At a Special Term of the Supreme Court of the State of New York held in and for the County of Franklin at the Courthouse in the Village of Malone, New York, on the 26th day of September, 2017.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF FRANKLIN

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In the Matter of the Application of **ADIRONDACK RAILWAY PRESERVATION SOCIETY, INC.,**

Petitioner,

-against-

NEW YORK STATE ADIRONDACK PARK AGENCY; LEILANI ULRICH, in her capacity as Chairperson of the New York State Adirondack Park Agency; **NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION; BASIL SEGGOS**, in his capacity as Acting Commissioner of the New York State Department of Environmental Conservation; **NEW YORK STATE DEPARTMENT OF TRANSPORTATION**; and **MATTHEW DRISCOLL**, in his capacity as Commissioner of the New York State Department of Transportation,

Respondents.

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DECISION, ORDER, AND JUDGMENT

Index Number 2016-213

RJI Number 16-1-2007-0129

DECISION AND ORDER

MAIN, JR., A.J.S.C. The above-captioned proceeding is before this Court pursuant to article 78 of the Civil Practice Law and Rules. The parties appeared, by and through counsel, upon the return of the Third Amended Verified Petition, filed

June 29, 2016.

Petitioner is the Adirondack Railway Preservation Society, Inc., (hereinafter "petitioner") and seeks judgment pursuant to Civil Practice Law and Rules article 78 upon three causes of action.

Respondents in the above-captioned matter are the New York State Adirondack Park Agency; Leilani Ulrich, in her capacity as Chairperson of the New York State Adirondack Park Agency; the New York State Department of Environmental Conservation; Basil Seggos, in his capacity as Acting Commissioner of the New York State Department of Environmental Conservation; the New York State Department of Transportation; and Matthew Driscoll, in his capacity as Commissioner of the New York State Department of Transportation, (hereinafter "respondents"). All of the aforementioned respondents have answered and appeared in this proceeding, with counsel, and oppose the relief requested by petitioner.

Background Summary

As is well known, in the late nineteenth century the New York State Constitution was amended to include constitutional protection for the Adirondack Forest Preserve. In 1971 the Adirondack Park Agency Act (hereinafter "APA Act") was enacted (*see* Executive Law article 27). The original enactment created the Adirondack Park Agency (hereinafter "APA"). The APA was mandated to promulgate, in conjunction with the Department of Environmental Conservation (hereinafter "DEC"), the New York State Land Management Plan (hereinafter "SLMP") for the management of publicly owned lands.

Pursuant to its mandate, the APA submitted the SLMP to the Governor and the Governor approved the plan in 1972. The SLMP has been re-approved and updated subsequently. The most recently approved plan is dated February 2014, having been approved in November 1987, with updates to descriptions and delineation to and including December 2013 (Petitioner's Exhibit "A" and Administrative Return[1] Exhibit 8, page R0547).

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[1] Hereafter, citations to the record will only be to the Administrative Return, by page number; repeated documents will only be cited to a single location.

As pertinent to this proceeding, the SLMP established guidelines for land management and required the APA to classify state lands into categories. The various classifications, nine in total, include Travel Corridors. The Remsen-Lake Placid Travel Corridor is the subject of this proceeding.

The APA Act, at Executive Law § 816, directs the DEC "to develop, in consultation with the [APA], individual management plans for units of land classified" in the SLMP. Each individual management plan is referred to as a Unit Management Plan ("UMP"). Each UMP "shall conform to the general guidelines and criteria set forth in the [SLMP]" (Executive Law § 816, *supra*). The SLMP expressly provides that a UMP "cannot amend the master plan itself" (Administrative Return Exhibit 8, page R0565). Executive Law article 27 is silent as to any grant of authority to amend the SLMP by means of a UMP.

Where applicable, each UMP must also comply with Parks, Recreation and Historic Preservation Law article 14 (see Parks, Recreation and Historic Preservation Law § 14.09 [State agency activities affecting historic or cultural property]. Furthermore, the Remsen-Lake Placid Travel Corridor is included in the National Register of Historic Places and the State Register of Historic Places, each as of 1993, which renders the Parks, Recreation and Historic Preservation Law applicable to this proceeding.

The SLMP provides that the DEC and the Department of Transportation (hereinafter "DOT") have joint responsibility over the Remsen-Lake Placid Travel Corridor. In 1996, the DEC and the DOT proposed the Remsen-Lake Placid Travel Corridor Final Management Plan/Environmental Impact Statement ("1996 UMP") (Administrative Return Exhibit 41, page R2201). The 1996 UMP was approved and included rail use development for the entire length of the Remsen-Lake Placid Travel Corridor.

In 2013, the DEC and the DOT commenced consideration of amending the 1996 UMP. The DEC and the DOT are "co-lead" agencies. This resulted in the Remsen-Lake Placid Travel Corridor Unit Management Plan Amendment/Final Supplemental EIS to the 1996 Remsen-Lake Placid Travel Corridor Unit Management Plan/Environmental Impact Statement ("2016 UMP")(Administrative Return Exhibit 11, page R0729).

