NEW YRK STATE BAR ASSOCIATION

Environmental Law Section

Fall Meeting

The Otesaga Resort
Cooperstown, New York

October 15, 2016
11:25 a.m.– 12:15 p.m. Constitutional Convention Panel (1.0 CLE Professional Practice)

The Potential for a Constitutional Convention in 2017: Implications for New York's "Forever wild" Forest Preserve and New York's Right to the Environment

Prof. Nicholas Adams Robinson
Elisabeth Haub School of Law
Pace University, White Plains, NY

Introduction

Every twenty years, the New York State Constitution mandates a public decision on whether or not to conduct elections for delegates to convene in a convention to rewrite the constitution. 2017 will focus New Yorkers on this question. This panel examines some of the issues that will arise regarding the constitution and the protection of the environment.

In 1894, New York's Constitutional Convention chose to provide protection for the Forest Preserve of the Adirondack and Catskill regions, in the wake of that era's illegal deforestation and flooding. In 1967, the Convention drafted a "Conservation Bill of Rights" and included it, and when the voters rejected their work (upset over non-environmental issues), the voters adopted that Conservation Bill of Rights in 1969, in the wake of gross levels of air and water pollution and toxic waste mismanagement. Since then the field of environmental law has become an integral part of the rule of law in New York, nationally, and globally. Today, as the State considers whether to amend the constitution, anticipating the wake of the gathering crises of sea level rise, disruption of weather patterns, and other climate change impacts, it is timely to debate debate whether or not New York should add the right to the environment to its constitution.

This Panel will outline the background and legal context for the 2017 Ballot Question and the scope of Article XIV, reviewed in the attached Report of the NYSBA Committee on the State Constitution (Prof. Nicholas A. Robinson), examine current legal issues of New York State law governing the Forest Preserve (Thomas A. Ulasewicz, Esq.) and explore how the State's Public Trust Doctrine provides a foundation or floor sustaining the existing protection for the Forest Preserve (Katherine Leisch, Esq.).

ENVIRONMENTAL CONSERVATION IN NEW YORK'S CONSTITUTION: BACKGROUND & SCOPE

1. The Requirement of Voting on a Convention

- Article XIX, Section 2: "At the general election to be held …every twentieth year … the question "Shall there be a convention to revise the constitution and mend 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 each Senate district shall elect 3 delegates…[who] shall convene on the first Tuesday in April next ensuing after their election … [and] any proposed constitution … shall be submitted to a vote not less than six weeks after the adjournment of such convention.

  NYSBA Committee on the New York State Constitution studies the legal and policy issues arising out of New York's unique and lengthy constitution:

  The Committee on the New York State Constitution will serve as a resource for the Association with regard to issues related to or affecting the New York State Constitution; finalizing substantive provisions of the state constitution and making recommendations with regard to potential changes; promoting initiatives designed to educate the legal community and the public about the state constitution and providing recommendations with regard to the forthcoming public referendum in 2017 on whether to convene a state constitutional convention, and propose the delegates selection process if the convention takes place. The chair is Henry Greenberg.
  See http://www.nysba.org/nyconstitution/

- NEW YORK STATE BAR ASSOCIATION CONSTITUTIONAL REPORTS:

  Two reports are approved by the House of Delegates. Both are succinct and provide essential briefings.
- www.nysba.org/nyconstitution
- www.nysba.org/homerulereport
  A third report, adopted by the Committee, is pending before the House of Delegates for its November 2016 meeting.

2. The Background for Article XIX

THOMAS JEFFERSON URGED "GENEOLOGICAL SOVEREIGNTY":
constitutions should adapt to changing circumstances
Joseph J. Ellis, The Quarter: Orchestrating the Second American Revolution 1783-1789 (2016)

Writing to a Virginian lawyer, Samuel Kercheval, Jefferson stated that a constitution should be revised every 19 to 20 years. Jefferson's time period was based on the mortality rate of his times. Since a majority of adults could be

expected to be dead in approximately 19 years, Jefferson believed that each new generation should have the right to adapt its government to changing circumstances, rather than being ruled by the past. Some criticize this "utopian vision."
Thomas Jefferson's Letter to Samuel Kercheval (1816

3. The Evolution of the NYS Constitution

- July 1776 – 1st Constitution Convention in White Plains – Reconvenes in April 1777 in Kingston – Constitution adopted April 20, 1777 (**with 7,000 words)**
- Amendments were promptly needed – Convene 1801 Convention – How to organize NY's Governance was an on-going debate
- Peter J. Galie, Ordered Liberty: A Constitutional History of New York (1996)
- 1846 "People's Constitution" adds the rule proposing a 20 year Convention ballot question
- 8 Constitutional Conventions: 1801, **1821** (adopts a bill of rights) , **1846**, 1867, **1894** (adopts Education & Forest Preserve Articles), 1915*, **1938**, 1967* (*voters defeated proposed Constitutions)
- Today's Constitution is still that of 1938, ***with 50,000 words***, and additional specific amendments adopted from time to time

4. The Forest Preserve

In 1894, New York led the world enacting the very first constitutional environmental rights.

- "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."
- ***Unanimously adopted in 1894, Article VII; since 1938 Article XIV***
- The history ands case law about Article XIV is reviewed in Nicholas A. Robinson, "Forever Wild": New York's Constitutional Mandates to Enhance the Forest Preserve (Arthur M. Crocker Lecture, Feb. 15, 2007), http://digitalcommons.pace.edu/lawfaculty/284/.; access also at:
- http://digitalcommons.pace.edu/cgi/viewcontent.cgi?article=1283&context=lawfaculty
- Currently Article XIV is subject to judicial enforcement via a CPLR Article 78 preceding in *Protect the Adirondacks! v. NYS DEC and APA* (Index No 2137-13, Sup. Ct., Third Department); tree cutting for snow mobile path in Forest Preserve enjoined, (See http://www.adirondackalmanack.com/2016/09/court-continues-temporary-ban-on-state-tree-cutting.html); pleadings at http://www.protectadks.org/2016/09/papers-filed-in-major-forever-wild-lawsuit-that-will-shape-the-future-of-the-forest-preserve/

5. New York's "Conservation Bill of Rights"

The Conservation Bill of Rights was adopted in 1969, as Article XIV, Section 4. It is discussed in the attached NYSBA Committee report in one of the only legal critiques of this important, but neglected, provision.

Requires NY to conserve and protect air and water, agricultural lands, wetlands, and preserve scenic beauty and lands beyond the Forest Preserve, due to their beauty, "wilderness character," geological, ecological or historic values."

These Conservation Rights arguably have not been given to the people directly (not "self-executing,") and the New York Legislature is slow to implement laws guaranteeing these rights

6. Historical antecedents for "rights" in fundamental laws and constitutions

Magna Carta (1215): "We shall not sell, or deny, or delay right or justice to anyone."

- What is "due process of law"?
- Should Our Constitution be long and detailed, or be concise and broadly guide government?
- Do we want to pay taxes for some governmental service simply because they were constitutionally mandated in past centuries?
- Since our legislature seems unable to reform itself, should we mandate a Constitutional Commission to prepare reforms, as we did from 1868-1894?
- ***The Forest Charter (1217)***: "These liberties and free customs traditionally held, both within and without the royal forests, are granted to all in our realm, to everyone. Everyone is also obliged to observe the liberties and customs granted in the Forest Charter." [Chap. 17] - Nicholas A. Robinson, The Charter of the Forest: Evolving Human Rights in Nature, in *Magna Carta* and the Rule of Law 311 (Daniel Barstow Magraw et al., eds. 2014), http://digitalcommons.pace.edu/lawfaculty/990/.
- Today Pennsylvania and 6 US States and 174 nations provide a right to the environment in their Constitutions.
- Hawaii's Supreme Court has construed the Public Trust Doctrine, which prevents the sovereign from undermining the levels of protection achieved; this duty to maintain progressive levels of protection, is also known internationally in human rights law and in international environmental law, as the Principle of Non-Regression.
- See James May, ed. Principles of Constitutional Environmental Law (ABA 2011), and D Boyd, The Rights Revolution (2012)

7. The Emergence of Environmental Rights

174 nations have environmental rights in their constitutions (John D. Boyd, The Rights Revolution)

- **Montana's Constitution** preserves its pure trout streams
- **Pennsylvania's Constitution** guarantees that its local governments could ban fracking
- **Philippines Constitution** requires today's governments to guarantee a sound environment to "future generations"
- **India's Constitution** requires educating the public about environmental health threats
- We live in the "Anthropocene" – humans have induced global change – glaciers melt and seas rise, weather patterns change and invasive species migrate
- Today, there are analogues to the environmental problems of the 1890s, e.g. forest fires, erosion and floods
- NY has enacted the "Community Risk and Resilience Act" in 2014 – But Disaster Risk Reduction not yet a high NYS priority. Could a Right to the Environment, judicially enforceable, enable State and local authorities to prepare for climate change and protect the environment?
- Is it time for an update on NY Constitutional "Environmental Rights"?

8. The NYSBA Committee on the State Constitution Report

See attached Report

REPORT AND RECOMMENDATIONS
CONCERNING
THE CONSERVATION ARTICLE IN THE
STATE CONSTITUTION (ARTICLE XIV)
ADOPTED BY
THE COMMITTEE ON THE NEW YORK STATE
CONSTITUTION
AUGUST 3, 2016

The Report provides a review of the Historical Development of Article XIV, including the dawn of Constitutional Conservation in the 1894"Forever Wild" Clause, and the 1915 policies reserving in principle 3% of the Preserve for reservoirs (The Burd Amendment) and the 1915, 1938 and 1967 Constitutional Conventions affirming the Forever Wild Mandate. It reviews also the 1969 enactment of the Constitutional Conservation Bill of Rights. The Report notes that many discrete amendments to Article XIV, as well as the vas expansion of the protected "forever wild" forest area in the years form 1894 until today, and examines how the Sections of Article XIV beyond the first Section related to the Forest Preserve. More attention will be needed to Section 3, which is not discussed. It examines the Conservation Bill of Rights in Section 4 in detail, a much neglected part of New York's constitutional environmental rights.

The full text of Article XIV is annexed to the report, for convenience of reference.

9. Prospects for Constitutional Reform

Several discrete proposal for changes in Article XIV have been studied and proffered by *The Adirondack Council.* See generally, http://www.adirondackcouncil.org/page/information-on-november-2013-adirondack-constitutional-amendments-125.html and http://www.adirondackcouncil.org/page/constitutional-amendments-153.html

The Adirondack Mountain Club is actively involved in constitutional issues involving the Forest Preserve. http://www.adk.org/page.php?pname=current-issues-constitutional-amendments

Beyond the environmental conservation issues, various recommendations of other Civic Groups have been made, e.g. Citizens Union, NY PIRG, and others.

Many education programs will be convened about various aspects of the Constitution in the coming months, including at the Rockefeller Institute in Albany, a law review symposium in the spring convened by the Pace Law Review at the Elisabeth Haub School of Law (White Plains, NY). One upcoming event is the forum on October 20th, 4-6 pm, will be held at Columbia Law School, in New York City, on the Constitution's Home Rule Articles (see the NYSBA Report on that issue, *supra*). Former NYC Mayor David Dinkins, the only living delegate from the 1967 Convention, will be speaking, along with others.

There many other Constitutional Articles that deserve study and present opportunities to improve the constitutional basis for governance in New York State:

- State (Art. VII) and Local (Art. VIII) Finances
- Taxation (Art. XVI)
- Education (Art. XI)
- Corporations (Art. X)
- Canals (Art. XV)
- Social Welfare (Art. XVII)
- Housing (Art. XVIII)
- Defense (Art. XII)

Beyond this Panel Discussion:

> *NYSBA House of Delegates' Meeting November 6, 2016, is scheduled to consider the Committee on the Constitution's Report on Conservation, and any comments yet to be submitted by Environmental Law Section's Executive Committee Recommendations*

Annex: NYSBA Report on environmental conservation in the Constitution.

NEW YORK STATE BAR ASSOCIATION

REPORT AND RECOMMENDATIONS

CONCERNING

THE CONSERVATION ARTICLE IN THE STATE CONSTITUTION (ARTICLE XIV)

ADOPTED BY

THE COMMITTEE ON THE NEW YORK STATE CONSTITUTION

AUGUST 3, 2016

Membership of the New York State Bar Association's Committee on the New York State Constitution

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INTRODUCTION AND EXECUTIVE SUMMARY

The New York State Constitution mandates that every 20-years voters be asked the following question: "Shall there be a convention to revise the constitution and amend the same?"[1] The next such referendum will be held on November 7, 2017. What follows is a report and recommendations of the New York State Bar Association's ("State Bar") Committee on the New York State Constitution ("the Committee") concerning the conservation article in the State Constitution, Article XIV.

In 1894, a New York State Constitutional Convention made world history by adopting the first constitutional provisions mandating nature conservation.[2] In the debates over the establishment of an Adirondack and Catskill Forest Preserve ("the Forest Preserve"), Convention delegates concurred with their President — the eminent lawyer Joseph H. Choate — when he observed: "You have brought here the most important question before this Assembly. In fact, it is the only question that warrants the existence of this convention."[3]

Approved by the voters in 1894, this groundbreaking provision, known as "the forever wild clause," is "generally regarded as the most

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[1] N.Y. CONST. art. XIX, § 2 ("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. The delegates so elected shall convene at the capitol on the first Tuesday of April next ensuing after their election, and shall continue their session until the business of such convention shall have been completed. . . .").

[2] PETER J. GALIE, THE NEW YORK STATE CONSTITUTION: A REFERENCE GUIDE 245 (1991) [hereinafter, "REFERENCE GUIDE"].

[3] *Quoted in* 2 ALFRED L. DONALDSON, A HISTORY OF THE ADIRONDACKS 190 (1921) [hereinafter, "HISTORY OF THE ADIRONDACKS"].

important and strongest state land conservation measure in the nation."[4] It is now part of Article XIV of the State Constitution,[5] which currently consists of five sections.

