader spectrum of recreational opportunities and wider public enjoyment of the state lands.”\textsuperscript{41} Only approximately 32,000 acres of state-owned land in the Adirondacks and 6,000 in the Catskills are classified as something other than Forest Preserve.\textsuperscript{42} This includes more intensive use areas including state-owned ski centers at Belleayre, Gore, and Whiteface Mountains.

\textsuperscript{36} GRAHAM, supra note 16, at 128.
\textsuperscript{37} Id.
\textsuperscript{38} New York’s Forest Preserve, supra note 2.
\textsuperscript{39} Adirondacks: Lumber Industry and Forest Conservation, supra note 17; GRAHAM, supra note 16, at 71; see generally Saranac Land & Timber Co. v. Roberts, 88 N.E. 753 (N.Y. 1909).
\textsuperscript{41} STATE OF N.Y., ADIRONDACK PARK STATE LAND MASTER PLAN 3 (2019).
\textsuperscript{42} Forest Preserve Lands are divided into various categories allowing for increasing intensity of use. In the Adirondacks, the most intensive use areas also are the smallest total of designated acreage. The categories of Forest Preserve Land include Wilderness (most restrictive use), Wild, Scenic, and Recreational Rivers (Adirondack Park only), Wild Forest, Canoe (Adirondack Park only), Primitive (Adirondack Park only), Primitive Bicycle Corridor (Catskill Park only), and Intensive Use. State Land Classifications, N.Y. DEP’T OF ENV’T CONSERVATION, https://www.dec.ny.gov/lands/7811.html [https://perma.cc/3J19-7SSQ]; see also The Preserve Within the Park, N.Y. DEP’T OF ENV’T CONSERVATION (Nov. 2017), https://www.dec.ny.gov/docs/lands_forests_pdf/catmapguide.pdf [https://perma.cc/BSQ4-B5SN] (depicting land classes within the Catskills Forest Preserve); Adirondack Park Land Use Classification Statistics – March 20, 2018, ADIRONDACK PARK AGENCY, https://apa.ny.gov/gis/stats/colc201803.htm [https://perma.cc/DL4V-JMSE] (listing acreage and park area percentage of each land class in the Adirondack Forest Preserve).
that are licensed to, but not owned by, the Olympic Regional Development Authority.43

Since 1894, the successful amendments to the Forever Wild clause were largely limited to removal of certain properties as Forest Preserve for other public purposes.44 Without such voter approval, the Forest Preserve land could not be sold or transferred, no matter how compelling the public need.45 To date, New York voters have approved nineteen such amendments and voted down just one amendment.46

The first proposed amendment, and the only one voted down, came in 1915 and was the only attempt to limit the breadth of Forever Wild. In that year, the first constitutional convention was held following passage of the Forever Wild Amendment.47 On the floor, delegates considered and defeated a proposal to allow dead or diseased timber to be removed from the State Forest Preserve lands.48 In defeating the amendment on the floor, one delegate noted that the proposal would encompass an estimated eight percent of all trees in the Adirondacks.49 A proposal to allow the state to construct fire trails, remove dead (but not diseased) trees, and build a road from Saranac Lake to Old Forge survived floor votes and was presented to the voters for ratification in 1915.50 The amendment was proposed even though a 1915 Attorney General’s opinion, discussed in Section VII, confirmed that the state had such inherent power.51 The amendment was defeated by over 500,000 votes.52

Following 1915, numerous amendments were proposed and passed concerning use of land designated as Forest Preserve land or land swaps involving such Forest Preserve lands.53 For instance, in 1941, New York State

44. See N.Y. CONST. art. XIV, § 1.
45. Id.
46. See id.
48. See id. 170-71.
49. Id. at 171.
50. Id.
51. 1915 N.Y. ATT’Y GEN. REP. & OPS. 101, 191 (explaining how the Attorney General’s finding of this inherent power was considered a “border ruling” in the interest of public health that related “solely to the removal of old, dead and decaying timber which was polluting the waters of McKenzie Pond.”).
53. Article 14, Section 1, of the NYS Constitution, the Forever Wild Provision, Has Been Amended 16 Times Since 1938, PROTECT THE ADIRONDACKS! (June 5, 2020),
voters approved the designation of Whiteface Mountain Ski Area as separate from Forest Preserve, and therefore allowed tree cutting.\footnote{44} In 1947, new ski areas at Gore Mountain in the Adirondacks and Belleayre Mountain in the Catskills followed suit, exempting those lands from being considered Forest Preserve.\footnote{45} In 1957, voters approved a land bank for New York State to utilize when needed for roads.\footnote{46} Two years later in 1959, voters approved Forest Preserve land to be utilized for the Adirondack Northway,\footnote{47} an interstate highway running from Albany north to the Canadian border. In 1963, Forest Preserve land was approved for use by the Town of Saranac Lake for their landfill.\footnote{48} In 1965 and again in 1991, voters also approved use of Forest Preserve lands for the Piseco Airport runways, including trimming of trees on approaches.\footnote{49} Further amendments were the 1979 land swap of 8,500 acres between the State and International Paper Company.\footnote{50} In 1983 and 1987, Forest Preserve land was approved to be owned by the Sagamore Institute to save one of the remaining great camps of the Adirondacks.\footnote{51} Municipal amendments included 1995 Keene Valley Cemetery\footnote{52} and the 2007 Raquette Lake Water Supply.\footnote{53} More recent approvals included Route 56 Powerline (2009),\footnote{54} quieting title on Township 40 properties (2013),\footnote{55} NYCO Minerals (2013),\footnote{56} and a land bank for further public health and safety uses (2017).\footnote{57} As can be seen, most of the amendments were to allow heretofore Forever Wild Forest Preserve lands to be used for a separate public purpose.\footnote{58} Only a handful of these amendments concerned private interests.