On February 11, 2016, the APA issued the RESOLUTION AND SEQRA FINDINGS ADOPTED BY THE ADIRONDACK PARK AGENCY WITH RESPECT TO THE REMSEN-LAKE PLACID TRAVEL CORRIDOR UNIT MANAGEMENT PLAN AMENDMENT (the "Conformance Resolution")(Administrative Return Exhibit 1, page R0001). On March 17 and 18, 2016, respectively, the DEC and the DOT approved the 2016 UMP. On May 17, 2016, the DEC and the DOT made State Environmental Quality Review Act findings. On January 27, 2017, the DEC, the DOT and the New York State Office of Parks, Recreation and Historic Preservation issued a Letter of Resolution (Exhibit "A" to Affidavit of Charles E. Vandrei, sworn to March 7, 2017). The Letter of Resolution was directed to the adverse impact, upon the Remsen-Lake Placid Travel Corridor, anticipated to be caused by implementation of the 2016 UMP.

Procedural Summary

The instant matter was commenced by petitioner on April 11, 2016, with the filing of the Notice of Verified Petition and the Verified Petition. The Verified Petition was supported by exhibits including the SLMP, the 1996 UMP, the 2016 UMP and the APA Conformance Resolution, totaling over 400 pages. The Supporting Affidavit of Bill Branson, President of the Board of Directors of petitioner, was accompanied by exhibits "A" through "Z", totaling over 800 pages. Petitioner also submitted a Memorandum of Law in support of its pleadings.

For various reasons, not necessary to be articulated here, and without opposition by respondents, amended verified petitions were filed, served, and re-amended. Ultimately, the Third Amended Verified Petition was filed on June 29, 2016, and is the operative pleading seeking relief herein.

Petitioner contends that respondents' approval of the 2016 UMP was affected by an error of law, was arbitrary and capricious, and was an abuse of discretion.

As previously noted, respondents have duly answered in opposition to the relief requested. Respondents have submitted a Memorandum of Law in opposition to the requested relief. Respondents have also submitted an Administrative Return totaling 6,554 numbered pages along with cross referenced digital materials and various hard copy plat maps.

Petitioner also submitted a Reply Memorandum to respondents' Memorandum of Law.

The proceedings were adjourned for a variety of reasons and stayed upon consent of counsel and with the approval of this Court. The parties submitted a proposed Stipulation and Order, signed November 17, 2016, agreeing to the adjournment of the initial original return. Such was approved, and the matter was adjourned to January 30, 2017. The most recent adjournment was occasioned by potential title issues affecting New York State's title and interest to the property along the Remsen-Lake Placid Travel Corridor. Under the 2016 UMP, the Remsen-Lake Placid Travel Corridor is divided into two segments: "Segment 1" from Remsen to Tupper Lake and "Segment 2" from Tupper Lake to Lake Placid. The title issues reported are in Segment 2 (hereinafter "Segment 2").

Upon the return, January 30, 2017, the parties were accorded a full and complete opportunity to be heard, and counsel for petitioner and respondents engaged in oral argument supporting their respective positions. Respondents' counsel submitted a copy of the January 27, 2017, Letter of Resolution to the Court and counsel during the oral argument.

In the course of oral argument, it became clear that the issues affecting New York State's title and interest to the property along Segment 2 remained unclear and had not been finally resolved. The Court also concluded that further information and clarification, as to the avoidance and/or mitigation of adverse impact under the Parks, Recreation and Historical Preservation Law, was necessary and appropriate.

Subsequent to oral argument, a conference was conducted between the Court and counsel. The Court re-iterated to counsel that the significant, and unanswered, questions as to title pertaining to Segment 2 remained and requested further research and submissions from the parties to enable the Court to meaningfully decide this matter. The parties duly complied with the Court's requests by submission of additional documents, affidavits, and memoranda of law.

In addition to the exhibits and other supplemental materials submitted by the parties, the Court, with the consent of counsel, granted permission to the Adirondack Recreational Trail Advocates, Inc. to submit a brief, amicus curiae, as an aid to the Court, particularly to identify law or arguments that might otherwise escape the Court's consideration. Upon receipt

and review of the amicus submission, the Court ultimately considered only the legal argument contained in pages 7-14 of the Memorandum of Law submitted by amicus counsel.

The submissions in this matter have been voluminous. As part of its deliberations, the Court has reviewed such in their entirety. As a result of the multiplicity of parties, certain exhibits were repetitive; some exhibits bear considerably less weight than others. The Court entertained and carefully considered the oral argument of the parties. Finally, the Court has carefully considered and thoroughly reviewed statutes, case law, and the written legal arguments cited by the parties.

The Standard of Review

The standard of review for this proceeding, derived from Civil Practice Law and Rules § 7803 (3), is

> "whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion . . .".

In this matter, the respondents did not conduct any quasi judicial hearing prior to taking the administrative action challenged herein.

> "[W]here agency action is taken without a hearing, or where the hearing is discretionary or informational as opposed to adjudicatory and evidentiary, judicial review is sought by way of a CPLR article 78 proceeding in the nature of mandamus to review (CPLR 7803 [3]). In such case, the standard of review is whether the agency's action had a rational basis and, thus, was not arbitrary or capricious." (*Department of Environmental Protection v Department of Environmental Conservation*, 120 A.D.2d 166, 169, (3d Dept 1986).