Section 1 contains the forever wild clause, establishing and protecting the Forest Preserve, and then carving out exceptions for certain lands and uses in it. The historic language is set forth in Section 1's first two sentences:

> 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.[6]

Section 2 provides for the creation of public reservoirs within the Forest Preserve.[7] Section 3 recognizes that forest and wildlife conservation are public policy and permits acquisition of additional lands outside the Forest Preserve for these purposes.[8] Section 4 — the so-called "Conservation Bill of Rights" — recognizes that the conservation and preservation of the natural resources and scenic beauty of the State are public policy and provides for State acquisition of lands for a "state nature

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[4] WILLIAM R. GINSBERG, The Environment, *in* DECISION 1997: CONSTITUTIONAL CHANGE IN NEW YORK 318 (Gerald Benjamin & Hendrik N. Dullea eds., 1997) (paper prepared for the New York State Temporary State Commission on Constitutional Revision established prior to the 1997 mandatory referendum vote on whether to hold a Constitutional Convention).

[5] PETER J. GALIE, ORDERED LIBERTY: A CONSTITUTIONAL HISTORY OF NEW YORK 173, 295-97, 347-49 (1996) [hereinafter, "ORDERED LIBERTY"].

[6] N.Y. CONST. art. XIV, § 1.

[7] *Id.* § 2 (on "Reservoirs"; section titles summarize content and are not part of the Constitution).

[8] *Id.* § 3 (on "Forest and wild life conservation; use or disposition of certain lands authorized").

and historical preserve" located outside the Forest Preserve.[9] Finally, Section 5 addresses how violations of Article XIV may be enjoined.[10]

The Forest Preserve has stood the test of time, enjoying widespread public support since its enactment.[11] Constitutional Conventions held in 1915, 1938 and 1967 all concluded that the forever wild clause should be retained, and voters have defeated all efforts to dilute it. Moreover, since 1894, the State has vastly expanded the acreage of the Forest Preserve, purchasing lands with funds approved by bond acts, legislative appropriations and gifts.[12] Voters have only removed a relatively small volume of acres from the Forest Preserve, through surgically-precise amendments.[13]

In 1997, when New York held its last mandatory referendum on whether to call a Constitutional Convention, concern that a Convention might consider ill-advised changes to Article XIV prompted opposition in some quarters.[14] After more than 120 years, however, the forever wild

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[9] *Id.* § 4 (on "Protection of natural resources; development of agricultural lands").

[10] *Id.* § 5 (on "Violations of article; how restrained").

[11] GINSBERG, The Environment, *supra* note 4, at 318.

[12] DAVID STRADLING, THE NATURE OF NEW YORK: AN ENVIRONMENTAL HISTORY OF THE EMPIRE STATE 102-04 (2010).

[13] These amendments appear as the clauses that begin with the word "Notwithstanding" in Section 1 of Article XIV. *See infra* Appendix A (setting forth each "notwithstanding" amendment). An example of such a limited amendment occurred on November 5, 2013, when the voters approved the Raquette Lake amendments to allow 200 landowners and public facilities to clear title of legal impediments since 1848 affecting their properties, while enlarging the size of the Forest Preserve by adding 295 acres on the Marion River. *See* MIKE PRESCOTT, *Commentary: Vote Yes on the Township 40 Amendment*, ADIRONDACK ALMANAC (Oct. 8, 2013), http://www.adirondackalmanack.com/2013/10/commentary-vote-yes-township-40-amendment.html.

[14] For example, in 1997, a task force of the New York City Bar Association concluded that "the risk of elimination or dilution of the 'forever wild' provisions far outweighs the nominal or speculative gains that could be achieved at a constitutional convention." ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, REPORT OF THE

clause remains intact. Throughout its history, there has never been broad-based public support for repealing or diluting the forever wild protections, and nothing in the lengthy record of past Conventions and amendments to Article XIV suggest that delegates to a 2019 Convention would seek to do so. In any event, worries over the forever wild clause's future should not inhibit study and robust debate over other provisions in Article XIV. Simply put, while there is no reason to modify the forever wild clause, opportunities to simplify and enhance other provisions in Article XIV merit serious consideration by policymakers and the public.

Indeed, few New Yorkers know what Article XIV covers, beyond the "forever wild" clause. Analysis of this one article, illustrates how comparable studies of other articles can make a significant contribution to the public's understanding of the State Constitution. The Committee's review of Article XIV suggests at least four potential changes that warrant study and debate:

First, since the forever wild clause's adoption in 1894, the text immediately following it has been the subject of 19 amendments, making Section 1, by far, the most amended section of the Constitution.[15] The net result is a series of detailed exceptions, consisting of 1,401 words, which have also rendered Section 1 one of the longest sections in the Constitution.[16] One way to eliminate this excessive verbiage — and thereby

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TASK FORCE ON THE NEW YORK STATE CONSTITUTIONAL CONVENTION *in* 52 THE RECORD 627-28 (1997) (hereinafter, "CITY BAR REPORT").

[15] PETER J. GALIE & CHRISTOPHER BOPST, *Constitutional "Stuff": House Cleaning the New York Constitution — Part II,* 78 ALB. L. REV. 1531, 1545-46 (2015) [hereinafter, *"House Cleaning"*]; *see also* GALIE, ORDERED LIBERTY, *supra* note 5, at 173 ("The very stringency of [the forever wild clause's] . . . language . . . has frequently interfered with legitimate and important uses of the land, such as scientific forestry. Not surprisingly, this provision has been amended fifteen times [as of 1996] to accommodate other uses.").

[16] GALIE & BOPST, *House Cleaning, supra* note 15, at 1540. *See* N.Y. CONST. art. XIV, § 1, *infra* Appendix A (setting forth each "notwithstanding" amendment).

enhance the forever wild mandate — would be to place it in a separately authorized constitutional document.[17]

Second, Section 2, adopted in 1913, reserving up to 3% of the Forest Preserve for constructing possible water reservoirs, has rarely been invoked, and the reasons behind its adoption may no longer exist.[18] An argument can thus be made that Section 2 should be eliminated.

Third, the mandate in the Conservation Bill of Rights (Section 4) to establish a natural and scenic preserve has been unfulfilled. The State has made little effort to implement this mandate, which lacks the clarity of the forever wild clause in Section 1. Other states have natural and scenic preserves, and their approaches could be emulated in New York.

Fourth, the "rights" set forth in Section 4 are not "self-executing,"[19] meaning that they cannot be invoked absent legislative authorization. Several other states,[20] such as Pennsylvania,[21] and 174 nations,[22] have adopted and implemented constitutional "environmental rights." The object of constitutional environmental rights is to ensure that citizens have a right

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[17] For example, New Jersey includes a list of amendments in a constitutional "Schedule." *See* N.J. CONST. art. XI.

[18] *See infra* notes 49 to 51, and 93 to 102, and accompanying text.

[19] *See* GINSBERG, The Environment, *supra* note 4, at 221-29.

[20] BARTON H. THOMPSON, JR., *The Environment and Natural Resources, in* 3 STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY: THE AGENDA OF STATE CONSTITUTIONAL REFORM ch. 10 (G. Alan Tarr & Robert F. Williams eds., 2006).

[21] *See* PA. CONST. art. I, § 27 ("The people have a right to clean air, pure water, and the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of the all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of the people."); *see generally*, James R. May & William Romanowicz, *Environmental Rights in State Constitutions*, *in* PRINCIPLES OF CONSTITUTIONAL ENVIRONMENTAL LAW 305 (James. R. May ed., 2011).

[22] DAVID R. BOYD, THE ENVIRONMENTAL RIGHTS REVOLUTION (2012).

— and government has a duty — to provide, resilient and effective responses for environmental problems.[23] Whether New York should amend Article XIV to include an enforceable "Environmental Bill of Rights" to address contemporary environmental challenges is a question worthy of consideration.

This report takes no position on whether a Constitutional Convention should be called in 2017, or if called, how in 2019 it should address potential changes to Article XIV. Even so, if the voters wish to simplify and enhance the present Constitution, Article XIV provides opportunities to do so.

To provide background for public discussion and debate, this report summarizes the Committee's background and study of Article XIV, provides a historical overview of its provisions, and evaluates potential amendments.

I. BACKGROUND OF THE REPORT

On July 24, 2015, State Bar President David P. Miranda announced the creation of The Committee on the New York State Constitution. The Committee serves as a resource for the State Bar on issues relating to or affecting the State Constitution; makes recommendations regarding potential constitutional amendments; provides advice and counsel regarding the mandatory referendum in 2017 on whether to convene a State Constitutional

[23] For discussion of other states' constitutional environmental rights provisions, *see infra* notes 119 to 126, and accompanying text. New York State and local governmental have begun to address sea level rise and storm surges, such as experienced in Superstorm Sandy in 2012. In 2014, for example, the State Legislature enacted, and Governor Cuomo signed, The Community Risk and Resilience Act, 2014 N.Y. Sess. Laws ch. 355 (S-6617B) (McKinney) (codified as amended in scattered sections of N.Y. ENVTL. CONSERV. LAW, N.Y. PUB. HEALTH LAW, and N.Y. AGRIC. & MKTS. LAW), which provides for planning to cope with ongoing sea level rise, larger numbers of extreme weather events, and other impacts of climate change. Some other states provide constitutional provisions to cope with climate change impacts. *See, e.g.,* N.J. CONST. art. VIII, § 6(a) (directing, in Tax and Finance Article, that funds shall be available for flood and storm damage). It may be asked whether or not climate change today is an environmental issue comparable to the need in 1894 to save forest lands, or in 1967 to abate extreme pollution through framing a "Conservation Bill of Rights" (adopted just before "Earth Year," 1969), which led to the enactment of laws for pollution control, wetlands preservation, and other environmental legislation of the 1970s and 1980s.

Convention; and promotes initiatives designed to educate the legal community and public about the State Constitution.

On March 10, 2016, the Committee began its study of Article XIV, by listening to a presentation delivered by Committee member Nicholas A. Robinson, Gilbert and Sarah Kerlin Distinguished Professor of Environmental Law Emeritus at the Elisabeth Haub School of Law at Pace University.

At the Committee's next meeting on April 29, 2016, it heard from two additional distinguished experts on environmental law: Michael B. Gerrard and Philip Weinberg. Professor Gerrard is the Andrew Sabin Professor of Professional Practice at Columbia Law School, teaches courses on environmental law, climate change law, and energy regulation, and is director of the Sabin Center for Climate Change Law. Professor Weinberg taught constitutional and environmental law at St John's Law School, after establishing and heading the Environmental Protection Bureau in the New York State Department of Law under Attorney General Louis J. Lefkowitz, and is currently an adjunct member of the faculty of the Elisabeth Haub School of Law at Pace University. Professors Gerrard and Weinberg discussed Article XIV, including its relevance to emerging environmental issues, such as the impacts of climate change in New York.

After further discussion and review, the Committee concluded that the public and legal profession would be well served by a report that provided a review of significant issues concerning Article XIV. On June 2, 2016, the Committee met and reviewed a first draft of this report. The report's final report and recommendations were considered and generally agreed at a meeting held on July 14, 2016, with final unanimous approval, after reviewing editorial refinements, on August 3, 2016.

II. THE HISTORICAL DEVELOPMENT OF ARTICLE XIV[24]

Since 1894, the New York State Constitution has included an article addressing nature conservation. In that year the Constitutional Convention adopted and voters approved the forever wild clause that conferred constitutional protection of the Forest Preserve.[25] Over time, and through numerous amendments, the current provisions of Article XIV took shape. To understand the opportunities that exist for simplifying and enhancing Article XIV, it is essential to recall the history of how it came to be.

A. The Dawn of Constitutional Conservation

New York inaugurated constitutional conservation in the last quarter of the 19th century because citizens were increasingly troubled by mismanagement of forests in both the Catskill and Adirondack regions of the State.[26] Verplank Colvin, appointed State Surveyor in 1870, had been

[24] The Committee acknowledges the research on the legal history of Article XIV by its member Professor Nicholas A. Robinson.

[25] *See* J. HAMPDEN DOUGHERTY, CONSTITUTIONAL HISTORY OF NEW YORK 350 (2d ed. 1915) (In 1894, "[t]he convention initiated the sound policy of protecting the lands of the State known as the forest preserve, forbad their being leased, sold or exchanged or taken . . . This was the first constitutional recognition of forestation . . ."). Previously, the Forest Preserve had been established by statute. 1885 N.Y. Laws ch. 283, §§ 7 & 8. The Forest Preserve is today defined in Article 9 of the Environmental Conservation Law. *See* N.Y. ENVTL. CONSERV. LAW § 9-0101(6) ("The 'forest preserve' shall include the lands owned or hereafter acquired by the state within the county of Clinton, except the towns of Altona and Dannemora, and the counties of Delaware, Essex, Franklin, Fulton, Hamilton, Herkimer, Lewis, Oneida, Saratoga, Saint Lawrence, Warren, Washington, Greene, Ulster, and Sullivan . . . .").

[26] Extreme forest fires, erosion, flooding and loss of flora and fauna accompanied extensive logging operations, in the Catskills and Adirondacks. In THE ADIRONDACK PARK, Frank Graham, Jr. described the public debates and legislative lobbying of the time. The issues included: intense debates about economic trade-offs between advocates of scientific forestry as opposed to unbridled timber exploitation; distress about unlawful corruption by lumber interests; concerns to preserve watersheds to ensure water supplies for many uses, especially the flow for the Erie Canal; and vocal calls to preserve resources for fish and game, other recreation, health and for spiritual values. *See* FRANK GRAHAM, JR., THE ADIRONDACK PARK *passim* (1978) [hereinafter, "THE ADIRONDACK PARK"].

mapping the Adirondacks for the first time. He and others alerted the State to growing environmental degradation in the wake of undisciplined timbering. As early as 1868, Colvin had urged "the creation of an Adirondack Park or timber preserve under the charge of a forest warden and deputies."[27] Vast areas of trees were being clear-cut and the lands abandoned to fires and erosion. Based on Colvin's topographical survey reports, in 1883, the Legislature banned sales of State lands in the 10 Adirondack counties, appropriated funds for the first time to buy lands, and directed Colvin to locate and survey all State lands.[28] In 1884, the State Comptroller issued a report of investigations into unpaid taxes on abandoned lands. That report featured maps of the State's lands in the Forest Preserve, along with a more extensive map depicting the wider Adirondack region as a "park," with its borders delineated in blue. This is the origin of the term "Blue Line," which continues to refer to the Adirondack Park's borders, an area encompassing both the Forest Preserve and other public and private lands.[29]

On May 15, 1885, the Legislature adopted legislation to establish the Forest Preserve in both the Catskills and Adirondacks, with a State Forest Commission to oversee it.[30] Just prior to the Forest Preserve's

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[27] DONALDSON, HISTORY OF THE ADIRONDACKS, *supra* note 3, at 164-65.

