SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

In the Matter of the Application of
THE ADIRONDACK PARK COUNCIL, INC.,
Petitioner/Plaintiff,

For a judgment pursuant to CPLR, Article 78 and
CPLR § 3001,

-against-

DECISION and ORDER
Index No.: 155-10
RJI: 01-10-ST1091

ADIRONDACK PARK AGENCY,
DEPARTMENT OF ENVIRONMENTAL
CONSERVATION, OFFICE OF PARKS,
RECREATION AND HISTORIC PRESERVATION,
Respondents - Defendants.

(Supreme Court, Albany County, Motion Term)
(Gerald W. Connolly, Presiding)

APPEARANCES:

LAW OFFICE OF MARC S. GERSTMAN
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Connolly, J.:

In this combined action for a declaratory judgment and special proceeding pursuant to Article 78 of the CPLR, petitioner-plaintiff seeks a judgment pursuant to Article 78 and CPLR 3001 (i) declaring the Adirondack Park Agency Resolution("APA") dated November 13, 2009 approving the "Management Guidance for Snowmobile Trail Siting, Construction and

Maintenance on Forest Preserve Lands in the Adirondack Park" ("Guidance") prepared by APA and the New York State Department of Environmental Conservation ("DEC") to be unlawful, arbitrary, capricious and an abuse of discretion; (ii) declaring the Guidance prepared by APA and DEC for Snowmobile Siting, Construction and Maintenance to be unlawful, arbitrary, capricious and an abuse of discretion; (iii) nullifying and vacating the APA Resolution dated November 13, 2009, and the Guidance; (iv) enjoining respondents and their agents, servants and employees from carrying out or having anyone else carry out on their behalf any further actions in reliance on the Guidance and the APA resolution approving the Guidance; and (v) awarding petitioner costs, disbursements and attorney's fees. Respondents-Defendants oppose petitioner's application and have moved to dismiss the amended petition/complaint: (i) as unripe, and (ii) on the grounds that the amended petition/complaint (a) fails to state a claim; (b) lacks the required prior consent of the appellate division to seek to restrain a constitutional violation; and (c) is contrary to documentary evidence.

Background

The amended petition challenges a document, referred to as the Guidance, drafted by respondents APA and DEC, in conjunction with respondent OPRHP, which establishes new standards and guidelines for the siting, constructing and maintaining of DEC snowmobile trails on Forest Preserve in the Adirondack Park which petitioner argues, *inter alia*, does not comport with the findings and conclusions contained in a 2006 environmental review.

The Adirondack Park consists of six-million acres of land. The public lands constitute the "forest preserve" and are protected by the New York State Constitution and by state statutes. Article XIV, §1 of the New York State Constitution provides that "[t]he 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." The APA, in consultation with DEC, developed the State Land Master Plan ("SLMP") for the development of State-owned lands in the Adirondack Park. Pursuant to Executive Law § 816(1), DEC, in consultation with the APA, is authorized and directed to develop individual management plans ("UMPs") for units of land classified in the SLMP. The UMPs are required to "conform to the general guidelines and criteria" set forth in the SLMP (Executive Law §816(1)).

In 2006, pursuant to the State Environmental Quality Review Act ("SEQRA"), DEC and OPRHP adopted the "Snowmobile Plan for the Adirondack Park and Final Generic Environmental Impact Statement" ("FGEIS"). The FGEIS provides that it is a supplement to the State of New York Snowmobile Trail Plan which was adopted by OPRHP in 1989, to the extent it relates to the Adirondack Park. The FGEIS provides that "[a]s part of the planning and environmental process, the existing snowmobile trail system was assessed and various alternatives for the development of snowmobile trails in the Adirondack Park were analyzed with the assistance of a Snowmobile Focus Group..." (FGEIS, Executive Summary pg 3). The FGEIS' purpose was to "provide conceptual guidance for identifying, developing and maintaining a snowmobile system within the Adirondack Park" ... and "to provide guidance and criteria for developing and maintaining snowmobile trails on the Forest Preserve" (FGEIS, pg 9).

Subsequent to the writing and adoption of the FGEIS, the Guidance, which provides a two-tier classification system for snowmobile trails and standards for the siting, construction and maintenance of snowmobile trails on the Forest Preserve, was drafted.