Thus, this Court need only analyze whether such action was arbitrary and capricious.

> "Whether a determination was arbitrary and capricious is the standard used in mandamus to review, i.e., where the agency was not

required to conduct a trial-type hearing. See Practice Commentaries on CPLR 7801, at C7801:3, *supra*. Although the phrase "arbitrary and capricious" was not used in Article 78 of the Civil Practice Act, this was the standard used by the courts to analyze the legality of administrative determinations. See, e.g., *Marburg v. Cole*, 1941, 286 N.Y. 202, 36 N.E.2d 113. CPLR 7803(3) aligned Article 78 with judicial practice. [Law review citation omitted].

The Court of Appeals explained the nature of the arbitrary and capricious standard in *Pell v. Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale and Mamaroneck, Westchester County*, 1974, 34 N.Y.2d 222, 356 N.Y.S.2d 833, 313 N.E.2d 321: "Arbitrary action is without sound basis in reason and is generally taken without regard to the facts." *Id.* at 231, 356 N.Y.S.2d at 839, 313 N.E.2d at 325. The question, said the Court, is whether the determination has a 'rational basis.' *Id.*" (Vincent C. Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR7803:2).

And,

"[i]n reviewing the City's determination--one that was made without a hearing--the issue is whether the action taken had a 'rational basis' and was not 'arbitrary and capricious' (*see e.g. Matter of Wooley v New York State Dept. of Correctional Servs.*, 15 NY3d 275, 280, 907 NYS2d 741, 934 NE2d 310 [2010]). 'An action is arbitrary and capricious when it is taken without sound basis in reason or regard to the facts' (*Matter of Peckham v Calogero*, 12 NY3d 424, 431, 883 NYS2d 751, 911 NE2d 813 [2009]). If the determination has a rational basis, it will be sustained, even if a different result would not be unreasonable (id.)" (*Ward v City of Long Beach*, 20 NY3d 1042, 1043 [2013]).

Finally,

"[t]he reviewing court must employ reasonableness and common sense" (*Matter of Chinese Staff & Workers' Assn. v Burden*, 88 AD3d 425, 429 [1st Dept 2011]).

Legal Analysis

Initially, the Court finds that none of petitioner's challenges raise, explicitly or implicitly, any issue related to substantial evidence. As such, this Court is not required to, and did not, transfer this matter, pursuant to Civil Practice Law and Rules §§ 7803 (4) and 7804 (g), to the Appellate Division.

(1) Violation of the Act and the SLMP (APA and Respondent Ulrich)

Petitioner's first cause of action contends that the APA did not comply with the APA Act and contravened the SLMP by issuing the Conformance Resolution respecting the 2016 UMP. Petitioner challenges that portion of the 2016 UMP calling for removal of the railway in Segment 2 of the Remsen-Lake Placid Travel Corridor and the creation of a multi-use recreational trail, in place thereof, between Tupper Lake and Lake Placid. It contends that such is a nonconforming use, contrary to the APA Act and the SLMP. Respondents deny any impropriety and oppose the relief requested upon the assertion that the determination of conformance for the 2016 UMP complies with the APA Act and the SLMP and such determination is entitled to deference.

The parties do not dispute the definition of the Remsen-Lake Placid Travel Corridor in the SLMP. As pertinent here, the issue before the Court involves the 2016 UMP as to Segment 2 of the Remsen-Lake Placid Travel Corridor from east of the Tupper Lake railroad station (the "to be determined" trail head of the multi-recreational use trail) to Lake Placid. Segment 1 of the Remsen-Lake Placid Travel Corridor is not a subject of dispute, as the respondents are not proposing to remove the rails or terminate railroad use for Segment 1.

The SLMP defines a travel corridor as

"that strip of land constituting the roadbed

> and right-of-way for state and interstate highways in the Adirondack Park, the Remsen to Lake Placid railroad right-of-way, and those state lands immediately adjacent to and visible from these facilities" (Administrative Return Exhibit 9, page R0599).
>
> The SLMP further provides that
>
> "[t]he application of the travel corridor definition results in the designation of approximately 1,220 miles of travel corridors, of which 1,100 are highway, 120 miles make up the Remsen to Lake Placid railroad" (Administrative Return Exhibit 9, page R0602).

The SLMP also includes, under the heading of "Travel Corridors", the "RAILROAD LINES Remsen to Lake Placid 122 miles" (Administrative Return Exhibit 9, page R0669).

It is uncontroverted that the 2016 UMP proposes removal of all railroad tracks and ties from Tupper Lake to Lake Placid, i.e., Segment 2. Nonetheless, respondents contend that the declaration that the travel corridor classification would continue is sufficient to continue such classification, notwithstanding that the railroad infrastructure would be eliminated and Segment 2 would be converted to a multi-recreational use trail, administered by the DEC not the DOT. The multi-recreational use trail would be just that, a recreational trail.