[28] *Id.* at 171-75.

[29] The Forest Preserve was defined by the N.Y. Laws of 1885 (ch. 283) to be situated in "the counties of Clinton, excepting the towns of Altona and Dannemora, Essex, Franklin, Fulton, Hamilton, Herkimer, Lewis, Saratoga, St. Lawrence, Warren, Washington, Greene, Ulster and Sullivan." The Adirondack Park was established by the N.Y. Laws of 1892 (ch. 707). The Adirondack and Catskill Forest Preserve and the Adirondack Park were re-enacted in the N.Y. Laws of 1893 (ch. 332, §§ 100 & 120).
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[30] N.Y. Laws of 1885 (ch. 283, § 7) provided:

> All the lands now owned or that any hereafter be acquired by the State of New York within the counties of Clinton, excepting the towns of Altona and Dannemora, Essex, Franklin, Fulton, Hamilton, Herkimer, Lewis, Saratoga, St. Laurence, Warren, Washington, Greene, Ulster, and Sullivan, shall constitute and be known as the Forest Preserve.

establishment, on April 20, 1885, the Legislature had transferred the mountain lands and forests, then held by Ulster County, to the State in settlement of the State's outstanding claims for tax revenues.[31] Many parcels of land in the North Woods had escheated to the State,[32] because loggers, after clear-cutting the timber had ceased to pay annual taxes due and abandoned their properties.[33] These damaged lands became the first Forest Preserve acreage.

In the decade after 1885, despite the Forest Commission's oversight, 100,000 acres of forest were logged unlawfully in the Adirondacks. These years saw both increased land degradation and public demands for enhanced protection. In 1886, William F. Fox, a representative of the State Forest Commission, visited the Forest Preserve in the Catskills and noted its value for watershed and recreation, encouraging its protection.[34] By 1890, the Forest Commission had issued a special report, "Shall a Park be established in the Adirondack Wilderness?"[35] However, in 1893 the Forest Commission

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The statute further provided that the lands of the Forest Preserve "shall be kept forever wild" and "shall not be sold, nor shall they be leased or taken by any person or corporation, public or private." *Id.* § 8.

[31] ALF EVERS, THE CATSKILLS: FROM WILDERNESS TO WOODSTOCK ch. 77 (1972) [hereinafter, "CATSKILLS"].

[32] *See, e.g.*, *People v. Turner,* 72 Sickels 227, 117 N.Y. 227, 22 N.E. 1022 (1889) (involving a plea that defendant had not cut state trees unlawfully based on defects in an 1877 tax sale of lands in default of taxes for the years 1864 through 1871).

[33] In 1885, New York State owned 681,374 acres in the Adirondacks and 34,000 acres in the Catskills. Today, the State owns 2.6 million acres in the Adirondack Preserve and 286,000 acres in the Catskill Preserve. N.Y. DEPT. Envtl. Conserv., http://www.dec.ny.gov/lands/4960.html.

[34] EVERS, CATSKILLS, *supra* note 31, at 579-80.

[35] NEW YORK STATE FOREST COMMISSION, THE SPECIAL REPORT OF THE NEW YORK FOREST COMMISSION ON THE ESTABLISHMENT OF AN ADIRONDACK STATE PARK (1891).

also approved extensive wood cutting contracts, which the State Surveyor and the State Engineer disapproved.[36]

B. 1894: The Forever Wild Clause

Concerns over the destruction of the State's forests, and the resulting impact on the public's health and well-being, became a central issue during the 1894 Constitutional Convention.[37] A delegate from New York City, David McClure,[38] introduced an amendment to the Constitution that was supported by delegates committed to nature conservation, led by Louis Marshall, a prominent constitutional lawyer.[39] The heart of the proposed amendment read: "The lands now or hereafter constituting the forest preserve shall be forever kept as wild forest lands. They shall not be sold, nor shall they be leased or taken by any person or corporation, public or private."[40] This language was refined a bit and during the Convention's debates, Judge William P. Goodelle, a delegate from Syracuse, proposed the addition of a few extra words. The Convention adopted the revised text of New York's first "forever wild" clause by a vote of 122 to 0, which made it the only amendment to be unanimously embraced at that Convention or any prior Convention.[41]

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[36] *Id.* at 186.

[37] GALIE, ORDERED LIBERTY, *supra* note 5, at 173.

[38] DONALDSON, HISTORY OF THE ADIRONDACKS, *supra* note 3, at 189-92.

[39] OSCAR HANDLIN, *Introduction, in* LOUIS MARSHALL: CHAMPION OF LIBERTY xi, (Charles Reznikoff ed., 1957). *See also* HENRY M. GREENBERG, *Louis Marshall: Attorney General of the Jewish People*, *in* NOBLE PURPOSES: NINE CHAMPIONS OF THE RULE OF LAW at 111 (Norman Gross ed., 2006).

[40] GEORGE A. GLYNN, ed., DOCUMENTS AND REPORTS OF THE [1894] CONSTITUTUTIONAL CONVENTION 172 (1895).

[41] *See* JOURNAL OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEW YORK, BEGUN AND HELD AT THE CAPITOL, IN THE CITY OF ALBANY, ON TUESDAY, THE EIGHTH DAY OF MAY, 1894 786-87; DONALDSON, HISTORY OF THE ADIRONDACKS, *supra* note 3, at 189-92.

The 1894 Convention also addressed how violations of the forever wild clause were to be enjoined. The delegates settled on an enforcement mechanism (the current Section 5) that authorized proceedings brought for this purpose by the State, or by a private citizen with the consent of the Appellate Division of the Supreme Court, on notice to the State Attorney General.[42]

The forever wild clause and its companion enforcement mechanism were placed in Article VII, Section 7, which was approved by the voters on November 6, 1894.[43] Opponents of the forever wild mandate immediately challenged the scope of the provision. In 1896, the Legislature placed before the electorate an amendment that would allow timbering on State lands. However, the proposed amendment was resoundingly defeated, by a vote of 710,505 to 321,486.[44]

New York courts soon took notice of the forever wild clause. In an 1899 case, the Court of Appeals observed: "The primary object of the park, which was created as a forest preserve, was to save the trees for the threefold purpose of promoting the health and pleasure of the people, protecting the water supply as an aid to commerce and preserving the timber for use in the future."[45]

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[42] Former N.Y. CONST. art. VII, § 7 (now N.Y. CONST. art. XIV, § 5). Examples of such lawsuits include: *Helms v. Reid,* 90 Misc.2d 583, 394 N.Y.S.2d 987 (Sup. Ct. Hamilton Cnty. 1977); *Slutzky v. Cuomo,* 128 Misc. 2d 365, 490 N.Y.S.2d 427 (Sup. Ct. Albany Cnty. 1985).

[43] DONALDSON, HISTORY OF THE ADIRONDACKS, *supra* note 3, at 193.

[44] *See* HISTORICAL SOCIETY OF THE NEW YORK COURTS, VOTES CAST FOR AND AGAINST PROPOSED CONSTITUTIONAL CONVENTIONS AND ALSO PROPOSED CONSTITUTIONAL AMENDMENTS, https://www.nycourts.gov/history/legal-history-new-york/documents/Publications_Votes-Cast-Conventions-Amendments.pdf [hereinafter, "VOTES CAST FOR AND AGAINST"].

[45] *People v. Adirondack Ry. Co.,* 160 N.Y. 225, 248, 54 N.E.2d 689, 696 (1899), *aff'd,* 176 U.S. 335 (1900).

Nearly every year since the forever wild clause's enactment, the State has acquired lands in the Catskills and Adirondacks to add to the Forest Preserve, with funds provided by Bond Acts approved by the voters, or from appropriations enacted by the Legislature.[46] For example, in 1916, by a majority of 150,496, voters approved a Bond Act to acquire lands for the Palisades Interstate Park and to increase lands in the Forest Preserve.[47] Many subsequent Bond Acts have financed acquisitions expanding the Forest Preserve.[48]

C. 1913: The Burd Amendment

In 1911, a constitutional amendment (known as the "Burd Amendment") was proposed allowing up to 3% of the Forest Preserve to be flooded for reservoirs. This would allow water to be diverted for municipal drinking water, wells, canals, and flood control.[49] Voters approved the Burd Amendment in 1913, and it appears today in Section 2 of Article XIV.[50]

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[46] JANE EBLEN KELLER, ADIRONDACK WILDERNESS: A STORY OF MAN AND NATURE 194-95 (1980). After the great "blowdown" of 1950, a storm of hurricane proportions, on the advice of the New York Attorney General, the Legislature authorized the removal of vast amounts of destroyed trees to avert forest fires and disease, and funds from the wood collected and sold were used to buy more lands to add to the Forest Preserve. *Id.* at 228-30.

[47] 1916 N.Y. Laws ch. 569.

[48] For example, Bond Acts approved by the voters in 1960, 1965, 1986, 1993, and 1996 authorized acquisitions of parks lands. *See* N.Y. State Fin. Law § 97-d (entitled, Environmental Quality Bond Act Fund"). Legislative appropriations and gifts have also enabled additions to the Forest Preserve. As of July 2016, the Forest Preserve contains three million acres in the Adirondacks and 287,500 acres in the Catskills. *See* N.Y. Dep't of Envtl. Conserv., *New York's Forest Preserve*, http://www.dec.ny.gov/lands/4960.html.

[49] STACEY LAUREN STUMP, "Forever Wild," *A Legislative Update on New York's Adirondack Park,* 4 ALB. Gov't L. REV. 682, 694 (2011) [hereinafter, "Forever Wild"].

[50] Former N.Y. CONST. art. VII, § 16 (now N.Y. CONST. art. XIV, § 2).

However, this allotment of potential reservoir sites has been rarely invoked.[51]

D. 1915, 1938 and 1967: Constitutional Conventions Affirm the Forever Wild Mandate

Delegates to the 1915 Constitutional Convention reaffirmed the 1894 forever wild mandate.[52] Similarly, the 1938 Constitutional Convention restated the "forever wild" clause and its enforcement mechanism in a revised Article XIV, with Sections 1 and 5 protecting the Forest Preserve.[53] Additionally, the 1938 Convention added forest and wildlife conservation measures in Section 3.1, in order to facilitate increasing the land area of the Forest Preserve;[54] and Section 3.2, to provide that State lands, situated

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[51] *See infra* notes 93 to 102, and accompanying text.

[52] GINSBERG, The Environment, *supra* note 4, at 318 ("The commitment to forest preservation and a strict interpretation of the 'Forever Wild' clause was reaffirmed by delegates to the 1915 Constitutional Convention.") (citing N.Y. CONSTITUTIONAL CONVENTION, UNREVISED RECORD 1336 (1915)). *See also Ass'n for the Protection of the Adirondacks v. MacDonald,* 228 A.D. 73, 79-80, 239 N.Y.S. 31, 38 (3d Dept. 1930) ("The constitutional convention of 1915 incorporated the 1894 provision verbatim, except that it added the words 'trees and' before the word 'timber' and then expressly added provisions for reforestation, for the construction of fire trails, for the removal of dead trees and dead timber for reforestation and fire protection solely, and for the construction of a state highway from Long Lake to Old Forge."), *aff'd* 253 N.Y. 234, 170 N.E. 902 (1930).

[53] *See* GALIE, ORDERED LIBERTY, *supra* note 5, at 295 ("The 1938 convention created a separate article for the conservation provisions of the constitution. At that time these provisions were primarily, but not exclusively, concerned with the forest preserves of the state. The central provision placed an absolute prohibition on the use of the preserve in the desire to keep it 'forever . . . wild.'").

[54] N.Y. CONST. art. XIV, § 3.1 ("Forest and wild life conservation are hereby declared to be policies of the state. For the purpose of carrying out such policies the legislature may appropriate moneys for the acquisition by the state of land, outside of the Adirondack and Catskill parks as now fixed by law, for the practice of forest or wild life conservation. The prohibitions of section 1 of this article shall not apply to any lands heretofore or hereafter acquired or dedicated for such purposes within the forest preserve counties but outside of the Adirondack and Catskill parks as now fixed by law, except that such lands shall not be leased, sold or exchanged, or be taken by any corporation, public or private.").

outside contiguous Forest Preserve acres, might be sold in order to permit further acquisitions within the Forest Preserve.[55]

The last Constitutional Convention of the 20th century occurred in 1967. Then, as before, there was little partisan disagreement. The delegates left the historic language of the forever wild clause intact.[56]

E. 1969: The Conservation Bill of Rights

At the 1967 Constitutional Convention, significant amendments to strengthen the State's environmental stewardship were adopted, without a single dissenting vote, and became known as the "Conservation Bill of Rights."[57] These amendments failed when the voters rejected the Convention's proffered Constitution in 1967.[58] These same provisions were again presented to the electorate in 1969 as a separate constitutional amendment, and adopted by a vote of 2,750,675 to 656,763.[59] It now appears as Section 4 of Article XIV and reads as follows:

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[55] *Id.* § 3.2 ("As to any other lands of the state, now owned or hereafter acquired, constituting the forest preserve referred to in section one of this article, but outside of the Adirondack and Catskill parks as now fixed by law, and consisting in any case of not more than one hundred contiguous acres entirely separated from any other portion of the forest preserve, the legislature may by appropriate legislation, notwithstanding the provisions of section one of this article, authorize: (a) the dedication thereof for the practice of forest or wild life conservation; or (b) the use thereof for public recreational or other state purposes or the sale, exchange or other disposition thereof; provided, however, that all moneys derived from the sale or other disposition of any of such lands shall be paid into a special fund of the treasury and be expended only for the acquisition of additional lands for such forest preserve within either such Adirondack or Catskill park.").