\footnote{44}{\textit{N.Y. Const.} art. XIV, § 1.}
\footnote{45}{\textit{Id.}}
\footnote{46}{\textit{Id.}}
\footnote{47}{\textit{Id.}}
\footnote{48}{\textit{Id.}}
\footnote{49}{\textit{Id.}}
\footnote{50}{\textit{Id.}}
\footnote{51}{\textit{Id.}}
\footnote{52}{\textit{Id.}}
\footnote{53}{\textit{Id.}}
\footnote{54}{\textit{Id.}}
\footnote{55}{\textit{Id.}}
\footnote{56}{\textit{Id.}}
\footnote{57}{\textit{Id.}}
\footnote{58}{\textit{Id.}}
IV. HOW CITIZENS CAN ENFORCE FOREVER WILD

The Forever Wild Amendment not only constrains the State of New York but also directly empowers New York citizens to enforce the state constitutional protection of Forest Preserve lands to prohibit state actions that would remove timber or Forever Wild lands in two types of causes of action, typically combined into one petition and complaint. The constitution itself provides for enforcement of the Forever Wild clause; Section 5 of Article XIV provides that “[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.”

This right, combined with current statutory law, may be enforced by two different types of actions. The first type of action is an administrative challenge that a state action concerning Article XIV is “arbitrary and capricious.” This is a statutory cause of action codified under Article 78 of the Civil Practice Laws and Rules. As such, it is typically called an Article 78 proceeding. The statute of limitations for an Article 78 challenge is exceedingly short at only four months.

The second type of action that can be brought is one for a declaratory judgment. Under this cause of action, the plaintiff asks the court to find a proposed action as violative of the state constitution or a state law. The statute of limitations for a declaratory judgment action is much longer at six years. However, when a declaratory judgment is pled with another action, such as an Article 78 proceeding, the shorter statute of limitations applies.

V. ANALYSES BY NYS COURTS AND CHALLENGES TO NYS DEC INTERPRETATIONS

Interpretations of constitutional amendments by courts and agencies in New York can be classified as either textual interpretation, interpretation through legislative history, interpretation through subsequent case law, or a combination of the three. Textual interpretation decisions are limited to only the words and text of the law, do not venture further into precedent or legislative history, and are often referred to as “plain meaning.”

69. N.Y. CONST. art. XIV, § 5.
70. N.Y. C.P.L.R. § 7803 (McKinney 2023).
71. See id.
meaning is typically the first analysis undertaken by a court when reviewing a statute, or in this case, a constitutional provision:

Where the terms of a statute are clear and unambiguous, “the court should construe it so as to give effect to the plain meaning of the words used.” Resort to legislative history will be countenanced only where the language is ambiguous or where a literal construction would lead to absurd or unreasonable consequences that are contrary to the purpose of the enactment. employs

When interpreting a statute, the New York Court of Appeals has been clear that the first step is the actual language in the statute:

“[O]ur primary consideration is to discern and give effect to the Legislature’s intention.” The text of a statute is the “clearest indicator” of such legislative intent and “courts should construe unambiguous language to give effect to its plain meaning.” We have also previously instructed that “[i]t is an accepted rule that all parts of a statute are intended to be given effect and that a statutory construction which renders one part meaningless should be avoided.” Furthermore, “a statute . . . must be construed as a whole and . . . its various sections must be considered together and with reference to each other.”

If the meaning cannot be determined by plain meaning, then a court will consider legislative history of the statute or constitutional provision in question. “Although ‘it is appropriate to consider legislative history even where a statute’s plain meaning is clear,’ ‘[c]ourts must construe clear and unambiguous statutes as enacted and may not resort to interpretative contrivances to broaden the scope and application of statutes.’”

Decisions and opinions based upon legislative history not only look at the text of the law, but also give meaning to key words or phrases by reviewing legislative records created as part of a law or amendment’s passage. Lastly, opinions and decisions based upon precedence look to prior court opinions to give meaning to operative words and phrases.