The SLMP expressly defines travel corridors in terms of either automobile or railroad transportation. Notably absent is any reference to hiking trails, bicycle traffic, snowmobile traffic, or any other cognizable recreational use. Respondents do not offer any explicit support for ignoring the travel corridor definition. They do not make persuasive argument for how the new land use for Segment 2 conforms with the established definition. For example, Respondents' Memorandum of Law (at page 15) attempts to justify the elimination of the railroad tracks and ties by distinguishing between the terms "define" and

"designate". Respondents acknowledge the definition of Travel Corridor and further reiterate that the "definition results in the designation". The Memorandum of Law then states that "the designation merely identifies where a Travel Corridor meeting [the] definition exists or is located." Contrary to respondents' efforts, this argument supports petitioner by confirming and acknowledging that, to be designated as a travel corridor, a location must meet the definition of travel corridor. In this matter, transforming Segment 2 into a recreational trail removes it from the definition of travel corridor.

In their initial Memorandum of Law (at page 16), respondents concede that the "Master Plan has been construed as having the same force as a legislative enactment", citing *Helms v Reid*, 90 Misc 2d 583. *Helms* held that "the concept of a Master Plan did not originate with the agency, but rather was a directive with statutory force which the Legislature adopted" (*Helms v Reid, supra* at 604 [Sup Court, Hamilton County 1977]).

This concession solidifies the SLMP's clear and unequivocal statement that a UMP cannot amend the SLMP and is fatal to the 2016 UMP. The SLMP expressly provides that a UMP "cannot amend the master plan itself" (Administrative Return Exhibit 9, page R0565). Executive Law article 27 is silent as to any grant of authority to amend the SLMP by means of a UMP.

Respondents expressly acknowledge this limitation of their authority in the December 21, 2009 MEMORANDUM OF UNDERSTANDING BETWEEN THE DEPARTMENT OF TRANSPORTATION, THE DEPARTMENT OF ENVIRONMENTAL CONSERVATION AND THE ADIRONDACK PARK AGENCY CONCERNING DEVELOPMENT AND IMPLEMENTATION OF TRAVEL CORRIDOR UNIT MANAGEMENT PLANS PURSUANT TO THE ADIRONDACK PARK STATE LAND MASTER PLAN (Administrative Return Exhibit 10, page R0705). Respondents specifically state therein that

> "TCUMPs [Travel Corridor Unit Management Plans] will conform to the guidelines and criteria set forth in the APSLMP [Adirondack Park State Land Master Plan] and cannot amend the APSLMP itself." (Administrative Return Exhibit 10, page R0709).

Respondents APA and DEC reaffirmed such limitation to

their authority in their March, 2010 MEMORANDUM OF UNDERSTANDING BETWEEN THE ADIRONDACK PARK AGENCY AND THE DEPARTMENT OF ENVIRONMENTAL CONSERVATION CONCERNING IMPLEMENTATION OF THE STATE LAND MASTER PLAN FOR THE ADIRONDACK PARK (Administrative Return Exhibit 9, page R0682). Respondents APA and DEC specifically state that

> "[a] UMP cannot amend the APSLMP [Adirondack Park State Land Master Plan] and as finally adopted shall be in conformance with the general guidelines and criteria of the APSLMP. Any issues with respect to conformance of a proposed UMP with the APSLMP will be resolved and any necessary Amendments to the APSLMP acted on, in accordance with the provisions of this memorandum, prior to the DEPARTMENT [DEC] providing the AGENCY [APA] with a proposed Final UMP for final review and determination as to whether such UMP complies with the general guidelines and criteria set forth in the APSLMP." (Administrative Return Exhibit 9, IV(1) of memorandum, pages R0688-9).

The Court rejects respondents' self-serving conclusion that the 2016 UMP is consistent with the SLMP. The destruction and removal of the railroad line can only be seen as a reclassification of the 34 mile Segment 2 of the Remsen-Lake Placid Travel Corridor. The 2016 UMP does not conform with the general guidelines and criteria set forth in the SLMP.

Respondents APA, DEC, and DOT were aware of the classification concern in the 1996 UMP which expressly addressed the issue of corridor classification.

> "Q. SLMP Technical Amendments
>
> The existing classification of the Remsen Lake Placid Corridor as a "travel corridor" will accommodate the types of development included in the preferred alternative, including a variety of recreational trail uses. DOT, DEC, and APA currently support

> the retention of the travel corridor classification. *In the event that an acceptable rail proposal is not received for some segments of the Corridor during the rail marketing period, the issue of Corridor classification would become important.*
>
> . . .
>
> The description of the travel corridor classification in the APSLMP refers to the railroad right-of-way in terms of a mass transit situation similar to roads and highways rather than a recreational facility. The travel corridor description should be amended to more clearly reflect the recreational theme of the management that would be pursued on the Corridor if rail options fail to materialize. As an alternative, *another classification should be added to the APSLMP to reflect recreational use of the Remsen-Lake Placid Corridor instead of major transportation use"* (Administrative Return Exhibit 41, pages R2274-5) (emphasis added).

Converting Segment 2 to a "recreational trail suitable for ... walking, running, biking, cross-country skiing, snowmobiling, and use by ... Olympic ... athletes" (Administrative Return Exhibit 11, page R0744) constitutes a reclassification beyond the authority of the 2016 UMP. It is an impermissible amendment to the SLMP. It also ignores the express classification concerns raised in the 1996 UMP. Simply saying that the new trail use for Segment 2 remains part of the travel corridor for automobiles and highways or rails and trains, and is not merely a trail, is not rational. The effect of the transformation adds thirty-four (34) more miles to the thousands of trail miles already extant in the Adirondack Park, and concomitantly, decreases the sole railroad line.