[56] HENRIK N. DULLEA, CHARTER REVISION IN THE EMPIRE STATE: THE POLITICS OF NEW YORK'S 1967 CONSTITUTIONAL CONVENTION 245 (1996) [hereinafter, "1967 CONSTITUTIONAL CONVENTION"].

[57] *Id.* at 250 ("The Conservation Bill of Rights was adopted, 175-0, with support from all sides.").

[58] *Id.* at 349-50.

[59] VOTES CAST FOR AND AGAINST, *supra* note 44.

> The policy of the state shall be to conserve and protect its natural resources and scenic beauty and encourage the development and improvement of its agricultural lands for the production of food and other agricultural products. The legislature, in implementing this policy, shall include adequate provision for the abatement of air and water pollution and of excessive and unnecessary noise, the protection of agricultural lands, wetlands and shorelines, and the development and regulation of water resources. The legislature shall further provide for the acquisition of lands and waters, including improvements thereon and any interest therein, outside the forest preserve counties, and the dedication of properties so acquired or now owned, which because of their natural beauty, wilderness character, or geological, ecological or historical significance, shall be preserved and administered for the use and enjoyment of the people. Properties so dedicated shall constitute the state nature and historical preserve and they shall not be taken or otherwise disposed of except by law enacted by two successive regular sessions of the legislature.[60]

Following the adoption of this provision, Governor Nelson A. Rockefeller reconstituted the New York State Conservation Department into the Department of Environmental Conservation. Additionally, in the 1970s the Legislature enacted laws dealing with air and water pollution and other environmental issues.[61] These developments fulfilled the spirit of Section 4 while rendering some provisions of little practical effect.[62]

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[59] DULLEA, 1967 CONSTITUTIONAL CONVENTION, *supra* note 56, at 349-50.

[60] N.Y. CONST. art. XIV, § 4.

[61] GINSBERG, The Environment, *supra* note 4, at 319 n.12.

[62] *See* N.Y. STATE BAR ASS'N, NEW YORK ENVIRONMENTAL LAW HANDBOOK §1.1, at 1-4 (Nicholas A. Robinson ed., 1988) ("The Rapid Development of Environmental Law"); *cf.* GINSBERG, THE Environment, *supra* note 4, at 319 n.12 ("It cannot be ascertained whether these statutes were to some degree a consequence of the

F. Adjustments to the Forest Preserve (1894-present)

Voters have periodically approved small changes to remove or exchange discrete parcels of land from the Forest Preserve to permit clearly defined developments.[63] Such decisions to remove lands have always been narrowly framed and today appear immediately after the forever wild clause in Section 1 of Article XIV.

Examples of such voter approved exceptions include the following:

- 1918: construction of a State Highway from Saranac Lake to Long Lake, and on to Old Forge by way of Blue Mountain Lake and Raquette Lake; [64]
- 1927: construction of a road to the top of Whiteface Mountain as a Memorial to veterans of World War I;[65]
- 1941, 1947 & 1987: ski trails on Whiteface, Belleayre, Gore, South and Peter Gay Mountains;[66]
- 1957 & 1959: 400 acres to eliminate dangerous curves and grades on state highways, as well as lands for the "Northway" Interstate highway, in response to Congress's enactment of the Interstate Highway Act.[67]

Conversely, voters have periodically rejected attempts to carve exceptions to the forever wild mandate. In 1930, for example, Robert Moses campaigned for adoption of the "Closed Cabin Amendment," which would

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constitutional mandate or a reflection of nationwide federal and state legislative activity concerning the environment in the 1970s and 1980s.").

[63] GALIE, ORDERED LIBERTY, *supra* note 5, at 347-349.

[64] DONALDSON, HISTORY OF THE ADIRONDACKS, *supra* note 3, at 248-49.

[65] VOTES CAST FOR AND AGAINST, *supra* note 44.

[66] GINSBERG, The Environment, *supra* note 4, at 319.

[67] *Id.*

have allowed construction of lodges, hotels and recreational facilities on Forest Preserve lands. The Legislature approved the placement of this amendment on the ballot in 1932, but voters overwhelmingly defeated it.[68]

The voters have also approved exchanges of parcels of Forest Preserve for other parcels of equal or greater acreage and value. For example:

- 1963: 10 acres conveyed to the Village of Saranac Lake in exchange for 30 other acres;[69]
- 1965: 28 acres exchanged for 340 acres in the Town of Arietta;[70]
- 1979: 8,000 acres exchanged with the International Paper Company for an equivalent acreage;[71]
- 1983: conveyance of Camp Sagamore and its historic buildings, to the Sagamore Institute, in exchange for 200 acres;[72]
- 2013: swap of land for a mining operation to expand into Forest Preserve Lands by removing those lands in exchange for a larger expansion of the Forest Preserve elsewhere.[73]

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[68] GRAHAM, THE ADIRONDACK PARK, *supra* note 26, at 187; STUMP, "*Forever Wild,*" *supra* note 49, at 696.

[69] GINSBERG, The Environment, *supra* note 4, at 319 n.10.

[70] *Id.*

[71] *Id.*

[72] *Id.*

[73] The proposal placed before the voters for this amendment was as follows:

> The proposed amendment to section 1 of article 14 of the Constitution would authorize the Legislature to convey forest preserve land located in the town of Lewis, Essex County, to NYCO Minerals, a private company that plans on expanding an existing mine that adjoins the forest preserve land. In exchange, NYCO Minerals would give the State at least the same

This pattern of carefully framing and debating amendments to Article XIV on a case-by-case basis, in order to adjust the strictures of the "forever wild" Forest Preserve, has persisted until today. The forever wild clause itself is preserved as first adopted.

In sum, over the 122 years that the forever wild clause has been a part of the Constitution, it has been debated and amended, but the mandate to safeguard the Forest Preserve remains as critical a component of the Constitution as when adopted in 1894.[74] The provision is unique among state constitutions in the United States. It rightly occupies a treasured place in our State Constitution and has been consistently protected but never weakened.[75]

III. THE FOREST PRESERVE, SECTIONS 1, 2 & 5

Today, the Constitutional provisions for the Forest Preserve are found in Sections 1, 2 and 5 of Article XIV. While the Forest Preserve is renowned worldwide,[76] it has a unique legal status under New York law.[77]

> amount of land of at least the same value, with a minimum assessed value of $1 million, to be added to the forest preserve. When NYCO Minerals finishes mining, it would restore the condition of the land and return it to the forest preserve.

New York Land Swap With NYCO Minerals Amendment, Proposal 5 (2013), Ballotpedia.org, https://ballotpedia.org/New_York_Land_Swap_With_NYCO_Minerals_Amendment,_Proposal_5_(2013)#cite_note-quotedisclaimer-5. Implementation of this amendment is the subject of judicial review as of July 2016.

[74] ALFRED S. FORSYTHE & NORMAN J. VAN VALKENBURGH, THE FOREST PRESERVE AND THE LAW (1996).

[75] *See* CITY BAR REPORT, *supra* note 14, at 627 ("The 'forever wild' provision is important and uniquely protective of the environment, and should be retained in the constitution.").

[76] In 1969, it was included by UNESCO in the Champlain-Adirondack Biosphere Reserve. *See* UNESCO, *Champlain-Adirondak* [sic], in MAB BIOSPHERE RESERVES DIRECTORY, http://www.unesco.org/mabdb/br/brdir/directory/biores.asp?code=USA+45&mode=all.

A. Sections 1 & 5

The clarity and mandatory nature of the "forever wild" clause is a classic illustration of an enforceable constitutional norm. Through periodic amendments to Section 1 proposed by the Legislature and approved by the voters, the State has determined the appropriateness of any derogation from the Constitution's "forever wild" mandate. These discrete adjustments to allow non-wilderness uses within the Blue Line boundaries of the Forest Preserve are of relatively little moment, in light of the substantial enlargements to the Forest Preserve over the years. Once placed in the Forest Preserve, new acreage enjoys "forever wild" status and constitutional protection.

Although there has been little litigation under Article XIV,[78] the enforceability of the forever wild clause is not open to question. A violation of Article XIV may be enjoined under Section 5, which authorizes the State to seek such relief through a judicial proceeding, or a private citizen with the

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[77] The Forest Preserve exists in the Catskills and Adirondacks, where it is distinct from the Adirondack Park. It is under the stewardship of the New York State Department of Environmental Conservation. *See, e.g., Matter of Balsam Lake Anglers Club v. Dep't of Envtl. Conserv.,* 153 Misc. 2d 606, 583 N.Y.S. 2d 119 (Sup. Ct. Ulster Cnty. 1991), *aff'd,* 199 A.D.2d 852, 605 N.Y.S. 2d 795 (3d Dep't 1993), *app. withdrawn,* 83 N.Y.2d 907, 637 N.E.2d 280, 614 N.Y.S.2d 389 (Table) (1994). The Legislature recognized the Adirondack Park in the N.Y. Laws of 1892 (ch. 707). The Forest Preserve is not legally in the purview of local authorities or the Adirondack Park Agency, both of which govern privately-held lands in the Adirondack Park, or the local authorities in the Catskills, or the New York City Department of Environmental Protection which manages the reservoirs in the Catskills. When State agencies, such as the Department of Transportation, violate the Forest Preserves "forever wild" status, enforcement proceedings result. *See* 26 THE N.Y. ENVTL. LAWYER (N.Y. State Bar Ass'n Sec. on Envtl. Law), spring 2006, at 31-34; *id.*, summer 2006, at 9-20.

[78] GALIE, REFERENCE GUIDE, *supra* note 2, at 251. *See also Helms v. Reid,* 90 Misc. 2d at 586, 394 N.Y.S.2d at 992 ("There is almost a total absence of court decisions construing this important provision in our State Constitution and the time has now come for a judicial interpretation of this provision so as to guide the future preservation of the unique Adirondack region of our State.").

consent of the Appellate Division.[79] The intent of Section 5 was to remove the Forest Preserve from the control of the legislature and to vest oversight of its mandates within the powers of the judiciary.[80]

Soon after the 1894 Convention, several New Yorkers formed a civic group to monitor compliance with the "forever wild" mandate. In the 1920s, the Association for the Preservation of the Adirondacks availed itself of its constitutional rights and sought judicial enforcement of the "forever wild" clause.[81] Specifically, the Association opposed siting Winter Olympic facilities in the Forest Preserve. The Appellate Division, Third Department, determined that the Constitution required that the Forest Preserve be preserved "in its wild nature, its trees, its rocks, its streams. It must be a great resort for the free use of all the people, but it must be a wild resort in which nature is given free rein."[82] The Court of Appeals affirmed, declaring that

> [t]he Forest Preserve is preserved for the public; its benefits are for the people of the State as a whole. Whatever the advantages may be of having wild forest lands preserved in their natural state, the advantages are for everyone within the state and for the use of the people of the State.[83]

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[79] Formerly N.Y. CONST. art VII, § 9, renumbered and approved on November 8, 1938.

[80] *See* CHARLES Z. LINCOLN, 3 CONSTITUTIONAL HISTORY OF NEW YORK 395 (1906) ("By including these subjects in the Constitution they are withdrawn from legislative control, and this withdrawal is in most cases the chief reason for constitutional interference.").

[81] *Association for the Protection of the Adirondacks v. MacDonald,* 228 A.D. 73, 239 N.Y.S. 31 (3d Dept.), *aff'd* 253 N.Y. 234, 170 N.E. 902 (1930).

[82] *Id.* at 82.

[83] *Association for the Protection of the* Adirondacks *v. MacDonald*, 253 N.Y. 234, 238, 170 N.E. 902, 904 (1930).

Thus, the State's highest court has recognized that the people's rights in the Forest Preserve, established under Section 1, are effective and enforceable through Section 5. The means by which the public may access or enjoy the Forest Preserve can be regulated by the Legislature, but only if it does not infringe on the "wild" characteristics.[84] Courts have had no difficulty construing and applying these straightforward principles.[85]

Although the "forever wild" clause itself is a model of clarity, the balance of Section 1 is unwieldy and unreadable. After the first two elegant sentences comes a dreary and prolix recitation of each specific exception amending the Constitution's rule of "forever wild."[86]

The text of Section 1 could easily be shortened and improved by authorizing a public roster of Forest Preserve Amendments. The roster can be maintained as an official record of amendments' terms, along with a record of land and waters that have been added to enlarge the Forest Preserve. Once an amendment has been adopted, derogation from "forever wild" is realized (such as when a road is built or lands transferred to allow a rural cemetery expanded in exchange for adding wild river lands to the Forest Preserve), and there would seem to be no reason for the Constitution

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[84] *See id.* at 238-39, 170 N.E. at 904 ("Unless prohibited by the constitutional prohibition, the use and preservation are subject to the reasonable regulations of the Legislature.").

[85] *See* CITY BAR REPORT, *supra* note 14, at 627 ("This provision, first enacted in 1894, has been consistently enforced by the courts as a powerful tool to protect New York's irreplaceable natural resources."). For example, construing Court of Appeals precedent, the court in *Matter of Balsam Lake Anglers Club v. Dep't of Envtl. Conserv.,* Supreme Court, Ulster County, found it clear "that insubstantial and immaterial cutting of timber-sized trees was constitutionally authorized in order to facilitate public use of the forest preserve so long as such use if consistent with the wild forest lands." 153 Misc. 2d 606, 609, 583 N.Y.S. 2d 119, 122 (Sup. Ct. Ulster Cnty. 1991), *aff'd,* 199 A.D.2d 852, 605 N.Y.S. 2d 795 (3d Dep't 1993), *app. withdrawn,* 83 N.Y.2d 907, 637 N.E.2d 280, 614 N.Y.S.2d 389 (Table) (1994).

[86] One commentator has referred to the amendments in Article XIV, Section 1, as reading like a road "gazetteer." PHILLIP G. TERRIE, CONTESTED TERRAIN: A NEW HISTORY OF NATURE AND PEOPLE IN THE ADIRONDACKS (2d ed. 2008).

to be used as an historical record of enactments. Indeed, when acres are added to the Forest Preserve, this fact does not appear in the Constitution, even though the "forever wild" safeguard applies to them at once.[87]

Also, the implicit reference in the first sentence of Section 1 to the 1885 Forest Act,[88] through the use of the phrase "as now fixed by law," appears redundant, since "now" has evolved and the Forest Preserve is defined today in the State Environmental Conservation Law.[89] The excision of this phrase would shorten Section 1 without any substantive impact.