A. STATE COURT INTERPRETATIONS OF THE FOREVER WILD AMENDMENT

New York State courts have reviewed the Forever Wild Amendment a total of seventeen times since its passage. Only a handful of those decisions were substantive. A careful reading of each shows that the courts utilized a textual analysis of the amendment without any review of legislative history. Only three decisions took the extra step of a review of the legislative history.

The first decision of a court on the 1894 Forever Wild Amendment came in 1898, with Adirondack Railway Co. v. Indian River Co. In that case, the plaintiff railroad company challenged the State of New York’s taking of property by eminent domain. The property at issue was taken by the State for Forest Preserve. The plaintiff argued that the railroad’s proposed use, which predated the State’s taking of the land via the filing of a map by the railroad, should also be prohibited because the condemnation made the land Forest Preserve to be held by the State as forever wild. The court examined the 1897 statute authorizing the taking, noting that the statute only allowed for reservation of rights for timber for no more than ten years. The court held that the statute and the 1894 amendment taken

---


79. See, e.g., Ass’n for the Prot. of the Adirondacks, 170 N.E. at 904; Finch, Pruyn & Co., 202 N.Y.S. at 583; Slutzky, 490 N.Y.S.2d at 429–30.

80. Indian River Co., 50 N.Y.S. at 245.

81. Id. at 247.

82. Id. at 250.

83. Id. at 247–49.

84. Id. at 249.
together required a finding for the State, meaning the railroad company lost all future rights to use the land for railroad purposes. Judge Herrick, writing for a panel of five, explained that: “Under well-known rules of statutory construction, [the State taking land free of other restrictions] is exclusive. Providing for their taking lands subject to specific-named burdens, excludes, by implication their right to take them subject to any other burdens.”

The efforts of the Adirondack Railway Company did not end so quietly. The State had to file another action in 1898 to enjoin the railroad company from continuing to seek transfer of the disputed lands. On appeal the following year, Judge Herrick dissented from the appeal decision that denied the injunction and held in favor of the railroad. In that case, *People v. Adirondack Railway Co.*, the majority ignored the Forever Wild provisions and relied solely on the statute that authorized construction of the railroad to find in their favor. Judge Herrick’s multiple page dissent again carefully analyzed the statutes as he did only a year earlier. He also argued that, in finding that the filing of the map by the railroad created a property interest, the majority deprived the owner, in this case the State, of due process of law, without an opportunity to be heard to refute the alleged interest. The matter was finally resolved by the Court of Appeals who found for the State in 1899. The court first recognized the 1894 Forever Wild Amendment and then discussed whether the railroad’s filed map was a property right deserving of protection under the Fourteenth Amendment, which forbids the deprivation of property rights without due process of law. The court held that the filing did not represent a lien or other property interest; and therefore, the designation of land so mapped as Forest Preserve did not entitle the railroad to an injunction or damages. Finding for the State, the Court of Appeals held:

85. Id. at 249–50.
86. Id. at 249.
89. Id. at 869–70.
90. Id. at 871–85.
91. Id. at 879.
93. Id. at 689, 692–93.
94. Id. at 696.
That the use for which the land in question was appropriated is a public use cannot well be questioned. The object of the legislature was to create a great public park for the promotion not only of health and pleasure, but of commerce as well. The statute declares that it is “for the free use of all the people for their health and pleasure,” as well as “the preservation of the head waters of the chief rivers of the state, and a future timber supply.” The creation of the park is a part of the permanent policy of the state, for the people have embedded the project in the Constitution and have made the lands devoted to the purpose absolutely inalienable.95

The court therefore held that the Forever Wild Amendment did not deprive railroads of property rights under a due process analysis.

i. Attempts for a public purpose exemption for cutting of timber

Many of the earliest cases examining the Forever Wild Amendment and Attorney General opinions focused upon the definition of the word “timber.” Since it was undefined in the Forever Wild Amendment, courts and the Attorney General were left to define it, and to determine whether, in the absence of a further constitutional amendment, if a public purpose exemption could be fairly read into the Forever Wild clause.

The seminal case limiting a court-created public purpose exemption for timber removal of Forever Wild Forest Preserve lands is Association for Protection of Adirondacks v. MacDonald.96 The 1932 Winter Olympics were scheduled to be held in Lake Placid, New York.97 Lake Placid is located in the Eastern High Peaks region of the Adirondacks and most of the mountain peaks were owned by the State of New York as Forest Preserve.98 The sole exception being Whiteface Mountain, which New York voters in 1941 allowed for the construction of ski trails on that mountain.99

In searching for land for a one and one-quarter mile bobsleigh run, the Olympic Committee identified a good candidate across the State Highway from the Whiteface Mountain on the slopes of the Sentinel Range.100 However, the land identified was also located entirely on Forest Preserve.101 To

95. Id.
96. Ass’n for Prot. of Adirondacks v. MacDonald, 170 N.E. 902 (N.Y. 1930).
97. Id. at 903.
98. See id.
99. PROTECT THE ADIRONDACS!, supra note 53; N.Y. CONST. art. XIV, § 1.
101. MacDonald, 170 N.E. at 903.
construct the run, about 2,500 trees would need to be cut down and removed on approximately four and one-half acres. In 1929, the state legislature authorized the construction of the bobsleigh run on Forest Preserve land. In response, the Association for the Protection of the Adirondacks brought an action arguing that the legislation authorizing construction was unconstitutional based on the tree cutting that would be required to construct the run of Forest Preserve lands.