Travel Corridor classifications as well as the Wild and Scenic and Recreational Rivers classifications are defined in the SLMP as essentially corridor overlays to the basic land

classifications through which such corridors run. Elimination of the elements of the overlay eliminates the travel corridor classification. Recreational trails are not included in the nine forms of land classification in the SLMP. The new trail must fall within the existing classifications. The 2016 UMP cannot amend the SLMP to create a new classification or to reclassify all or part of units of land. The Court need not, and does not, determine into which of the other classifications such a newly created Segment 2 multi-recreational use trail would fall. The Court simply finds that the change from a railroad to a multi-use recreational trail in Segment 2 removes it from the definition of travel corridor.

Approval and implementation of the 2016 UMP is an impermissible circumvention of the APA Act. It does not conform with the SLMP or either of the interagency memoranda quoted above. Segment 2, as intended by respondents, is not a conforming use of the land. The rationalization by respondents that a multi-recreational use trail is qualified for continuation as a travel corridor is not based in reason. It defies common sense. The Court rejects this contention as irrational and, hence, arbitrary and capricious.

Based upon the Court's findings, respondents' determination is not entitled to deference.

> "This Court should defer to an agency's interpretation of its own regulations as long as it is not irrational or unreasonable (*Matter of IG Second Generation Partners L.P. v. New York Division of Housing and Community Renewal*, 10 NY3d 474, 478; *Campion v. New York State Adirondack Park Agency*, 188 AD2d 877, 878)" (*Matter of Residents' Comm. to Protect the Adirondacks, Inc. et ano. v. Adirondack Park Agency, et al.*, 24 Misc. 3d 1221(A) [Sup Ct, Albany County 2009]).
> As well,
>
> "[w]hen an agency interprets a regulation that it promulgated, deference is afforded to that agency's interpretive approach unless it is 'irrational or unreasonable'" (*Matter of Entergy Nuclear Indian Point 2, LLC v New*

York State Dept. of State, 130 AD3d 1190, 1191 (3d Dept 2015).

The 2016 UMP, and the APA parties Conformance Resolution is not in conformance with the APA Act and the SLMP. Accordingly, the Third Amended Verified Petition will be granted as to the first cause of action.

(2) Violation of the APA Act and SLMP (DEC, Respondent Seggos, DOT and Respondent Driscoll)

In its second cause of action, petitioner claims that the DEC and the DOT approval of the 2016 UMP did not comply with the APA Act and the SLMP and that, accordingly, such approval constituted an error of law, was arbitrary and capricious, and was an abuse of discretion. This claim includes the assertion that the DEC and DOT action was not supported by substantial evidence which has already been discounted by this Court due to the absence of any evidentiary proceedings.

The petition must be granted, as to this second cause of action, with respect to the DEC and DOT parties, for the same reasons set forth above regarding the first cause of action. The foregoing analysis and determinations applicable to the APA parties and the first cause of action are incorporated herein by reference as if set forth in full as to the second cause of action.

The 2016 UMP, and the DEC and DOT parties' approval thereof, is not in conformance with the APA Act and the SLMP. The Third Amended Verified Petition will be granted as to the second cause of action.

(3) Violation of the New York State Parks, Recreation and Historic Preservation Law (DEC, Respondent Seggos, DOT and Respondent Driscoll)

In its third cause of action, petitioner claims the DEC and the DOT violated the Parks, Recreation and Historic Preservation Law. Specifically, that based upon the adverse impact determination, the Parks, Recreation and Historic Preservation Law requires avoidance or mitigation of adverse impact and that the DEC and the DOT have failed to comply.

It is uncontroverted in this matter that the Remsen-Lake Placid Travel Corridor was placed on the State Register of Historic Places by the Commissioner of the Office of Parks, Recreation and Historic Preservation on November 5, 1993, and that said travel corridor was listed on the National Historic Register of Historic Places on December 23, 1993. As a result, the provisions of Parks, Recreation and Historic Preservation Law article 14, and appurtenant regulations, are applicable to the 2016 UMP (*see* Parks, Recreation and Historic Preservation Law § 14.09 [state agency activities affecting historic or cultural property]). The parties do not dispute that the respondents were required to undertake an analysis as to any adverse impact and to determine mitigation and avoidance measures.

On February 4, 2016, the Office of Historic Preservation concurred with respondents' DEC and DOT determination that implementation of the 2016 UMP would have an adverse impact as to the historical nature of the Remsen-Lake Placid Travel Corridor. The Office of Historic Preservation February 4, 2016, letter states

> "[a]s such, the next step is for your agency [DEC co-lead with DOT], in consultation with this office [Division for Historic Preservation], is to establish meaningful ways to minimize and/or mitigate the adverse impacts associated with the removal of 34 miles of the National Register listed Adirondack Railroad's trackage and the development of a new recreational pathway. This phase will need to include all sections of the corridor that will be impacted by this plan. These mitigation measures will need to be memorialized in a Letter of Resolution." (Administrative Return Exhibit 13, page R0875).