While subject to debate, the Forest Preserve's judicial enforcement provisions in Section 5 have proven to be effective.[90] Section 5 anticipated by 78 years the enactment in 1972 of procedures for citizen suits, which appear in many environmental statutes, such as Section 505 of the federal Clean Water Act[91] and its New York State analogue.[92] Section 5 was

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[87] In a similar vein, two noted commentators have suggested condensing the exceptions into a general exception. "For example, the section could be amended to delete everything after the second sentence and simply add to the end of the first sentence the words 'as heretofore guaranteed by constitutional provision." GALIE & BOPST, *House Cleaning, supra* note 15, at 1546.

[88] 1885 N.Y. Laws ch. 283.

[89] *See* N.Y. ENVTL. CONSERV. LAW § 9-0101(6) ("The 'forest preserve' shall include the lands owned or hereafter acquired by the state within the county of Clinton, except the towns of Altona and Dannemora, and the counties of Delaware, Essex, Franklin, Fulton, Hamilton, Herkimer, Lewis, Oneida, Saratoga, Saint Lawrence, Warren, Washington, Greene, Ulster, and Sullivan . . . .").

[90] *Compare* GINSBERG, The Environment, *supra* note 4, at 320 ("This section is unusually restrictive in its limitation on citizens' suits. It may also prohibit other remedies such as damages. Thus, if trees are wrongfully destroyed in the Forest Preserve, the wrongdoer can be enjoined from further cutting, but a court may not be able to award damages to the state for the value of the trees destroyed." (citing *Matter of Oneida County Forest Preserve Council v. Wehle*, 309 N.Y 152, 128 N.E.2d 282 (1955)).

[91] 33 U.S.C. § 1365.

[92] *See* N.Y. DEP'T OF ENVTL. CONSERV., DEE-19: CITIZEN SUIT ENFORCEMENT POLICY (July 23, 1994), http://www.dec.ny.gov/regulations/25226.html.

adopted to permit enforcement of the "forever wild" mandate, and has not been used to enforce other potential rights within Article XIV.

B. Section 2

Adopted by the voters in 1913, Section 2 (known as the Burd Amendment) reserves up to 3% of the Forest Preserve for reservoirs and dams. However, in stark contrast to the forever wild mandate in Section 1, Section 2 is rarely used,[93] and has been contested whenever its provisions have been invoked.[94]

Most notably, in 1953, by a vote of 1,002,462 to 697,279, the electorate approved an amendment that revoked the Legislature's power to provide for use of portions of the Forest Preserve for the construction of reservoirs to regulate the flow of streams.[95] As a consequence, Section 2 "was cancelled and withdrawn" to the extent that "the People of the State . . . rendered the lands of the State Forest Preserve inviolate for use in regulating the flow of streams."[96]

Another example of public opposition to the placement of reservoirs and dams in the Forest Preserve occurred in 1955. Voters then defeated (1,622,196 to 613,727) a proposed amendment to use Forest Preserve lands

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[93] In 1915, the Legislature enacted the Machold Storage Law, which allowed a Water Power Commission in the Conservation Department to authorize dams. 1915 N.Y. Laws ch. 662. In general, use of Section 2 to site reservoirs for waterpower in the Forest Preserve has been highly contested; and section 2 has gone largely unused for municipal water supplies. While the Stillwater Reservoir was expanded in 1924, little other use was sought to be made of Forest Preserve lands, until the City of New York in the 1960s sought additional water sources.

[94] For example, when proposals were made to flood the Moose River Valley with a dam, they were challenged in *Adirondack League Club v. Board of Black River Regulating Dist.*, 301 N.Y. 219, 93 N.E.2d 647 (1950).

[95] VOTES CAST FOR AND AGAINST, *supra* note 44.

[96] *Black River Regulating Dist. v. Adirondack League Club,* 307 N.Y. 475, 484, 121 N.E.2d 428, 430-31 (1954), *rearg. denied,* 307 N.Y. 906, 123 N.E.2d 562 (1954), *app. dismissed,* 351 U.S. 922 (1956).

for the construction and operation of the Panther Mountain reservoir to regulate the flow of the Moose and Black rivers.[97] Likewise, in 1947 Governor Thomas E. Dewey opposed proposals for constructing the proposed Higley Mountain Dam, which the Legislature authorized in the 1920s.[98]

In recent years, few reservoirs and dams have been constructed nationally, and even less in New York.[99] Worries that cities would deplete their water supplies have dissipated. Moreover, statutes enacted long after the adoption of Section 2 would constrain future attempts to place reservoirs, dams and the like in the Forest Preserve. For example, among the provisions of the Environmental Conservation Law is protection of the extensive fresh water wetlands found in the Adirondacks,[100] along with rules for environmental impact assessment,[101] both of which would restrict any contemplated use of Section 2.[102]

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[97] VOTES CAST FOR AND AGAINST, *supra* note 44; GRAHAM, THE ADIRONDACK PARK, *supra* note 26, at 206-07.

[98] PAUL SCHNEIDER, THE ADIRONDACKS: A HISTORY OF AMERICA'S FIRST WILDERNESS 291-94 (1998).

[99] In 2014, the Lake Placid Village Dam was removed from the Chubb River. In 2015, the Saw Mill Dam in Willsboro was removed from the Bouquet River. There is an increasing nationwide trend of dam removals to restore ecological systems. *See* AMERICAN RIVERS, MAP OF U.S. DAMS REMOVED SINCE 1916, https://www.americanrivers.org/threats-solutions/restoring-damaged-rivers/dam-removal-map/.

[100] *See* N.Y. ENVTL. CONSERV. LAW art. 24; N.Y. COMP. CODES R. & REGS. tit. 6.

[101] N.Y. ENVTL. CONSERV. LAW art. 8 (the "State Environmental Quality Review Act" or "SEQRA").

[102] Beyond locating possible dam sites, enabling legislation would be required to select the sites, in addition to further constitutional amendments to remove the sites chosen along with access roads for construction equipment, eminent domain procedures to condemn private or other public rights unavoidably impacted by the dam and reservoirs, and appropriations to pay for the dam construction.

Thus, a question exists as to whether Section 2 continues to serve a constitutional purpose and should remain part of New York's fundamental law. As noted, Section 2 has rarely been invoked, and any future use of it would be constrained by statute. Arguably, too, the repeal of Section 2 from the Constitution would enhance Section 1's "forever wild" norms.

IV. THE CONSERVATION BILL OF RIGHTS, SECTION 4

Although Section 4 was intended to be a "Conservation Bill of Rights,"[103] it is debatable whether it has attained fundamental constitutional stature. After Section 4's adoption, and at the request of Governor Rockefeller in 1970, the legislature authorized a codification of the 1911 Conservation Law, which it then re-enacted in 1972 as the Environmental Conservation Law. The Legislature thereafter enacted new legislation, including the State's Endangered Species Act,[104] Tidal and Freshwater Wetlands Acts,[105] Wild and Scenic Rivers Act,[106] and New York's implementing statutes for the federal Clean Air Act,[107] Clean Water Act,[108] and laws on solid[109] and hazardous wastes.[110]

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[103] Proposals for strengthening the environmental rights in the Constitution predate the 1967 Convention. *See, e.g.*, ANNUAL REPORT OF THE JOINT LEGISLATIVE COMM. ON CONSERV., NAT'L RES. AND SCENIC BEAUTY, Legislative Document No. 13 (1967). On the continuing debate over a broader environmental rights, *see* CAROLE L. GALLAGHER, *Movement to Create an Environmental Bill of Rights: From Earth Day 1970 to the Present*, 9 FORDHAM ENVTL. L.J. 107, 107 (1997).

[104] 1970 N.Y. Laws ch. 1047 & 1048; N.Y. ENVTL. CONSERV. LAW § 11-0535.

[105] N.Y. ENVTL. CONSERV. LAW art. 24 (Freshwater wetlands) and art. 25 (Tidal wetlands).

[106] 1972 N.Y. Laws ch. 869 ; N.Y. ENVTL. CONSERV. LAW art. 24, tit. 22.

[107] The Clean Air Act of 1970, Pub. L. No. 88-206, 77 Stat. 392 (1970), *codified at* 42 U.S.C. §§ 7401, *et seq.*, implemented in New York as N.Y. Comp. Codes R. & Regs. tit. 6, §§ 200, *et seq.*; *see Friends of the Earth v. Carey*, 552 F.2d 25 (2d Cir. 1977), *cert denied* 434 U.S. 902 (1977).

[108] *See* Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816 (1972), *codified at* 33 U.S.C. § 1251, *et seq.* (the "CLEAN WATER

In one sense, the broad policy goals of the Conservation Bill of Rights have been realized through federal and State environmental statutes.[111] In fact, Section 4 was enacted on the eve of the first "Earth Day" in 1970, which was a time when the State suffered severe water and air pollution, acute loss of wetlands and species, and widespread contamination of hazardous and toxic waste. It was apparent that the voters in 1969 wanted a constitutional mandate to oblige government to restore and secure their environmental public health and quality of life, and the Legislature responded accordingly.

In another sense, the more profound environmental rights contemplated by Section 4 have not been effectuated. Section 4 expressly provides for State acquisition of lands for a "state nature and historical preserve" located outside the Forest Preserve.[112] Although this provision has been on the books for nearly fifty years "with questionable effect,"[113] the State has not established a "Preserve" for natural resources and scenic beauty, either on par with the Forest Preserve or with such preserves in other states.[114]

ACT"); N.Y. ENVTL. CONSERV. LAW art. 17; N.Y. Comp. Codes R. & Regs. tit. 6, §§ 750, *et seq*.

[109] The Resource Conservation and Recovery Act of 1976 (RCRA), Pub. L. No. 94-580, 90 Stat. 2795 (1976), *codified at* 42 U.S.C. 6901, *et seq*.; N.Y. ENVTL. CONSERV. LAW art. 27.

[110] N.Y. ENVTL. CONSERV. LAW art. 27, tit. 9 *and* N.Y. Comp. Codes R. & Regs. tit. 6, §§ 200, *et seq*.

[111] *See* GALIE, REFERENCE GUIDE, *supra* note 2, at 251 ("Protection of the kind envisaged by this section had already been provided by statute, at least in part. . . . The broad policy goals of this section were implemented by statues in the 1970s.").

[112] N.Y. CONST. art. XIV, § 4.

[113] GINSBERG, The Environment, *supra* note 4, at 326.

[114] Comparable provisions are found in the states of Arkansas, Florida, Hawaii, Illinois, Indiana, Maryland, Michigan, New Jersey, North Carolina, Ohio, Oregon, Pennsylvania, Virginia and Washington. *See* Frank P. Grad, 10 TREATISE ON

Furthermore, Section 4 does not appear to be self-executing. At least one court has held that Section 4's provisions afford no constitutionally-protected property right enforceable by courts.[115] Hence, the provision amounts to little more than an exhortation for the government to act.[116] Citizens apparently cannot seek judicial enforcement of the Conservation Bill of Rights, as they can the "forever wild" clause.[117]

Over 20 years ago, Professor William R. Ginsberg argued that New York should move "toward 'self-executing' status for the existing constitutional statement of environmental goals."[118] He recommended converting the general language of Section 4 into a specific "environmental right," such as exists in other states. For example, the constitution for the Commonwealth of Pennsylvania provides:

> The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and aesthetic values of the environment. Pennsylvania's public natural resources are

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ENVIRONMENTAL LAW § 10.03(v) (1986). Although laws in New York exist to protect wild plants and biodiversity, sufficient funding has not been provided to implement them nor integrated them with Article XIV's provisions. *See* PHILIP WEINBERG, *Practice Commentaries,* N.Y. ENVTL. CONSERV. LAW § 3-0302, at 54 (McKinney's 2005).

[115] *See Leland v. Moran,* 235 F.Supp.2d 153, 169 (N.D.N.Y. 2002) ("Article 14, section 4 of the New York State Constitution requires the legislature to include adequate provision for the abatement of various types of pollution. It has done so by enacting the ECL [Environmental Conservation Law]. Nothing in the language of this constitutional provision sufficiently restricts the DEC's discretion in enforcing the ECL such that it provides plaintiffs with a source of a constitutionally protected property right."), *aff'd,* 80 Fed. Appx. 133, 2003 WL 22533185 (2d Cir. 2003).

[116] *See* GINSBERG, The Environment, *supra* note 4, at 320 ("This section is similar to other provision of other state constitutions that mandate state legislatures to enact environmentally protective legislation. The efficacy of such provisions is limited. Courts usually refuse to compel legislatures to act on the basis of constitutional mandates. Since the judiciary is a coordinate branch of government, it does not have the power to compel the legislature to act in a purely legislative function.") (citations omitted).

[117] *See id.*

[118] *Id.* at 326 (Conclusion #2).

> the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of the people.[119]

Florida,[120] Hawaii,[121] Illinois,[122] and Montana[123] provide comparable constitutional environmental rights (as do 174 nations),[124] and 19 states provide constitutional rights for hunting and fishing.[125] Establishing such rights in state constitutions serve varied objectives,[126] and afford a unique dimension of environmental protection.[127]

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[119] PA. CONST. art. I, § 27. The Pennsylvania Supreme Court gave direct effect to this provision in *Robinson Township, Washington Cnty., Pa. et al. v. Commonwealth,* 623 Pa. 564, 683-87, 83 A.3d 901, 974-977 (Pa. 2013).

[120] FLA. CONST. art. II, § 7 ("It shall be the policy of the state to conserve and protect its natural resources and scenic beauty. Adequate provision shall be made by law for the abatement of air and water pollution and of excessive and unnecessary noise.").

[121] HAW. CONST. art. XI, § 9 ("Each person has the right to a clean and healthful environment, as defined by laws relating to environmental quality, including control of pollution and conservation, protection and enhancement of natural resources. Any person may enforce this right against any party, public or private, through appropriate legal proceedings, subject to reasonable limitations and regulation as provided by law.").