The New York Court of Appeals held that the cutting down of over 2,500 trees for a toboggan run ran afoul of the Forever Wild clause. The court found that the Forever Wild Amendment forbid the “cutting down of these trees to any substantial extent for any purpose.” Although the case stands for the proposition that the cutting down of trees is forbidden, the court’s holding left open the argument that insubstantial cutting of timber could be permissible. It was cited for that very purpose in later court cases and New York State Attorney General opinions.

Following the MacDonald case, the pressure to find a public purpose exception did not go away. In 1951, the New York Court of Claims found no fault with a plan to run a new state highway through Forest Preserve in the Catskills. The court held that the construction did not include a “material or unreasonable” amount of felling of timber on Forest Preserve. In that case, the construction company filed a claim against the State for the additional costs of timber removal on Forest Preserve land. The court found for the construction company and held that:

To this item of the claim the State offers several defenses. The first is that section 1 of article XIV of the Constitution, which provides that the forest preserve shall be forever kept as wild forest lands and that the timber thereon shall not be sold, removed or destroyed, prohibited claimants from availing themselves of any salvage from the trees and that they should have

102. id.
103. id.
104. id.
105. id. at 905.
106. id. (emphasis added).
107. See, e.g., infra notes 126, 174, 184, 187 and accompanying text.
109. id.
110. id. at 353–55.
known the law and the Constitution before they bid. The fact is that the plans for the highway to be built through the forest preserve necessarily contemplated that a certain amount of growing timber would be cut, removed or destroyed. The Attorney-General concedes as much. This was a proper exercise of authority by the State Department of Public Works. As the plans did not call for the removal of timber to any material or unreasonable degree, the Constitution was not violated.111

In 1979, the Supreme Court of Hamilton County delved into the legislative history of Article XIV in a challenge to the Adirondack Park Agency’s Master Plan.112 In *Helms v. Reid*, the plaintiff, an air taxi service, challenged the State’s actions of designating uses of Forest Preserve lands in three causes of action.113 The first cause of action was that various actions and uses by the State of Forest Preserve violated Article XIV of the New York State Constitution.114 These potential uses included construction of public campsites, dirt access roads to the campsites, as well as outbuildings, boat launches, jeep and fire roads, paved roads, electric transmission lines, and the like.115 The parties agreed that these claims could only be resolved by trial.116 The second cause of action argued that state legislative approval and a constitutional amendment were required for the Adirondack Park Agency’s Master Plan because it directly allowed certain uses, actions and restrictions under a new classification system of Forest Preserve lands.117 It was this new classification system in the Master Plan that led to plaintiff’s third cause of action, alleging that the State’s prohibition on the plaintiff’s air taxi service for hunters and fisherman on certain water bodies in the Forest Preserve was arbitrary and capricious.118

In finding for the State, the court reviewed the legislative history of the Forever Wild clause, and in particular a floor discussion regarding roads. The court expressly found:

[T]he framers of the [Forever Wild Amendment] apparently intended a strict interpretation of its language and application of its principles. The lands of the forest preserve were to be retained in their wild forest state,

111. Id. at 355 (citations omitted).
113. Id. at 992.
114. Id.
115. Id.
116. Id. at 993.
117. Id. at 992.
118. Id.
and it is clear that the application of the principle de minimus was not to be applied in the [F]orest [P]reserve.\textsuperscript{119} The court also noted the lack of other decisions, except for \textit{MacDonald} and various Attorney General opinions, on the application of the Forever Wild Amendment.\textsuperscript{120} The court noted the Attorney General opinions’ trend of a “strict” interpretation prior to \textit{MacDonald} and a “more reasonable approach” after \textit{MacDonald}.\textsuperscript{121}

Following \textit{Helm}, the next substantive interpretation of the Forever Wild clause was in 1993.\textsuperscript{122} In \textit{Balsam Lake Anglers Club v. Department of Environmental Conservation}, the plaintiff challenged the New York State Department of Environmental Conservation’s unit management plan for the Balsam Lake region, specifically construction of a ski trail loop and five new parking areas.\textsuperscript{123} Citing \textit{MacDonald}, the court found that “activities involving the removal of timber ‘to any material degree’ [would] run afoul of the [Forever Wild clause].”\textsuperscript{124} The court reasoned that the felling of 350 trees to provide for the trail did not amount to “unconstitutional amounts of cutting” under \textit{MacDonald}’s substantial extent of removal exception.\textsuperscript{125}