The record does not show how quickly the DEC and the DOT commenced action on this recommendation. However, a Letter of Resolution was not issued within a week of the recommendation. Nevertheless, on February 11, 2016, the APA issued the Conformance Resolution, prior to any mitigation or avoidance plan or Letter of Resolution. On March 17, 2016, the DEC approved the 2016 UMP, and on March 18, 2016, DOT approved the 2016 UMP, both prior to any mitigation or avoidance plan or Letter of Resolution. On January 27, 2017, approximately one year after the Conformance Resolution, and eight months after DEC/DOT Approval, the Office of Historic Preservation executed a Letter

of Resolution in conjunction with DEC and DOT.

The Parks, Recreation and Historic Preservation Law prescribes the pertinent actions that are required respecting the 2016 UMP at § 14.09 [state agency activities affecting historic or cultural property] providing, in pertinent part:

> 1. As *early in the planning process as may be practicable and prior to the preparation or approval of the final design or plan* of any project undertaken by a state agency . . . the agency's preservation officer shall give notice, with sufficient documentation, to and consult with the commissioner concerning the impact of the project if it appears that any aspect of the project may or will cause any change, beneficial or adverse, in the quality of any historic, architectural, archeological, or cultural property that is listed on the national register of historic places or property listed on the state register . . . Generally, adverse impacts occur under conditions which include but are not limited to (a) *destruction or alteration of all or part of a property; . . . Every agency shall fully explore all feasible and prudent alternatives and give due consideration to feasible and prudent plans which avoid or mitigate adverse impacts on such property* . . .
>
> 2. The commissioner shall undertake a review and make comment within thirty days of receipt of notice, . . . If it is determined that a project may have an adverse impact on such property, the commissioner shall so notify the agency in writing. Upon receipt of such notification from the commissioner, *the agency shall immediately contact the commissioner for the purpose of exploring alternatives which would avoid or mitigate adverse impacts to such property consistent with the policy and provisions of this article and other provisions of law relating to historic preservation. To the fullest extent practicable, it is the responsibility of every state agency, consistent with other provisions of law, to avoid or mitigate*

adverse impacts to registered property or property determined eligible for listing on the state register by the commissioner." (Emphasis added)

The regulations promulgated by the Commissioner of Office of Parks, Recreation and Historic Preservation reiterate the duty of every state agency to participate in avoidance or mitigation efforts.

"9 NYCRR § 428.8. Consultation process: exploration of feasible and prudent alternatives

To the fullest extent possible it is the duty of every State agency to avoid or mitigate the adverse impacts of its undertakings on eligible or registered properties. To protect these irreplaceable assets and meet their legal obligations, agencies must make every effort to reconcile their programs with the public policy of the State regarding historic preservation by finding a feasible and prudent means to avoid or mitigate any adverse impact of the undertaking identified by the commissioner. To this end, the following procedures shall be followed:

(a) *If the commissioner determines that an undertaking will have an adverse impact on eligible or registered property recommendations shall be formulated which the undertaking agency must consider when exploring all feasible and prudent alternatives. These recommendations shall accompany the notice of adverse impact given by the commissioner pursuant to section 428.7. . . .*

. . . . .

(d) In formulating recommendations or alternatives, both the commissioner and the undertaking agency must *give primary consideration to the State's historic preservation policy as expressed in article 14.00 of the Parks, Recreation and Historic Preservation Law.* Other factors such as

cost, program needs, safety, efficiency, code requirements or alternate sites may also be considered. However, none of these factors standing alone shall be determinative of whether a particular proposal is feasible or prudent." (Emphasis added)

"9 NYCRR § 428.10 Consultation process: letter of resolution

The dialogue contemplated by sections 428.8 and 428.9 of this Part should, if at all possible, *culminate in the execution of a Letter of Resolution between the commissioner and the undertaking agency.* To this end, the following procedure shall be followed:

(a) After reviewing all information regarding the proposed undertaking and after any on-site inspection or public hearings, *the agency and the commissioner shall determine if there are feasible and prudent alternatives which would avoid or mitigate any adverse impact of the undertaking on eligible or registered property.*

(b) If the commissioner and the agency agree on a course of action which would avoid or satisfactorily mitigate an adverse impact, their agreement shall be embodied in a Letter of Resolution, executed by both parties, and specifying how the undertaking will proceed. Except for submission of the certification of completion described in subdivision (c) of this section execution of a Letter of Resolution will conclude the consultation process." (Emphasis added)

In the State Respondents' Supplemental Memorandum of Law, at page 12, respondents concede that Parks, Recreation and Historic Preservation Law includes "the execution of a Letter of Resolution, prior to agency approval of a project." The parties do not controvert that this did not occur prior to agency approval of the 2016 UMP. Thus, it is clear that the Confirmation Resolution and the approval by the DEC and the DOT occurred prior to, and without knowledge of, the Letter of Resolution or any mitigation or avoidance plan. On May 17, 2016, the DEC and the DOT made findings which acknowledged the

prospective nature of the mitigation and avoidance planning.