[122] ILL. CONST. art. XI, § 2 ("Each person has the right to a healthful environment. Each person may enforce this right against any party, governmental or private, through appropriate legal proceedings subject to reasonable limitation and regulation as the General Assembly may provide by law.").

[123] MONT. CONST. art. II, § 3 ("All persons are born free and have certain inalienable rights. They include the right to a clean and healthful environment and the rights of pursuing life's basic necessities . . . .").

[124] DAVID R. BOYD, THE RIGHTS REVOLUTION *passim* (2012).

[125] *See* NAT'L CONFERECE OF STATE LEGISLATURES, *State Constitutional Right to Hunt and Fish* (Nov. 9, 2015), http://www.ncsl.org/research/environment-and-natural-resources/state-constitutional-right-to-hunt-and-fish.aspx.

[126] *See* ART ENGLISH & JOHN J. CARROL, *State Constitutions and Environmental Bills of Rights*, *in* COUNCIL OF STATE GOVERNMENTS, THE BOOK OF THE STATES 18 (2015), http://knowledgecenter.csg.org/kc/content/state-constitutions-and-environmental-

But it is by no means clear that New York would benefit from the inclusion in the State Constitution of a self-executing environmental right. Current State and federal law provide ample environmental protections, and regulators already police environmentally harmful conduct. Judicial review of most environmental issues is readily available under Article 78 of the Civil Practice Law & Rules, and citizen suits can be brought to authorize enforcement of most environmental statutes.[128] Thus, it is debatable whether the addition of a self-executing constitutional environmental right could do more; indeed, it might even lead to needless, duplicative litigation, which would discourage economic development, especially in economically-depressed regions of the State.

To be sure, though, there is another side of the argument. Arguably, the narrow scope of Section 4 in Article XIV is insufficient to address New York's new environmental challenges. In 1894, the destruction of forests was deemed a crisis worthy of constitutional reform. The "forever wild" mandate was thus born. In 1969, pollution presented a comparable crisis. The "Conservation Bill of Rights" was thus created.[129] Today's analogue may be impacts associated with climate change, as evaluated in reports by

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bills-rights; *see also* JAMES R. MAY, PRINCIPLES OF CONSTITUIONAL ENVIRONMENTAL LAW *passim* (2011).

[127] *See generally,* JOHN C. DERNBACH, JAMES R. MAY & KENNETH T. KRISTL, *Robinson Township v. Commonwealth of Pennsylvania*: *Examination and Implications,* 67 RUTGERS L.J. 1169 (2015).

[128] *See, e.g.,* CLEAN WATER ACT § 505; *supra* note 92.

[129] Environmental constitutionalism began in New York, and was expanded in 1969, influenced in part by Dr. Rachel Carson's seminal book, *Silent Spring.* Dr. Carson wrote that "[i]f the Bill of Rights contains no guarantees that a citizen shall be secure against lethal poisons distributed either by private individuals or by public officials, it is surely only because our forefathers, despite their considerable wisdom and foresight, could conceive of no such problem." RACHEL CARSON, SILENT SPRING 12-13 (1962).

the New York Academy of Sciences,[130] the U.S. National Academy of Sciences,[131] and the Intergovernmental Panel on Climate Change.[132]

CONCLUSION

In 2017, voters will have a unique opportunity to debate whether the provisions of the State Constitution's conservation article, Article XIV, are sufficient to meet current needs or can otherwise be improved. As this report illustrates, Article XIV presents opportunities to simplify its text, address obsolete aspects, and to consider how to enhance its effectiveness. At a minimum, if and when the State establishes a preparatory constitutional commission, it has ample reason to carefully study Article XIV.

[130] *See* NEW YORK CITY PANEL OF CLIMATE CHANGE, *Building the Knowledge Base for Climate Resiliency: New York City Panel on Climate Change 2015 Report*, 1336 ANNALS N.Y. ACAD. SCI. 1-150 (2015), http://onlinelibrary.wiley.com/doi/10.1111/nyas.2015.1336.issue-1/issuetoc.

[131] *See* U.S. NAT'L ACAD. OF SCI. & U.K. ROYAL SOCIETY, *Climate Change: Evidence and Causes* (2014), nas-sites.org/americasclimatechoices.

[132] *See* INTERGOVT'L PANEL ON CLIMATE CHANGE, *Fifth Assessment Report* (2013-14), https://www.ipcc.ch/report/ar5/. *Fifth Assessment Report*

APPENDIX A

ARTICLE XIV

CONSERVATION

{Text, annotated with subject headings in brackets}

[Forest preserve to be forever kept wild; authorized uses and exceptions]

Section 1.[1] *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.* (Italics added.)

Nothing herein contained shall prevent the state from constructing, completing and maintaining any highway heretofore specifically authorized by constitutional amendment, nor from constructing and maintaining to federal standards federal aid interstate highway route five hundred two from a point in the vicinity of the city of Glens Falls, thence northerly to the vicinity of the villages of Lake George and Warrensburg, the hamlets of South Horicon and Pottersville and thence northerly in a generally straight line on the west side of Schroon Lake to the vicinity of the hamlet of Schroon, then continuing northerly to the vicinity of Schroon Falls, Schroon River and North Hudson, and to the east of Makomis Mountain, east of the hamlet of New Russia, east of the village of Elizabethtown and continuing northerly in the vicinity of the hamlet of Towers Forge, and east of Poke-O-Moonshine Mountain and continuing northerly to the vicinity of the village

[1] Article 14 was formerly Section 7 of N.Y. CONST. art. VII in the Constitution of 1894. Renumbered and amended by Constitutional Convention of 1938 and approved by vote of the people November 8, 1938; further amended by vote of the people November 4, 1941; November 4, 1947; November 5, 1957; November 3, 1959; November 5, 1963; November 2, 1965; November 6, 1979; November 8, 1983; November 3, 1987; November 5, 1991; November 7, 1995; November 6, 2007; November 3, 2009; November 5, 2013.

of Keeseville and the city of Plattsburgh, all of the aforesaid taking not to exceed a total of three hundred acres of state forest preserve land, nor from constructing and maintaining not more than twenty-five miles of ski trails thirty to two hundred feet wide, together with appurtenances thereto, provided that no more than five miles of such trails shall be in excess of one hundred twenty feet wide, on the north, east and northwest slopes of Whiteface Mountain in Essex county, nor from constructing and maintaining not more than twenty-five miles of ski trails thirty to two hundred feet wide, together with appurtenances thereto, provided that no more than two miles of such trails shall be in excess of one hundred twenty feet wide, on the slopes of Belleayre Mountain in Ulster and Delaware counties and not more than forty miles of ski trails thirty to two hundred feet wide, together with appurtenances thereto, provided that no more than eight miles of such trails shall be in excess of one hundred twenty feet wide, on the slopes of Gore and Pete Gay mountains in Warren county, nor from relocating, reconstructing and maintaining a total of not more than fifty miles of existing state highways for the purpose of eliminating the hazards of dangerous curves and grades, provided a total of no more than four hundred acres of forest preserve land shall be used for such purpose and that no single relocated portion of any highway shall exceed one mile in length.

Notwithstanding the foregoing provisions, the state may convey to the village of Saranac Lake ten acres of forest preserve land adjacent to the boundaries of such village for public use in providing for refuse disposal and in exchange therefore the village of Saranac Lake shall convey to the state thirty acres of certain true forest land owned by such village on Roaring Brook in the northern half of Lot 113, Township 11, Richards Survey.

Notwithstanding the foregoing provisions, the state may convey to the town of Arietta twenty-eight acres of forest preserve land within such town for public use in providing for the extension of the runway and landing strip of the Piseco airport and in exchange therefor the town of Arietta shall convey to the state thirty acres of certain land owned by such town in the town of Arietta.

Notwithstanding the foregoing provisions and subject to legislative approval of the tracts to be exchanged prior to the actual transfer of title, the state, in order to consolidate its land holdings for better management, may convey to International Paper Company approximately eight thousand five hundred acres of forest preserve land located in townships two and three of Totten and Crossfield's Purchase and township nine of the Moose River Tract, Hamilton county, and in exchange therefore International Paper Company shall convey to the state for incorporation into the forest preserve approximately the same number of acres of land located within such townships and such County on condition that the legislature shall determine that the lands to be received by the state are at least equal in value to the lands to be conveyed by the state.

Notwithstanding the foregoing provisions and subject to legislative approval of the tracts to be exchanged prior to the actual transfer of title and the conditions herein set forth, the state, in order to facilitate the preservation of historic buildings listed on the national register of historic places by rejoining an historic grouping of buildings under unitary ownership and stewardship, may convey to Sagamore Institute, Inc., a not-for-profit educational organization, approximately ten acres of land and buildings thereon adjoining the real property of the Sagamore Institute, Inc. and located on Sagamore Road, near Racquette Lake Village, in the Town of Long Lake, county of Hamilton, and in exchange therefor; Sagamore Institute, Inc. shall convey to the state for incorporation into the forest preserve approximately two hundred acres of wild forest land located within the Adirondack Park on condition that the legislature shall determine that the lands to be received by the state are at least equal in value to the lands and buildings to be conveyed by the state and that the natural and historic character of the lands and buildings conveyed by the state will be secured by appropriate covenants and restrictions and that the lands and buildings conveyed by the state will reasonably be available for public visits according to agreement between Sagamore Institute, Inc. and the state.

Notwithstanding the foregoing provisions the state may convey to the town of Arietta fifty acres of forest preserve land within such town for

public use in providing for the extension of the runway and landing strip of the Piseco airport and providing for the maintenance of a clear zone around such runway, and in exchange therefor, the town of Arietta shall convey to the state fifty-three acres of true forest land located in lot 2 township 2 Totten and Crossfield's Purchase in the town of Lake Pleasant.

Notwithstanding the foregoing provisions and subject to legislative approval prior to actual transfer of title, the state may convey to the town of Keene, Essex county, for public use as a cemetery owned by such town, approximately twelve acres of forest preserve land within such town and, in exchange therefor, the town of Keene shall convey to the state for incorporation into the forest preserve approximately one hundred forty-four acres of land, together with an easement over land owned by such town including the riverbed adjacent to the land to be conveyed to the state that will restrict further development of such land, on condition that the legislature shall determine that the property to be received by the state is at least equal in value to the land to be conveyed by the state.

Notwithstanding the foregoing provisions and subject to legislative approval prior to actual transfer of title, because there is no viable alternative to using forest preserve lands for the siting of drinking water wells and necessary appurtenances and because such wells are necessary to meet drinking water quality standards, the state may convey to the town of Long Lake, Hamilton county, one acre of forest preserve land within such town for public use as the site of such drinking water wells and necessary appurtenances for the municipal water supply for the hamlet of Raquette Lake. In exchange therefor, the town of Long Lake shall convey to the state at least twelve acres of land located in Hamilton county for incorporation into the forest preserve that the legislature shall determine is at least equal in value to the land to be conveyed by the state. The Raquette Lake surface reservoir shall be abandoned as a drinking water supply source.

Notwithstanding the foregoing provisions and subject to legislative approval prior to actual transfer of title, the state may convey to National Grid up to six acres adjoining State Route 56 in St. Lawrence County where it passes through Forest Preserve in Township 5, Lots 1, 2, 5 and 6 that is

necessary and appropriate for National Grid to construct a new 46kV power line and in exchange therefore National Grid shall convey to the state for incorporation into the forest preserve at least 10 acres of forest land owned by National Grid in St. Lawrence county, on condition that the legislature shall determine that the property to be received by the state is at least equal in value to the land conveyed by the state.

Notwithstanding the foregoing provisions, the legislature may authorize the settlement, according to terms determined by the legislature, of title disputes in township forty, Totten and Crossfield purchase in the town of Long Lake, Hamilton county, to resolve longstanding and competing claims of title between the state and private parties in said township, provided that prior to, and as a condition of such settlement, land purchased without the use of state-appropriated funds, and suitable for incorporation in the forest preserve within the Adirondack park, shall be conveyed to the state on the condition that the legislature shall determine that the property to be conveyed to the state shall provide a net benefit to the forest preserve as compared to the township forty lands subject to such settlement.

Notwithstanding the foregoing provisions, the state may authorize NYCO Minerals, Inc. to engage in mineral sampling operations, solely at its expense, to determine the quantity and quality of wollastonite on approximately 200 acres of forest preserve land contained in lot 8, Stowers survey, town of Lewis, Essex county provided that NYCO Minerals, Inc. shall provide the data and information derived from such drilling to the state for appraisal purposes. Subject to legislative approval of the tracts to be exchanged prior to the actual transfer of the title, the state may subsequently convey said lot 8 to NYCO Minerals, Inc., and, in exchange therefor, NYCO Minerals, Inc. shall convey to the state for incorporation into the forest preserve not less than the same number of acres of land, on condition that the legislature shall determine that the lands to be received by the state are equal to or greater than the value of the land to be conveyed by the state and on condition that the assessed value of the land to be conveyed to the state shall total not less than one million dollars. When NYCO Minerals, Inc. terminates all mining operations on such lot 8 it shall remediate the site and

convey title to such lot back to the state of New York for inclusion in the forest preserve. In the event that lot 8 is not conveyed to NYCO Minerals, Inc. pursuant to this paragraph, NYCO Minerals, Inc. nevertheless shall convey to the state for incorporation into the forest preserve not less than the same number of acres of land that is disturbed by any mineral sampling operations conducted on said lot 8 pursuant to this paragraph on condition that the legislature shall determine that the lands to be received by the state are equal to or greater than the value of the lands disturbed by the mineral sampling operations.

[**Reservoirs]**

§2.[2] The legislature may by general laws provide for the use of not exceeding three per centum of such lands for the construction and maintenance of reservoirs for municipal water supply, and for the canals of the state. Such reservoirs shall be constructed, owned and controlled by the state, but such work shall not be undertaken until after the boundaries and high flow lines thereof shall have been accurately surveyed and fixed, and after public notice, hearing and determination that such lands are required for such public use. The expense of any such improvements shall be apportioned on the public and private property and municipalities benefited to the extent of the benefits received. Any such reservoir shall always be operated by the state and the legislature shall provide for a charge upon the property and municipalities benefited for a reasonable return to the state upon the value of the rights and property of the state used and the services of the state rendered, which shall be fixed for terms of not exceeding ten years and be readjustable at the end of any term. Unsanitary conditions shall not be created or continued by any such public works.