The latest decision on the Forever Wild clause of Article XIV is \textit{Protect the Adirondacks! Inc. v. N.Y. State Department of Environmental Conservation}.\textsuperscript{126} The Court of Appeals in that case considered the constitutionality of constructing twenty-seven miles of snowmobile connector trails through Forest Preserve lands.\textsuperscript{127} The trail construction would involve the cutting of 6,184 trees with at least three inch diameter trunks and 25,000 trees total, as well as rock removal and grading.\textsuperscript{128} The court briefly reviewed legislative history of the Forever Wild clause and noted that “[t]he destruction or removal of trees represented a principal threat recognized by the 1894

\begin{enumerate}
\item \textsuperscript{119} \textit{Id.} at 996.
\item \textsuperscript{120} \textit{Id.}
\item \textsuperscript{121} \textit{Id.}
\item \textsuperscript{122} \textit{Balsam Lake Anglers Club v. Dep’t of Env’t Conservation, 605 N.Y.S.2d 795, 795 (App. Div. 1993).}
\item \textsuperscript{123} \textit{Id.} at 796–97.
\item \textsuperscript{124} \textit{Id.} at 797.
\item \textsuperscript{125} \textit{Id.}
\item \textsuperscript{126} \textit{Protect the Adirondacks! Inc. v. N.Y. State Dep’t of Env’t Conservation, 170 N.E.3d 424, 430–31 (N.Y. 2021).}
\item \textsuperscript{127} \textit{Id.} at 425.
\item \textsuperscript{128} \textit{Id.} at 429.
\end{enumerate}
Convention delegates.”

Citing MacDonald, the court found that the removal of over 6,000 trees violated Article XIV because the removal was substantial, regardless of the public benefit. The court concluded that if the trails were important to the people of the State of New York, a constitutional amendment could be put forth to authorize their construction.

Citing the public nature of the trails, a dissenting judge argued that even MacDonald recognized that the creation and “maintenance of proper facilities for public use . . . are among the ‘things necessary’ that are permitted, so long as they do not result in ‘the removal of the timber to any material degree.’” The dissent also argued that the court’s definition of timber was too broad. Furthermore, the dissent argued that the timber cutting contemplated was not substantial under the standard established by MacDonald and that the “‘substantial extent’ or ‘material degree’ standard cannot be reduced to merely an exercise in tree counting, but requires consideration of the scope, nature, purpose and impact of the project on the affected area and on the Forest Preserve as a whole.” Finally, the dissent also noted that the majority ignored the thousands of miles of trails already existing on Forest Preserve lands and the cutting required to maintain such trails. “The purpose of the cutting is to open safe, year-round trails geared toward keeping users on the trails and out of sensitive areas.”

VI. INTERPRETATIONS IN NY ATTORNEY GENERAL OPINIONS

The New York State Attorney General (hereinafter the “Attorney General”) is a constitutionally established and elected position in New York State. In addition to representing the State in courts, the Attorney General’s Office provides formal opinions on legal questions involving state law to New York State departments and agencies. The Attorney General’s office can also provide informal opinions to local governments on state law as well. As the Queens County Court summarized:

129. *Id.* at 427–29.
130. *Id.* at 429–31.
131. *Id.* at 431.
132. *Id.* at 432, 436.
133. *Id.* at 437.
134. *Id.* at 434, 438.
135. *Id.* at 437, 439.
136. *Id.* at 438.
137. N.Y. CONST. art. V, § 1.
The Attorney General’s Office, in a letter dated September 3, 1999, informed counsel that the Attorney General rendered formal opinions to State departments and agencies; informal opinions are issued to local governments at the request of the municipal attorney; and as a matter of policy the Attorney General did not issue opinions regarding the constitutionality of a State statute.\(^\text{139}\)

Although opinions of the Attorney General are not binding on courts, they can be persuasive and are often cited by courts when the opinions are on point.\(^\text{140}\) Additionally, the opinions more often than not provide a summary and factual basis and legal reasoning for each proffered opinion. As such, the New York State Attorney General opinions provide an earlier and more plentiful review and interpretation of the Forever Wild clause.