By resolution adopted on November 13, 2009 the APA approved the Guidance as

consistent with the SLMP. On December 21, 2009, the DEC Commissioner issued a memorandum to "The Record" which approved incorporation of the Guidance in the *Memorandum of Understanding Between the Adirondack Park Agency and the Department of Environmental Conservation Concerning the Implementation of the State Land Master Plan for the Adirondack Park.* In the memorandum, the Commissioner provided that the Guidance replaced the DEC's Office of Natural Resource Policy - 2 (Snowmobile Trails - Forest Preserve) ("ONR2") to the extent such policy applies to the Adirondack Park.

Discussion

Petitioner argues, *inter alia*, that respondents failed to take the necessary legal steps to promulgate the Guidance in accordance with Executive Law §816 and in conformity with the SLMP, that the Guidance authorizes new and rerouted snowmobile trails in a manner which "expands by potentially up to two miles the locations where a snowmobile trail can be sited in violation of the SLMP" and creates definitions which are not defined in the SLMP, that the Guidance violates the terms and conditions established by the FGEIS for the siting, construction and management of snowmobile trails in the Adirondack Park, that promulgation of the Guidance constitutes an action pursuant to SEQRA and required further review pursuant to SEQRA which did not occur, and that DEC did not issue a public notice prior to its adoption of the Guidance nor did it follow other required procedures prior to its recision of an internal policy.

Respondents move to dismiss petitioner's first cause of action, which alleges that the Guidance violates Article XIV, Section 1 of the NYS Constitution as it authorizes the "impairment of the wild forest character of Forest Preserve lands and adversely impact [sic] wildlife and wildlife habitat", on the ground that, *inter alia*, petitioner failed to seek prior

Appellate Division consent for its claim. N.Y. Constitution, Article XIV, §5 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". Petitioner concedes it did not comply with the conditions precedent, and accordingly, the first cause of action must be dismissed.

As to petitioner's second through seventh causes of action, namely that: (i) the Guidance violates the SLMP and the APA acted ultra vires in violation of Executive Law §816 in approving the Guidance, (ii) the APA resolution which determined that the Guidance was consistent with the SLMP was arbitrary, capricious and in error of law, (iii) DEC's adoption and implementation of the Guidance was in violation of Executive Law §816 and unlawful as it violated the SLMP, (iv) DEC's adoption of the Guidance was arbitrary, capricious and in error of law, (v) the Guidance is subject to SEQRA review and (vi) DEC and OPRHP failed to comply with SEQRA prior to adopting the Guidance, based upon a review of the record such causes of action must be dismissed for lack of ripeness.

"The concept of 'ripeness' holds that a 'controversy cannot be ripe if the claimed harm may be prevented or significantly ameliorated by further administrative action or by steps available to the complaining party'" (*Matter of Federation of Mental Health Ctrs. v DeBuono*, 275 AD2d 557, 561-562 [3d Dept 2000], *quoting Church of St. Paul & St. Andrew v Barwick*, 67 NY2d 510, 520 [1986], *cert. denied* 479 US 985]). "A claim contingent on events which may not occur should be dismissed as nonjusticiable" (*Matter of Federation of Mental Health Center, supra; see Matter of New York State Inspection, Sec. & Law Enforcement Empls. v Cuomo*, 64 NY2d 233, 240 [1984]). In determining whether an agency action is ripe for judicial review,

courts ordinarily employ a two-step analysis. "The first step, which is the 'appropriateness inquiry', involves an analysis of the completeness of the agency's action to decide if it inflicts actual and concrete injury, or whether the agency's action, despite being final, awaits consideration of extraneous factors as yet unknown" *(Matter of Rushin v Commissioner of the N.Y. State Dept. of Correctional Servs.*, 235 AD2d 891 [3rd Dept 1997] [internal quotations omitted]). "The second step of the analysis involves a consideration of the effect on the parties if judicial review is declined. If the anticipated harm is insignificant, remote or contingent, or if it may be prevented or ameliorated by further agency action or steps available to the complainant, the controversy will not be deemed ripe for review" (*id.*).

Respondents argue that these causes of action must be dismissed as the Guidance does not constitute "final action" and, does not inflict any injury, at most creating the possibility of potential harm which may or may not occur depending on future agency actions. Respondents note that the petitioner complains the Guidance expands the areas where DEC can site a snowmobile trail system and that DEC will "implement" the Guidance and "apply the Guidance" in harmful ways. Respondents point, however, to the amended complaint/petition and the allegations wherein petitioner alleges that the "next steps in implementation of the Guidance" will include "development of: interim and amended temporary revocable permits ("TRPs") and Adopt-a-Natural Resource Agreements ("AANRS") UMPs or UMP amendments" and "work plans for trail development and non ordinary maintenance activities, and that DEC will implement the Guidance through various administrative mechanisms". Respondents contend that such allegations demonstrate that future administrative actions must occur and that until the UMP process is complete and trails have been planned, approved and subjected to further

environmental review, there is no final administrative action.