> "Adverse impacts on historical resources as a result of the implementation of the 2016 Amendment/SEIS will be mitigated through consultation with the New York State Office of Parks, Recreation and Historic Preservation (OPRHP) by NYSDEC and NYSDOT as required by the New York State Historic Preservation Act (SHPA) (PRHPL Article 14), in accordance with the Article 14.09 [sic] process. Detailed design and work plans will be shared and coordinated with other involved agencies as they are developed." (Administrative Return Exhibit 11 page R0866).

The Court hereby finds and adjudges that this pre-approval in derogation of their obligations under the Parks, Recreation and Historic Preservation Law renders the agency action to be arbitrary and capricious. It is irrational and nonsensical to claim that a plan which must include consideration of mitigation and/or avoidance measures for a historical site is final without knowledge, and prior to the formulation, of such mitigation and avoidance measures. The pertinent historical considerations, mandated by statute, were overlooked and/or ignored, rendering the statute's historical preservation statutory protections meaningless. Respondents DEC and DOT considered the project to have an adverse impact on the historical site and approved the project prior to statutory compliance and issuance of the Letter of Resolution. The retroactive, i.e., reversed mitigation plan, *nunc pro tunc* to approval, does not make sense and is not rationally based. This lack of meaningfully addressing any mitigation or avoidance plan is fatal to the 2016 UMP and requires remand.

More significantly, the mitigation and avoidance plan remains inchoate and prospective. The stipulation includes agreement for further consultation and coordination along with video documentation and a future plan for education and interpretation without any time frame. None of the Letter of Resolution's stipulations have been completed or even commenced. All stipulations are prospective and lacking in detail, being simply general agreements for future consultations. At best, it is little more than an agreement to agree.

Finally, any contention that a potential, future restoration of rail service could constitute a mitigation effort

has no rational basis. The mere conjecture of the potential costs of track and tie removal and the subsequent costs of replacement would render any such possibility unreasonable as a serious mitigation and avoidance prospect under any common sensible analysis. Removal of existing National Register listed Adirondack Railroad trackage with a plan to replace railroad infrastructure subsequent to the installation of a multi-recreational use trail just does not make sense (*see,* State Respondents' Memorandum of Law, page 24).

The pertinent regulation, 9 NYCRR § 428.8., states that "[t]o the fullest extent possible it is the duty of every State agency to avoid or mitigate the adverse impacts of its undertakings on eligible or registered properties." In the Court's view, this has not occurred. The retroactive Letter of Resolution and its contents are not based in reason and the petition must be granted.

In formulating and approving the 2016 UMP, the DEC and the DOT did not comply procedurally and substantively with the Parks, Recreation and Historic Preservation Law's statutory and regulatory historic preservation protections as to mitigation and/or avoidance. The Third Amended Verified Petition will be granted as to the third cause of action.

(4) Title to the Travel Corridor

As stated above, the parties have also addressed the updated status of title and reversionary interests regarding Segment 2.

Respondents have conceded that the State is not in possession of fee title to the entire travel corridor, and it is, thus, likewise undisputed that the 2016 UMP is based upon mistaken information, assumptions, and beliefs. This concession is contrary to the long held, but erroneous, belief by respondents that respondents held fee title to the entire Remsen-Lake Placid Travel Corridor. This lack of fee title adds additional support for the relief requested in all three of petitioner's causes of action.

The State of New York does not possess fee title to a one-half mile portion of Segment 2 of the travel corridor. This portion passes directly through the North Country Community College campus in Saranac Lake. The State of New York also does not possess fee title to the end of the travel corridor in Lake Placid.

Specifically, the Saranac Lake parcel (referred to by respondents as the "College Parcel") is subject to and contains the following a reversionary provisions:

> "RESERVING, however, unto the Grantor; (1) a permanent right and easement, 24 feet wide, over and across the parcel of land hereinbefore described, being 12 feet on either side of the center line of Grantor's existing tracks, for the continued maintenance, repair, renewal, operation and use of the existing railroad tracks and appurtenant devices and facilities in connection with the same and with the free and uninterrupted right, liberty and privilege of passing at all times here after over and upon the same with or without locomotives, freight or other cars; it being understood and agreed by and between the parties hereto that the easement hereby reserved will cease and terminate upon formal abandonment of railroad tracks by the Public Service Commission, Interstate Commerce Commission or other governmental bodies empowered to grant abandonment of same and upon removal of such tracks in that event . . ." (Affidavit of Robert A. Morrell, sworn to March 7, 2017, exhibit B)

As for the Lake Placid parcel (referred to by respondents as the "Depot Parcel"), the pertinent reversionary language states,

> "RESERVING, HOWEVER, to the Grantor, the exclusive right and easement to use and occupy for so long as required for railroad tracks, equipment and other transportation facilities in connection with the railroad operations of the Grantor, strips of land twenty-four (24) feet in width, lying twelve (12) feet on each side of the center line of the existing tracks of the railroad of the Grantor as lie within and through the premises hereby conveyed. . ." (Affidavit of Kayla Biltucci, sworn to March 7, 2017, exhibit G)

In this Court's view, prior to finalizing the efforts

to amend the 1996 UMP, a review of the title to the Remsen-Lake Placid Travel Corridor should have been undertaken. That such a reasonable and appropriate title review, which is basic and ordinary legal research, did not occur until after approval of a trail conversion of Segment 2 is inexplicable. When easements are involved, especially for railroads and highways, reversionary interests are reasonably foreseeable. Respondents knew, or should have known, that they did not possess fee title to the entire Remsen-Lake Placid Travel Corridor.