Attorney General opinions concerning then Article VII, renumbered to Article XIV, of the state constitution concerning removal of timber were largely textual-based until MacDonald.\(^\text{141}\) Many also concerned the tension between the new constitutional provision and need for highways through the Adirondacks and Catskills.\(^\text{142}\) In their opinions, the Attorney General often looked for exceptions to the constitutional amendment prohibiting timber removal to allow for public highways and trails. In 1907, the Attorney General advised that taking of timber to construct a new highway on Forest Preserve lands without any authorizing statute violated the Forever Wild clause.\(^\text{143}\) A 1908 opinion advised identically in concluding that “[t]here is no exception expressed in the Constitution permitting the removal of timber

\(^{139}\text{Id.}^{140}\text{"It is true, as the defendant argues, that although the opinions of the Attorney General may be persuasive they are not conclusive or binding on the courts. In this case, however, the court is very much persuaded by his opinion." Shpack v. Baretti, 349 N.Y.S.2d 256, 259 (Civ. Ct. 1973) (citations omitted).}^{141}\text{See, e.g., 1915 N.Y. ATT’Y GEN. REP. & OPS. 101, 190.}^{142}\text{See, e.g., 21 N.Y. STATE DEP’T REPS. 1, 412 (1920).}^{143}\text{1907 N.Y. ATT’Y GEN. REP. & OPS. 237, 333–34.}
for road building. If the Constitution be stretched to permit one road, there will be no limit to the number of roads.”

Similarly, in 1915 the Attorney General in a brief opinion advised that a proposed highway could not remove Forest Preserve timber near Lake Placid. In that opinion, the Attorney General contrasted his conclusion against a letter issued earlier that year allowing for removal of old, dead, and decaying timber from a pond that served as a public water supply in the Forest Preserve. Each of these decisions were brief and were textually based, relying solely upon the text of the Forever Wild constitutional amendment and not any outside sources. None of the opinions examined the legislative history of the constitutional amendment or any case law.

The prohibition of tree removal in the Forever Wild Amendment was not found to be absolute by the Attorney General, however. In 1919, the Attorney General was asked to provide an opinion on the constitutionality of removing six trees to improve an existing but winding public road. The Attorney General agreed that the original road was authorized to continue so long as it did not remove trees. Subsequently, the Conservation Commission was requested to remove trees to improve the road for the public. The Attorney General noted that at the time the Forever Wild constitutional amendment was passed, existing legislation provided the Commission with several powers including the removal and selling of trees as well as the power to lay roads and paths through the Forest Preserve. The Attorney General found that the constitution only prohibited the first power: to remove and sell trees. The Attorney General opined that the second power, to “lay out paths and roads,” was not prohibited by the subsequent constitutional amendment and survived because “[t]he power . . . is as old as the park itself.” Therefore, the Attorney General concluded that the “incidental cutting and removing of trees as might be deemed necessary in establishing roads and paths into or through the forests, for the prevention or extinguishment of fires, or to promote the pleasure and convenience of the people while visiting the Adirondack Park” did not violate the Forever Wild Amendment.

144. 1908 N.Y. ATT’Y GEN. REP. & OPS. 125, 146.
145. 1915 N.Y. ATT’Y GEN. REP. & OPS. 101, 190.
146. Id. at 191.
147. 21 N.Y. STATE DEP’T REPS. 1, 412–14 (1920).
148. Id. at 413.
149. Id. at 413–14.
150. Id. at 414–18.
151. Id. at 418–19.
152. Id. at 425.
153. Id. at 419.
prohibit the incidental cutting of trees involved in laying out a road or path by the Commission, it would naturally have prohibited the doing of the thing which would have rendered such cutting necessary.”

Similarly, in a much longer opinion, the new Attorney General in 1921 expressly disagreed with those earlier opinions and concluded that legislation granting authorization for roads through Forest Preserve was not unconstitutional, without any concern of timber removal. Stating that the prior decisions “rest upon too narrow and technical construction of the constitutional provision, and deprive the Legislature of a power over the Forest Preserve which is absolutely necessary to its preservation.” Ignoring that a recently passed constitutional amendment was required for a separate highway, Attorney General Charles Newton found that the law granting power to construct roads on Forest Preserve was constitutional, and that by the separate amendment the legislature had made the implicit power of the legislature to provide for roads within the Forest Preserve explicit.

Later that same year, the Attorney General provided an opinion regarding the use of Forest Preserve waterways for logging. The Attorney General determined that although the construction of camps and storehouses, repair and use of old roads, repair and reconstruction of dams was allowable on Forest Preserve, the cutting of living trees for dam restoration was not.

In 1927, the Attorney General also found that cutting of dead or dying trees in a replanting of a clearcut area did not violate Article VII. In that opinion, the Attorney General reviewed a request of the Commission to trim seedlings and young trees and remove dead or dying trees and trees that were dwarfed due to overcrowding. The Attorney General there found that silviculture was allowed because the area was not yet a forest that would be required to be protected as timber by the Forever Wild Amendment.