Further, respondents argue that not until DEC plans the contemplated snowmobile trails, applying the terms and definitions in the Guidance, will any potential future harm become actual. Respondents contend that petitioner has not experienced any actual harm as the snowmobile trails contemplated by the FGEIS and the Guidance may ultimately be sited, designed and constructed in a manner that petitioner is satisfied with.

Petitioner opposes the motion, alleging, *inter alia*, that the Guidance itself should have been subjected to SEQRA review, and that harm has occurred as the Guidance, which petitioner argues is in contravention with, *inter alia*, the SLMP and FGEIS, will be used in development and amendment of the UMPs. Petitioner also acknowledges, however, that "the specific location of the snowmobile trail system will not be definitively identified until DEC prepares individual or unit management plans (UMPs) for Forest Preserve lands classified as Wild Forest, as required pursuant to Executive Law §816."

The FGEIS provides that "[n]ew and reconfigured trails contemplated for State lands pursuant to this Final Plan/GEIS will require specific authorization in an approved UMP for the location in question" and that the FGEIS contemplated that "amendments to DEC policy" would be needed in order to fully implement the FGEIS. The FGEIS further provides that the UMPs "will be written or amended to reflect the recommendations of the Final Plan/GEIS, to the extent that they are consistent with legal authority, including but not limited to Article XIV of the State Constitution and the APSLMP." The FGEIS provides that designation of community connector snowmobile trails will occur through the UMP process and that the UMP will also establish "how and by what means construction and maintenance of such trails shall occur". Further, the

FGEIS provides that "[c]onstruction of new trails anywhere in the Forest Preserve will require approval in a UMP and be subject to SEQRA", that any expansion of trail width must be authorized in a UMP and would require a site specific SEQRA review, that "[a]ny modification of the existing trail system within the Forest Preserve will be considered through the UMP process", and "[b]ecause the APSLMP requires that management of Forest Preserve lands be planned through UMPs, any reclassification of existing trails and creation of new trails, and the layout of new Community Connector trails will take place through the UMP process, and will receive additional SEQR review in that process".[1]

The express language of the FGEIS provides that the management of Forest Preserve lands be planned through the UMP process, which has admittedly not yet occurred, and that pursuant to such process additional SEQRA review will take place.

Further, the Guidance itself provides that implementation of its terms will occur through "authorization granted directly via an approved UMP or UMP amendment" and "interagency consultation on Work Plans authorized by UMP's or UMP amendments".

As the express language of the FGEIS and Guidance provides that its terms are contingent upon agency development of UMPs and amendments to UMPs (i.e. further governmental action) and upon the corresponding SEQRA review processes that will take place, and as such reviews are either ongoing or have yet to occur, respondents' actions with respect to the Guidance cannot

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[1]The Court additionally notes that to the extent petitioner contends that the Guidance differs from the FGEIS as to the width and character of the contemplated snowmobile trails by providing that the trail width can be 12 feet while the FGEIS provides widths of 9 feet, a review of the FGEIS (pg 52) demonstrates that the two documents are consistent.

be said to be final, nor can it be said to have inflicted actual and concrete injury.[2] Such ongoing administrative proceedings may result in trails that are sited in acceptable locations and constructed in an acceptable manner to petitioner, and, as further agency action and proceedings might render the disputed issues moot or academic, the Guidance cannot be considered definitive action nor can it be said that petitioner's alleged injuries are actual or concrete (*see Matter of Essex County v. Zagata*, 91 NY2d 447, 453 [1998]).[3]

Finally, if judicial review is declined at this point, the anticipated harm is remote and may be ameliorated by further agency actions, as any further action will be subjected to further administrative action (i.e. the UMP process) and further environmental review. To the extent petitioner is unsatisfied with the UMP approval process, they may litigate their claims. While petitioner argues that they will experience harm by potentially having to litigate their claims as against each UMP or amendment thereto, such claim is too speculative at this point to constitute sufficient harm.

Accordingly, petitioner's second through seventh causes of action must be dismissed for lack of ripeness.