[2] An addition made in 1913 to former N.Y. CONST. art. VII, §7, which was renumbered and amended by Constitutional Convention of 1938 and approved by vote of the people November 8, 1938; further amended by vote of the people November of 1953, and November of 1955.

[Forest and wild life conservation; use or disposition of certain lands authorized]

§3.[3] 1. Forest and wild life conservation are hereby declared to be policies of the state. For the purpose of carrying out such policies the legislature may appropriate moneys for the acquisition by the state of land, outside of the Adirondack and Catskill parks as now fixed by law, for the practice of forest or wild life conservation. The prohibitions of section 1 of this article shall not apply to any lands heretofore or hereafter acquired or dedicated for such purposes within the forest preserve counties but outside of the Adirondack and Catskill parks as now fixed by law, except that such lands shall not be leased, sold or exchanged, or be taken by any corporation, public or private.

2. As to any other lands of the state, now owned or hereafter acquired, constituting the forest preserve referred to in section one of this article, but outside of the Adirondack and Catskill parks as now fixed by law, and consisting in any case of not more than one hundred contiguous acres entirely separated from any other portion of the forest preserve, the legislature may by appropriate legislation, notwithstanding the provisions of section one of this article, authorize: (a) the dedication thereof for the practice of forest or wild life conservation; or (b) the use thereof for public recreational or other state purposes or the sale, exchange or other disposition thereof; provided, however, that all moneys derived from the sale or other disposition of any of such lands shall be paid into a special fund of the treasury and be expended only for the acquisition of additional lands for such forest preserve within either such Adirondack or Catskill park.

[Protection of natural resources; development of agricultural lands]

§4.[4] The policy of the state shall be to conserve and protect its natural

[3] Formerly N.Y. CONST. art. VII, §16, this provision as renumbered and amended by Constitutional Convention of 1938 and approved by vote of the people November 8, 1938; further amended by vote of the people November 5, 1957; November 6, 1973.

[4] First proposed and accepted by the Constitutional Convention in 1966, whose proposed constitution was not accepted, and thereafter added by amendment adopted by

resources and scenic beauty and encourage the development and improvement of its agricultural lands for the production of food and other agricultural products. The legislature, in implementing this policy, shall include adequate provision for the abatement of air and water pollution and of excessive and unnecessary noise, the protection of agricultural lands, wetlands and shorelines, and the development and regulation of water resources. The legislature shall further provide for the acquisition of lands and waters, including improvements thereon and any interest therein, outside the forest preserve counties, and the dedication of properties so acquired or now owned, which because of their natural beauty, wilderness character, or geological, ecological or historical significance, shall be preserved and administered for the use and enjoyment of the people. Properties so dedicated shall constitute the state nature and historical preserve and they shall not be taken or otherwise disposed of except by law enacted by two successive regular sessions of the legislature.

[Violations of article; how restrained.]

§5.[5] 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 the appellate division, on notice to the attorney-general at the suit of any citizen.

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the legislature and approved by vote of the people November 4, 1969.

[5] Initially adopted in 1894 in former N.Y. CONST. art. VII, §7; retained by Constitutional Convention of 1938 and approved by vote of the people November 8, 1938, and renumbered §5 by vote of the people November 4, 1969.

NEW YORK STATE BAR ASSOCIATION

REPORT AND RECOMMENDATIONS

CONCERNING

THE ESTABLISHMENT OF A PREPARATORY STATE COMMISSION ON A CONSTITUTIONAL CONVENTION

ADOPTED BY

THE COMMITTEE ON THE NEW YORK STATE CONSTITUTION

Approved by the House of Delegates on November 7, 2015

Membership of the New York State Bar Association's Committee on the New York State Constitution

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INTRODUCTION AND EXECUTIVE SUMMARY

The New York State Constitution mandates that every 20 years New Yorkers are asked the following question: "Shall there be a convention to revise the constitution and amend the same?"[1] The next such mandatory referendum will be held on November 7, 2017. What follows is a report and recommendations of the New York State Bar Association's ("State Bar") Committee on the New York State Constitution ("the Committee") concerning the establishment of a non-partisan preparatory commission in advance of the upcoming vote on a Constitutional Convention.

The State Constitution is the governing charter for the State of New York. More than six times longer than the U.S. Constitution, the State Constitution establishes the structure of State government and enumerates fundamental rights and liberties. It governs our courts, schools, local government structure, State finance, and development in the Adirondacks — to name only a few of the countless ways it affects the lives of New Yorkers.

The State Legislature can propose amendments to the State Constitution, subject to voter approval. However, the framers of the Constitution wanted to make sure that there was an even more direct way for the citizenry to review fundamental principles of governance. That is why at least once every 20 years New Yorkers get to decide for themselves whether to hold a Constitutional Convention.

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[1] N.Y. CONST. art. XIX, § 2 ("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. The delegates so elected shall convene at the capitol on the first Tuesday of April next ensuing after their election, and shall continue their session until the business of such convention shall have been completed. . . .").

The Convention vote in 2017 presents the electorate with a constitutional choice of profound importance. Absent a legislative initiative, we will not have this opportunity for another twenty years. So, the State should properly prepare for this referendum, regardless of the outcome.

In the Twentieth Century, every Constitutional Convention in New York was (and two mandatory Convention votes were) preceded by a preparatory commission created and supported by the State government. Conventional wisdom was that if a referendum vote approved a Constitutional Convention, expert, non-partisan preparations were required well in advance of the Convention delegates' assembly.[2] Indeed, most delegates to a Convention had insufficient time or resources to plan or carry out factual investigations or legal research on their own initiative. To a significant degree, the delegates had to rely on research and materials developed by others.[3]

Thus, since 1914, the State has vested in temporary constitutional commissions the important — indeed indispensable — responsibility of doing the research, data-collection and other preparations necessary to conduct a Constitutional Convention. "Some [commissions] were appointed by the governor; others were established by the legislature. Some were created in anticipation of a vote on the mandatory Convention question;

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[2] *See, e.g.,* Robert Moses, *Another New York State Constitutional Convention,* 31 ST. JOHN'S L. REV. 201, 207 (1957) ("Today here in New York much depends on the preliminary work of the Constitutional Convention Commission if there is to be a Constitutional Convention at all. The importance of a genuinely expert, non-partisan approach cannot be overstated.").

[3] *See* Samuel McCune Lindsay, *Constitution Making in New York,* THE SURVEY, July 31, 1915, at 391, 392 ("What a convention can attempt in the study of new problems depends largely upon the preparation made in advance of the assembly of the convention. There is not time for the committees to plan or carry out investigations of their own initiative, and in a constitutional convention there is not the accumulated experience and tradition of special subjects that are often carried over from session to session in a legislative committee through the hold-over members who serve several terms. The constitutional convention can do little more than study the materials put in their hands by interested parties.").

others resulted from the need to prepare quickly after the question passed."[4] And some produced bodies of research and work product useful not only to Convention delegates, but also policymakers, courts and scholars decades after.[5]

The State's extensive history with preparatory commissions makes clear that the formation of such an entity — with adequate funding, top-notch staff, and support from all branches of government — is necessary to properly plan and prepare for the mandatory Convention vote and a Convention, if the voters approve the call for one. Accordingly, this Committee recommends as follows:

First, the State should establish a non-partisan preparatory commission as soon as possible.

Second, the commission should be tasked with, among other duties: (a) educating the public about the State Constitution and the constitutional change process; (b) making a comprehensive study of the Constitution and compiling recommended proposals for change and simplification; (c) researching the conduct of, and procedures used at, past Constitutional Conventions; and (d) undertaking and directing the preparation and publication of impartial background papers, studies, reports and other materials for the delegates and public prior to and during the Convention, if one is held.

Third, the commission should have an expert, non-partisan staff.

Fourth, the commission and its staff should be supported by adequate appropriations from the State government.

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[4] Robert F. Williams, *The Role of the Constitutional Commission in State Constitutional Change* [hereinafter *Constitutional Commission*], *in* DECISION 1997: CONSTITUTIONAL CHANGE IN NEW YORK 49 (Gerald Benjamin & Hendrik N. Dullea eds., 1997) [hereinafter DECISION 1997].

[5] *Id.*

This report is divided into four sections. Part I summarizes the background of the Committee on the New York State Constitution and the issuance of this report. Part II provides a historical overview of past preparatory commissions for Constitutional Conventions. Part III presents the Committee's recommendations and discusses various lessons from past preparatory commissions and Conventions. Part IV concludes that the importance of the mandatory referendum in 2017 and a potential Convention obliges the State to appropriately plan and prepare, and recommends that the establishment of a preparatory commission is the best way to do so.

I. BACKGROUND OF THE REPORT

On July 24, 2015, State Bar President David P. Miranda announced the creation of The Committee on the New York State Constitution. The Committee's function is to serve as a resource for the State Bar on issues and matters relating to or affecting the State Constitution; make recommendations regarding potential constitutional amendments; provide advice and counsel regarding the mandatory referendum in 2017 on whether to convene a State Constitutional Convention; and promote initiatives designed to educate the legal community and public about the State Constitution.

At the Committee's first meeting on August 27, 2015, President Miranda requested that the members study and make recommendations on whether the State should establish a preparatory commission to plan and prepare for a Constitutional Convention. The Committee then heard from Professor Gerald Benjamin, Associate Vice President for Regional Engagement and Director of the Benjamin Center for Public Policy Initiatives at SUNY New Paltz, a nationally respected political scientist and commentator on state and local government. Professor Benjamin presented an overview of issues relating to the 2017 mandatory referendum and the conduct of a Constitutional Convention, and spoke about his service as Research Director of the Temporary Commission on Constitutional Revision from 1993 to 1995. Next, the Committee reviewed and discussed a research memorandum that surveyed the history of past preparatory commissions for

Constitutional Conventions, described the work product created by them, and identified key issues that must be considered in creating such a commission today.

After further discussion and review, the Committee concluded that the State government should establish, in advance of the mandatory Convention referendum in 2017, a non-partisan preparatory commission, as it has done in the past. This position is set forth and elaborated on in this report, which was unanimously approved by the Committee at a meeting held on September 30, 2015.

II. HISTORICAL OVERVIEW OF PREPARATORY COMMISSIONS AND CONVENTIONS

In the Twentieth Century, the question of whether to hold a Constitutional Convention was placed before the voters on six occasions (1914, 1936, 1957, 1965, 1977 and 1997) and was answered in the affirmative three times, resulting in Constitutional Conventions held in 1915, 1938 and 1967. Preparatory commissions were established by the State in advance of these Conventions as well as the mandatory Convention votes in 1957 and 1997. Each of these commissions is discussed in turn, highlighting the circumstances leading to their establishment, composition, work product, staff support and funding.

A. Constitutional Convention Commission (1914-1915)

On April 7, 1914, the voters approved the call for a Constitutional Convention by a slim majority (153,322 to 151,969).[6] Shortly thereafter, the Governor signed into law a bill establishing the "New York State Constitutional Convention Commission" with full power and authority to "collect, compile and print such information and data as it may deem useful for the delegates to the constitutional convention . . . in their deliberations at

[6] PETER J. GALIE, ORDERED LIBERTY: A CONSTITUTIONAL HISTORY OF NEW YORK 193 (1996) [hereinafter ORDERED LIBERTY].

such convention."[7] The Commission was specifically tasked to supply research materials to the Convention delegates before the Convention was to convene in April 1915.[8]

The Commission consisted of the Majority Leader of the Senate, the Speaker of the Assembly, and three citizens of the State appointed by the Governor.[9] The Commission's enabling legislation provided for no compensation to the members, but provided expenses, and also provided for the employment of paid "clerical, expert and other assistance."[10] For this purpose, the Legislature initially appropriated $5,000.[11]

The Commission's Chair was Morgan J. O'Brien, a former Justice of the State Supreme Court. The Commission selected its staff and fixed their compensation.[12] The State agency responsible for providing assistance to the Commission, the Department of Efficiency and Economy, relied heavily on a newly formed private organization dedicated to producing research of government organizations, the New York Bureau of Municipal Research.[13] The Bureau assigned 20 people to this project, including Charles A. Beard,

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[7] L. 1914, ch. 443. *See also* THOMAS SCHICK, THE NEW YORK STATE CONSTITUTIONAL CONVENTION OF 1915 AND THE MODERN STATE GOVERNMENT 42 (1978) [hereinafter CONSTITUTIONAL CONVENTION OF 1915].

[8] *Id.*

[9] L. 1914, ch. 261, § 1; *see* Robert F. Williams, *Are State Constitutional Conventions Things of the Past? The Increasing Role of the Constitutional Commission in State Constitutional Change*, 1 HOFSTRA L. & POL'Y SYMP. 1, 12-13 (1996) (discussing constitutional commissions established in 1872, 1875, 1890, 1915, 1921, 1936, 1956, 1958, 1965 and 1993).

[10] L. 1914, ch. 261, § 1.

[11] *Id.* § 2.

[12] *Id.* § 1.

[13] GALIE, ORDERED LIBERTY, *supra* note 6, at 193.

later to become one of the most influential historians and political scientists in American history.[14]

The Commission produced a 768-page report for the 1915 Convention delegates that contained a comprehensive and detailed description of the organization and functions of the State government.[15] The Commission also produced a 246-page appraisal of the State Constitution and government.[16] The comprehensiveness and quality of these materials established New York as the first state in the nation to lay a solid research foundation for a Constitutional Convention.[17] In fact, "[t]he report of the commission was the first comprehensive description of a state government ever prepared."[18] These materials ensured that the delegates to the Convention arrived well-prepared[19] and established a precedent of detailed preparation for two future mandatory Convention referenda (1957 and 1997) and Constitutional Conventions (1938 and 1967).[20]

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[14] *Id.*; SCHICK, CONSTITUTIONAL CONVENTION OF 1915, *supra* note 7, at 43-44.

[15] NEW YORK STATE DEPARTMENT OF EFFICIENCY AND ECONOMY, GOVERNMENT OF THE STATE OF NEW YORK: A SURVEY OF ITS ORGANIZATION AND FUNCTIONS (1915).