---

154. Id. at 422.
156. Id. at 144.
157. Id. at 147–49.
158. Id. at 125.
159. Id. at 128–30.
161. Id. at 252.
162. Id. at 253.
Following the MacDonald decision, the Attorney General opinions cited that case but continued to find a limited public purpose exception to the removal of timber. In 1931, the Attorney General also confirmed a request by the State to straighten a highway utilizing Forest Preserve land in the Adirondacks. The request was ostensibly for fire prevention and public access. In summarizing MacDonald, the Attorney General noted the exception created by that case and opined:

This decision of the Court of Appeals should not be considered an obstacle to the proper improvement or reconstruction of state highways in the forest preserve which have been duly designated by law for improvement by the state, where such improvement or reconstruction makes it necessary to occupy small areas of state-owned land, or to cut a reasonable number of trees necessary to eliminate dangerous curves or secure favorable grades.

The Attorney General continued to cite the MacDonald decision in advising the Commission that “such steps as are necessary to preserve this land from harm are within the reasonable interpretation of the things which the State may do in the Forest Preserve.” Construction of toll booths in addition to a constitutionally permitted highway on Whiteface Mountain in the Adirondacks on Forest Preserve lands and authorized by the state legislature was also opined to be consistent with the original Article VII.

However, this newly created public use exception is limited. In 1933, the Attorney General was again requested to find lawful relocation of a highway between Saranac Lake and Lake Placid in the opinion cited above. The relocation would have involved the removal of some 3,539 trees on Forest Preserve land and an additional 2,067 trees to eliminate curves. The Attorney General opined that the construction and removal was prohibited by the original Article VII, the then Forever Wild Amendment of the New York Constitution. Pointing to a recently passed constitutional amendment authorizing construction of a road on Forest Preserve in Hamilton County, the Attorney General opined that similar construction could not occur without a similar constitutional amendment to the Forever Wild

163. 1931 N.Y. ATT’Y GEN. REP. & OPS. 93, 142.
164. Id. at 143–44.
165. Id. at 144 (emphasis added).
166. 1933 N.Y. ATT’Y GEN. REP. & OPS. 369, 370.
167. Id. at 382–86.
168. Id. at 395.
169. Id.
170. Id. at 395.
clause.\textsuperscript{171} “The Legislature cannot allow such broad encroachments upon the preserve, when the electorate is required to register its consent to a few miles from Indian lake to Speculator.”\textsuperscript{172}

Also citing \textit{MacDonald}, in 1934, the Attorney General determined that tree removal for widening or construction of ski trails did not violate the Forever Wild clause\textsuperscript{173}:

I conclude that what would amount to a material infraction of the constitutional provision for commercial or business purposes might not amount to a material infringement directed to a better and more complete enjoyment by the public within the established purposes; that what would be an unreasonable regulation by the Legislature for a condemned purpose might be held reasonable when applied for a proper one.\textsuperscript{174}

Attorney General opinions relying on the \textit{MacDonald} immaterial exception continued. In 1934, the Attorney General opined that the construction of triangulation stations on peaks was allowed.\textsuperscript{175} In so finding, the Attorney General noted that the request included the possibility of small tree cutting and removal.\textsuperscript{176} The Attorney General opined that “[t]he number of small trees utilized or removed and the amount of necessary trimming of tree tops appear immaterial.”\textsuperscript{177}

Also relying on \textit{MacDonald}, the Attorney General in 1935 considered the constitutionality of the Conservation Commission creating more open views and vistas along trails on Forest Preserve lands in the Adirondacks.\textsuperscript{178} In that opinion, the Attorney General concluded:

The question which, I apprehend, is of most concern to you is the one we cannot answer, i.e., how far you can actually extend your operations. . . . [Y]ou can make the proposed improvement but your work must be carried

\begin{flushleft}
171. \textit{See id.} at 396.
172. \textit{id.}
173. 1934 N.Y. ATT’Y GEN. REP. &OPS. 266, 269.
174. \textit{id.}
175. 1934 N.Y. ATT’Y GEN. REP. &OPS. 307, 309.
176. \textit{id.} at 310.
177. \textit{id.}
178. 1935 N.Y. ATT’Y GEN. REP. &OPS. 274, 274.
\end{flushleft}
out with care in order that the tree removal may not be sufficient to pass the point of immateriality.\(^{179}\)

In 1935, the Attorney General extended the public purpose exemption to dead timber that may injure or kill the public while on Forest Preserve lands.\(^{180}\) The Attorney General found that such removal was within the police power of the State and did not run afoul of the Forever Wild clause, provided the removal was necessary to preserve public safety or elimination of a fire hazard.\(^{181}\) The amount of tree removal was left to the discretion of the Commissioner.\(^{182}\)

Following those immediate requests after \textit{MacDonald} was decided, cutting of timber on State Forest Preserve was not an issue again until 1948. In that year, the Attorney General agreed with a request of the Conservation Department to allow the cutting of lower tree breaches to feed deer during a particularly brutal winter.\(^{183}\) Citing \textit{MacDonald}, the Attorney General found no destruction of timber as contemplated in the Forever Wild clause prohibition.\(^{184}\) The Attorney General also noted that the proposed cutting would be limited to saplings less than three inch diameter, brush, and some small lateral branches.\(^{185}\)