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[2]Such Guidance cannot be said to impose an obligation, deny a right or fix some legal relationship as a consummation of the administrative process (*see Guido v Town of Ulster Town Board*, 902 NYS2d 710 [3rd Dept., 2010]; *Sour Mt. Realty Inc. v. New York State Dep't of Envtl. Conservation*, 260 AD2d 920 [3rd Dept., 1999]).

[3]Additionally, to the extent petitioners contend that they will be harmed as they may have to bring repetitive challenges to each individual action implementing the Guidance, in the absence of the final administrative actions implementing the Guidance, petitioner cannot demonstrate that such final actions will constitute actual harm. Petitioners may be satisfied that certain future speculative administrative actions implementing the Guidance do not require litigation. Such speculative harm is insufficient.

Finally, petitioner contends that DEC violated ECL §3-0301(2)(z) by failing to publish the notice of its intention to adopt the Guidance.[4] While petitioner claims that respondent DEC failed to comply with such provision, petitioner has alleged no harm as a result of such alleged violation.[5] The record reflects that petitioner is aware of the Guidance. Such claim must be dismissed for failure to state a cause of action. Moreover, in opposition to the motion to dismiss, petitioner has failed to oppose the motion with respect to this claim. Accordingly, such claim is dismissed.

Therefore, based on the foregoing, it is hereby

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[4]ECL §3-0301(2)(z) provides that

"To further assist in carrying out the policy of this state as provided in section 1-0101 of the chapter the department, by and through the commissioner, shall be authorized to:

(z) Issue and amend guidance memoranda and similar documents of general applicability which are to be relied upon by department personnel for implementation of this chapter, and rules and regulations promulgated pursuant thereto, and for guidance to the general public in complying with the requirements of this chapter; provided, however, that ... (2) no such document shall be implemented until thirty days after the full text, or a summary thereof, along with information on how the full text may be obtained, has been published in the environmental notice bulletin, as defined in section 70-0105 of this chapter. At a minimum, the full text of each such document shall be made available by the department on and after the date of such publication to the public upon request, and, in addition, at least one copy shall be made available in the department's main office and in each regional office for public inspection. The department shall publish and invite public comment on a draft version of any such document, unless it determines that to do so would delay or otherwise impede compliance with the underlying statute or regulation, provided that, when a document is issued without making provisions for public comment, the department shall also publish its reason or reasons for deeming such provisions inappropriate. This paragraph shall not apply to (i) declaratory rulings issued pursuant to section two hundred four of the state administrative procedure act or (ii) documents which only concern the internal management of the agency and which do not have any effect on the rights of or procedures or practices available to the public. Each January, the department shall publish in the environmental notice bulletin an index of its existing guidance documents, and indicate how the full text thereof may be obtained; provided, however, that the secretary of state may exempt the department from compliance with this publication requirement upon a determination that the department has published on its website the full text of all guidance documents on which it currently relies. The secretary of state shall publish a notice of such determination identifying the website in the state register.

[5]Additionally, the Court notes that petitioner has failed to seek mandamus to compel respondent DEC to comply with such provision (*see* CPLR §7803(1)).

ORDERED, that respondents' motion to dismiss the petition is granted for the reasons discussed herein and, accordingly, the relief requested in this action by petitioner is in all respects denied.

This Memorandum constitutes the Decision and Order of the Court. This original Decision and Order is being returned to the attorney for respondents. The below referenced original papers are being mailed to the Albany County Clerk. The signing of this Decision and Order shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the provision of that rule regarding filing, entry, or notice of entry.

SO ORDERED.
ENTER.

Dated: August 31, 2010
Albany, New York

Gerald W. Connolly
Acting Supreme Court Justice

Papers Considered:

1. Amended Notice of Verified Petition and Complaint dated January 15, 2010; Amended Verified Petition/Complaint dated April 8, 2010 with accompanying exhibits; Affirmation in Support of Amended Verified Petition/Complaint of Marc S. Gerstman dated April 8, 2010; Affidavit of Brian Houseal dated March 25, 2010 with accompanying exhibit; The Adirondack Council's Memorandum of Law in Support of Amended Verified Petition and Complaint;
2. Notice of Motion to Dismiss dated May 14, 2010; Affirmation of Susan L. Taylor, Esq. dated May 14, 2010; Memorandum of Law in Support of Respondents' Motion to Dismiss;
3. Affidavit of Marc S. Gerstman dated May 26, 2010; The Adirondack Council's Memorandum of Law in Opposition to Motion to Dismiss; Character of a foot trail;
4. Reply Memorandum of Law in Support of Respondents' Motion to Dismiss.