The plain language of the reversionary interests is that upon removal of the railroad tracks the easements terminate. Title to the Saranac Lake parcel ("College Parcel") continues in the college without the encumbrance of the easement. Likewise, as to the Lake Placid parcel ("Depot Parcel"). Although respondents have indicated certain options are being considered prospectively to obtain title, they have not acted upon them (*see generally* Affidavit of Robert A. Morrell, sworn to March 7, 2017, at ¶ 20). Implementing the 2016 UMP will divest New York State of the benefit of an easement over one-half mile of Segment 2 in Saranac Lake as well as the benefit of an easement to the Lake Placid parcel. Whether the owners will enter some type of agreement, require the State of New York to exercise its eminent domain powers, or agree to some other alternative is the subject of conjecture not appropriate for this Court. But it would have been most appropriate for the state respondents to have identified and resolved the issue before undertaking the action complained of here.

Respondents' implementation of the 2016 UMP, given the status of title currently extant as to what could be seen as pivotal links in the chain, is irrational, rendering it to be arbitrary and capricious. The reversionary clauses are clear to this Court. Removal of the tracks completes the second requirement for elimination of the easement in the Saranac Lake parcel. Removal of the tracks completes the elimination of the easement for the Lake Placid parcel. Termination of either of the easements removes any authority for respondents to complete the 2016 UMP along the entirety of Segment 2.

Segment 2 will be, thus, severed and shortened. The planned multi-recreational use trail would need to be re-routed and/or reconfigured. This action will leave portions of Segment 2 outside of the travel corridor and subject to new and different land use classification.

This is a further irrational result based upon information that should have been known to respondents prior to the finalization of the 2016 UMP. As a result, as to the first two causes of action, respondents are not in compliance with the APA Act and the SLMP because the 2016 UMP is rendered unworkable such that the Remsen-Lake Placid Travel Corridor will be changed, divided, and partially eliminated. As to the third cause of action, the travel corridor, a duly registered historical site, will be severed in Segment 2. Based upon the reversionary interest, two parcels currently encumbered by easements will be unburdened of those easements. The balance of Segment 2 will likewise be effectively removed from the historic designation and rendered disconnected parcels. For these additional reasons, attributable to the lack of fee title, the formulation and approval of the 2016 UMP was arbitrary and capricious such that the Third Amended Verified Petition will be granted as to all three causes of action.

For the reasons set forth herein, the various infirmities, considered jointly and severally and cumulatively, the Third Amended Verified Petition must be granted, and the matter remanded.

The balance of the arguments proffered herein have been reviewed, analyzed, and duly considered and are hereby deemed to be without merit.

It does not appear that there are any other issues for the Court's determination.

NOW, THEREFORE, after due deliberation, pursuant to Civil Practice Law and Rules § 7806, it is

ORDERED, ADJUDGED AND DECREED that the Third Amended Verified Petition, filed April 8, 2016, be, and the same hereby is, granted; and it is hereby

ADJUDGED that the respondent Adirondack Park Agency's February 11, 2016, Confirmation Resolution is affected by errors of law and was arbitrary and capricious; and it is

ORDERED that the respondent Adirondack Park Agency's February 11, 2016, Confirmation Resolution is annulled and vacated, in its entirety, and in each and every part; and it is hereby

ADJUDGED that the respondent Department of Environmental Conservation's and respondent Department of Transportation's May 17, 2016, approval of the 2016 UMP is affected by errors of law and was arbitrary and capricious; and it is hereby

ORDERED that the respondent Department of Environmental Conservation's and the respondent Department of Transportation's May 17, 2016, approval of the 2016 UMP is annulled and vacated, in its entirety, and in each and every part; and it is further

ORDERED that the matter of the revision to the 1996 UMP, and all other ancillary matters before this Court, in the above-captioned proceeding, be, and they hereby are, remitted to the respondent Adirondack Park Agency, Department of Environmental Conservation, and Department of Transportation for the development and approval of a UMP that complies with the instant Decision, Order and Judgment and all applicable law, rules, and guidance; and it is further

ORDERED that, subject to further order and judgment of this Court, the New York State Adirondack Park Agency; Leilani Ulrich, in her capacity as Chairperson of the New York State Adirondack Park Agency, or her successor; the New York State Department of Environmental Conservation; Basil Seggos, in his capacity as Acting Commissioner of the New York State Department of Environmental Conservation, or his successor; the New York State Department of Transportation; and Matthew Driscoll, in his capacity as Commissioner of the New York State Department of Transportation, or his successor, as the respondents in the above-captioned matter be, and they hereby are, enjoined and restrained from implementing the 2016 UMP pending preparation and approval of a revised UMP that conforms with the instant Decision, Order and Judgment and all applicable law, rules, and guidance.

ENTER

Robert G. Main, Jr.
Acting Justice of the Supreme Court

Dated at Malone, New York, this 26th day of September, 2017.