Similarly, in 1950, the Attorney General considered the legality of removal of dead or downed timber following a hurricane.\(^{186}\) In finding in the affirmative and briefly citing \textit{MacDonald}, the Attorney General opined that necessity found such removal lawful.\(^{187}\) However, the advice was limited to only what was necessary, not convenient.\(^{188}\)

It was not until 1986 that the Attorney General again was requested to provide an opinion regarding the cutting of trees for trail maintenance.\(^{189}\) Citing both the \textit{MacDonald} case and past Attorney General opinions noted in this Article, the Attorney General found that limited tree cutting of live trees could be allowed for trail maintenance.\(^{190}\) Expressing the need for caution, the Attorney General wrote:

\(^{179}\) \textit{Id.} at 275.
\(^{180}\) \textit{Id.} at 308.
\(^{181}\) \textit{Id.} at 310.
\(^{182}\) \textit{See id.}
\(^{184}\) \textit{Id.} at 160.
\(^{185}\) \textit{Id.}
\(^{187}\) \textit{Id.} at 155.
\(^{188}\) \textit{Id.}
\(^{190}\) \textit{Id.} at 17–19.
Only limited tree cutting may be undertaken by [the Department of Environmental Conservation] that is carefully designed and necessary to maintain existing trails in order to protect the forest preserve, while ensuring its reasonable accessibility to the public for hiking, an activity consistent with the wild forest character of the land . . . Once a towering tree is cut it cannot be replanted.191

In 1990, the Attorney General was again called upon to review and issue their opinion on tree removal from Forest Preserve, but for a runway at a public airport.192 A voter-approved amendment in 1965 to the Forever Wild clause conveyed a total of twenty-eight acres of Forest Preserve land to a town for the purpose of maintaining a public airport.193 However, between 1965 and 1990, Federal Aviation Administration regulations required a “clear zone” and the cutting of trees on additional lands that remained Forest Preserve.194 Citing numerous past Attorney General opinions, and unequivocal nature of the Forever Wild clause, the Attorney General concluded that such cutting was not permissible.195 A 1991 amendment to the Forever Wild clause subsequently authorized transfer of additional Forest Preserve lands to meet the new federal regulations.196

CONCLUSION

The basic premise of the Forever Wild Amendment, that Forest Preserve lands will be untouched by man after its passage, has survived numerous amendments and as a constitutional provision is uncontested. Its interpretation in the intervening years provides a roadmap in how the Green Amendment may also be interpreted. There are several reasons for the continued longevity of the Forever Wild Amendment. First, the Forever Wild Amendment was drafted without complex legalese. The words at the heart of the amendment have readily discernable meanings. The only questionable term “timber” is defined by regulation.

191. Id. at 19.
193. PROTECT THE ADIRONDACKS!, supra note 53; N.Y. CONST. art. XIV, § 1.
195. Id. at 21–22.
196. PROTECT THE ADIRONDACKS!, supra note 53; N.Y. CONST. art. XIV, § 1.
Second, the Forever Wild provision has been read to not be a complete prohibition on any tree cutting on all State Forest Preserve. Both the Attorney General and New York courts were loath to interpret the Forever Wild Amendment so broadly as to forbid all tree cutting. An exception was created to allow cutting that is not material. Assuming all state action on Forest Preserve land has a public purpose, courts have allowed limited tree cutting providing it is not “substantial” or “material.” The creation of such an exception did not gut the primary purpose of the Forever Wild clause.

Lastly, public support for the preservation of State Forest Preserve lands cannot be understated. Amendments to constitutional provisions are inevitable. Public support for the basic purpose of the constitutional provision limits the impact of amendment attempts. That public support is bolstered by a cause of action directly provided for in the Forever Wild Amendment.

Green Amendment proponents should anticipate a similar path for that amendment. The first step should be to identify agencies that will be interpreting the Green Amendment. In New York State that is not only the court system but also the New York State Attorney General’s Office, that reviews and provides legal opinions on the state’s constitution to state agencies considering actions that could potentially involve the Green Amendment.

The second matter to anticipate is to not overly rely on legislative history. Only a small percentage of New York Attorney General opinions and court cases reviewing the Forever Wild clause moved beyond the plain language of the amendment to consider legislative history. In its inevitable review and interpretation by the New York Attorney General and courts, the Green Amendment likely faces being reviewed and interpreted in a similar manner.

The last matter to anticipate is exceptions to any hard rules. The Forever Wild clause expressly prohibits the removal of timber from State Forest Preserve lands. However, both the Attorney General and New York courts found an exception to this prohibition when limited timber removal was required for necessary public purposes. The Green Amendment will likely be read to allow exceptions, such as continued State permitting under the federal Clean Air Act and Clean Water Act.