[16] NEW YORK BUREAU OF MUNICIPAL RESEARCH, THE CONSTITUTION AND GOVERNMENT OF THE STATE OF NEW: AN APPRAISAL (1915). *See* SCHICK, CONSTITUTIONAL CONVENTION OF 1915, *supra* note 7, at 44-49 (discussing the appraisal).

[17] GALIE, ORDERED LIBERTY, *supra* note 6, at 193. *See also* SCHICK, CONSTITUTIONAL CONVENTION OF 1915, *supra* note 7, at 43.

[18] Peter J. Galie & Christopher Bopst, *The Constitutional Commission in New York: A Worthy Tradition*, 64 ALB. L. REV. 1285, 1299 (2001) [hereinafter *A Worthy Tradition*].

[19] *Id.* at 1299. The 1915 Constitutional Convention convened on April 4, 1915 and adjourned on September 4, 1915.

[20] *Id.* at 1300.

B. Constitutional Convention Committee (1937-1938)

On November 3, 1936, the voters approved the call for a Constitutional Convention by a vote of 1,413,604 to 1,190,275.[21] In response, Governor Herbert H. Lehman recommended in his annual message to the Legislature that past practice be followed by establishing a non-partisan committee to assemble and collate data for the use of the Convention.[22] "It seems to be extremely short-sighted," he observed, "for us to do nothing until the day the convention assembles." The two Houses of the Legislature, however, did not adopt the Governor's recommendation.[23]

In the face of the Legislature's inaction, on July 7, 1937, Governor Lehman announced the appointment of the "New York State Constitutional Committee."[24] Consisting of 42 members, the Committee was "non-partisan and non-political in character and in motive," and responsible for undertaking and directing "the preparation and publication of accurate, thorough, and above all, impartial studies on the important phases of government, certain to be considered at the Constitutional Convention."[25] Governor Lehman made clear that the Committee's purpose was not "to

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[21] *Id.* at 1304.

[22] VERNON A. O'ROURKE & DOUGLAS W. CAMPBELL, CONSTITUTION-MAKING IN A DEMOCRACY: THEORY AND PRACTICE IN NEW YORK STATE 67 (1915) [hereinafter CONSTITUTION-MAKING]; Franklin Feldman, *A Constitutional Convention in New York: Fundamental Law and Basic Politics,* 2 CORNELL L. REV. 329, 336 (1957) [hereinafter *A Constitutional Convention*].

[23] O'ROURKE & CAMPBELL, CONSTITUTION-MAKING, *supra* note 22, at 67 ("[Governor Lehman's] . . . recommendation . . . was unable to scale the heights of partisanship. A bill was passed by the Senate, but the legislature adjourned without authorizing such a fact-finding committee, despite Governor Lehman's assurance that the committee would be restricted to fact-finding, with no power over the order or the character of business to be handled by the convention.").

[24] 1937 PUBLIC PAPERS OF GOVERNOR LEHMAN 664 [hereinafter LEHMAN PAPERS].

[25] *Id.*

determine an agenda for the Convention . . . Its functions will be confined to fact-finding studies and to the collection of data."[26] Although all of the Committee's members were appointed by the Governor, the Legislature appropriated money in support of its work.[27]

The Committee's Chair was then-State Supreme Court Justice (later Lieutenant Governor and Governor) Charles Poletti. He and the other Committee members were supported by a substantial staff of at least 16 people. In addition, at Governor Lehman's direction, 15 people were assigned from the State Law Revision Commission to work with the Committee. More than 100 others, including leading academics, government officials, and private citizens, also provided assistance, advice and counsel.[28]

The Committee produced 12 reports: five reference volumes, along with volumes devoted to problems related to the bill of rights, taxation and finance, and issues of home rule and local government. As constitutional historian Peter J. Galie has observed, "despite the haste in gathering this material, the Poletti Committee, as it became known, produced one of the most comprehensive and reliable source[s] of information on the New York Constitution."[29]

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[26] *Id.*

[27] Feldman, *A Constitutional Convention, supra* note 22, at 337.

[28] Information regarding the Poletti Committee's staff and other support was gleaned from introductory notes at the front of each of the 12 reports produced by the Committee. The reports are accessible online from the New York State Library: http://128.121.13.244/awweb/main.jsp?flag=collection&smd=1&cl=library1_lib&field11=1301505&tm=1442777021299&itype=advs&menu=on (last visited on Sept 20, 2015).

[29] GALIE, ORDERED LIBERTY, *supra* note 6, at 233; Williams, *Constitutional Commissions, supra* note 4, at 50 (the "Committee produced a body of work extraordinary for its depth, breath, and quality"). The Poletti Committee's reports are often cited by New York courts. *See, e.g., People v. Peque*, 22 N.Y.3d 168, 187 (2013) ("As noted in the Poletti Committee's report in preparation for the State's constitutional convention of 1938 . . . ."); *Bordeleau v. State*, 18 N.Y.3d 305, 317 (2011) ("Such

C. Temporary Commission on the Constitutional Convention (1956-1958)

In 1956, more than a year before the mandatory referendum on a Constitutional Convention, the Legislature established the "New York State Temporary Constitution Convention Commission."[30] The Commission was given three responsibilities: (1) to study proposals for change and simplification of the Constitution; (2) to collect and present information and data useful for the delegates and electorate prior to and during the convention; and (3) to issue reports to the Governor and the Legislature. The interim reports were due not later than March 1, 1957, and from time to time thereafter until March 1, 1959, provided, however, that if the voters decided against the Convention the Commission would terminate on February 1, 1958.[31]

The Commission was composed of 15 members, five named by the Governor, five by the Majority Leader of the Senate, and five by the Speaker

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concerns were the subject of debate during the 1938 Constitutional Convention. But the Convention and subsequent ratification of the amendments by the electorate demonstrated the approval for the ability of public benefit corporations to receive and expend public monies, enable the development and performance of public projects and be independent of the State [*see Problems Relating to Executive Administration and Powers,* 1938 Rep. of N.Y. Constitutional Convention Comm., vol. 8, at 325–326 . . . .") (citing the Poletti Report)].

[30] L. 1956, ch. 814; Feldman, *A Constitutional Convention, supra* note 22, at 337-338. As the future Chair of the Commission observed: "The action taken by the Legislature in passing the bill creating the Temporary State Commission on the Constitutional Convention and the Governor's signing of it marked the first time in our State's history, or in that of any other state so far as we can ascertain, that a Commission has been established prior to the referendum on the calling of a convention." Nelson A. Rockefeller, *The Work of the State Constitutional Convention Commission*, 29 N.Y. St. B. Bull. 314, 315 (July 1957) [hereinafter *Work of the State Constitutional Convention Commission*].

[31] GALIE, ORDERED LIBERTY, *supra* note 6, at 262-63; Moses, *Another State Constitutional Convention, supra* note 2, at 205-206.

of the Assembly.[32] When a dispute developed between Republican leaders and Governor W. Averell Harriman over who would serve as the Commission's chair, Harriman appointed Nelson A. Rockefeller (who later became Governor).[33]

The Commission had an outstanding staff, with nearly 70 expert consultants to conduct policy reviews.[34] On September 26, 1956, the Commission held its first organizational meeting,[35] and issued its First Interim Report on February 19, 1957.[36] The report provided a brief outline of the State's constitutional history, a description of methods of amending the Constitution, and staff studies that updated the compilation of state constitutions that had served the 1938 Convention and presented an outline of proposed background studies in local government. The Commission indicated that it would look for opportunities to simplify the existing Constitution in non-controversial ways.[37]

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[32] L. 1956, ch. 814, § 2.

[33] GALIE, ORDERED LIBERTY, *supra* note 6, at 262. *See* RICHARD NORTON SMITH, ON HIS OWN TERMS: A LIFE OF NELSON ROCKEFELLER 267-269 (2014) [hereinafter ROCKEFELLER].

[34] Smith, ROCKEFELLER, *supra* note 33, at 270. The Commission's Executive Director was Dr. William J. Ronan, the 44-year old Dean of the New York University Graduate School of Public Administration and Social Science. The Counsel to the Commission was George L. Hinman, a highly respected 51-year-old lawyer from Binghamton. *Id.* at 270-271.

[35] HENRIK N. DULLEA, CHARTER REVISION IN THE EMPIRE STATE: THE POLITICS OF NEW YORK'S 1967 CONSTITUTIONAL CONVENTION 33 (1997) [hereinafter CHARTER REVISION].

[36] TEMPORARY STATE COMMISSION ON THE CONSTITUTIONAL CONVENTION, FIRST INTERIM REPORT (1957), *reprinted in* N.Y. Legis. Doc. No. 8 (1958); *see* DULLEA, CHARTER REVISION, *supra* note 35, at 33 (summarizing First Interim Report).

[37] *Id.*

In June 1957, the Commission held public hearings in Buffalo, Albany and New York City to provide the public an opportunity to present suggestions and proposals for constitutional revision and simplification.[38] At the hearings more than 80 people representing their individual points of view or those of organized groups appeared before the Commission.[39]

In the spring of 1957, the Commission created an Inter-Law School Committee on Constitutional Simplification. The Committee examined 54 sections of the Constitution, recommending elimination of 23 of them as superfluous and outmoded. Other sections were deemed so cumbersome and "harmfully detailed" that they could "be rewritten and substantially shortened."[40]

At the summer meeting of the State Bar in June 1957, Chairman Rockefeller said that the two questions voters would face in November were (1) whether the state Constitution needs amending, and if so, (2) whether a convention or the alternative legislative method would be more effective. He observed that there was "no group in the state which is more interested in these questions or whose judgment and informed opinion can be more helpful to the voters in deciding these issues than the New York State Bar Association."[41]

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[38] DULLEA, CHARTER REVISION, *supra* note 35, at 34-35.

[39] Rockefeller, *Work of the State Constitutional Convention Commission*, *supra* note 30, at 320.

[40] GALIE, ORDERED LIBERTY, *supra* note 6, at 263 (quoting THE INTER-LAW SCHOOL COMMITTEE, THE PROBLEM OF SIMPLIFICATION OF THE CONSTITUTION (1958), *reprinted in* N.Y. Legis. Doc. No. 57, at xiii (1958)); Rockefeller, *Work of the State Constitutional Convention Commission*, *supra* note 30, at 318.

[41] Rockefeller, *Work of the State Constitutional Convention Commission*, *supra* note 30, at 314.

On September 19, 1957, the Commission issued a Second Interim Report[42] that summarized the proposals gathered by the Commission from individuals and 107 organizations during public hearings. The subjects receiving the greatest attention were local governments and home rule, legislative apportionments, organization and procedure.[43]

On November 5, 1957, the electorate voted against a Constitutional Convention by a vote of 1,368,068 to 1,242,538. Nevertheless, the Commission remained in existence under the name Special Committee on the Revision and Simplification of the Constitution. Before going out of existence in 1961, this body issued a number of reports, some of which provided the basis for amendments to the Constitution subsequently proposed by the Legislature and approved by the people.[44]

D. Temporary State Commission on the Constitutional Convention (1965-1967)

As a result of legislative action calling for a referendum vote, in November 1965, the voters approved the call for a Convention by a vote of 1,681,438 to 1,468,431.[45] That same year, the Legislature established the "temporary state commission on the revision and simplification of the constitution and to prepare for a constitutional convention."[46] The Commission was charged with making "a comprehensive study of the constitution with a view to proposing simplification of the constitution," in addition to the traditional assignment of collecting and compiling useful

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[42] TEMPORARY STATE COMMISSION ON THE CONSTITUTIONAL CONVENTION, SECOND INTERIM REPORT (1957), *reprinted in* N.Y. Legis. Doc. No. 57 (1957).

[43] *Id.*; *see* DULLEA, CHARTER REVISION, *supra* note 35, at 34-35 (summarizing Second Interim Report).

[44] Williams, *Constitutional Commission, supra* note 4, at 50.

[45] GALIE, ORDERED LIBERTY, *supra* note 6, at 307.

[46] L. 1965, Ch. 443, § 1.

information and data for the delegates and public before the convening of, and during the course of, the Constitutional Convention.[47]

The Commission was comprised of 18 members, with the Governor, the Speaker of the Assembly, and the Senate Majority Leader each appointing six members.[48] However, the Commission's work was delayed because of policy conflicts, personality clashes, and disputes over the Commission's leadership and staff.[49] The Commission's membership roster was not announced until December 20, 1965, and its first planning meeting was not held until January 20, 1966.[50]

Also, delays in appropriating money to support the Commission's work strained the relationship between the Commission's initial chair (who resigned) and the Legislature.[51] Moreover, whereas earlier Commissions had been able to pick and choose among those subjects they wished to present to the Legislature, the Commission's enabling legislation was construed to require the Commission to address every article of the Constitution.[52]

The Commission had a 28-person staff, supported by numerous consultants on a wide range of subject areas.[53] The Legislature initially

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[47] *Id.*

[48] *Id.*, at § 2.

[49] Galie & Bopst, *A Worthy Tradition, supra* note 18, at 1312-1313.

[50] DULLEA, CHARTER REVISION, *supra* note 35, at 131.

[51] The Commission's initial chair was Henry T. Heald, president of the Ford Foundation, who resigned on June 30, 1966. He was replaced by Sol Neil Corbin, a former Counsel to Governor Nelson A. Rockefeller. *Id.* at 130-132.

[52] *Id.* at 131-134; *see* L. 1965, ch. 443, § 1 (requiring the commission to undertake a comprehensive study of the Constitution).

[53] The Commission's staff and consultants are listed at the front of the Commission's 16 reports, which are accessible online from the New York State Library:

appropriated $150,000 for the Commission, although the State eventually spent over a million dollars on it.[54]

Hampered by partisan divisions, the Commission issued 16 reports relatively late in the process, with modernization, simplification and reorganization as the dominant themes.[55] The reports were "non-controversial and uneven in quality" and had little impact on the Convention.[56]

E. 1977 Referendum on a Constitutional Convention

No commission was established by the Governor or the Legislature during the run up to the mandatory Convention vote in 1977.[57] The City of New York was engulfed in a major fiscal crisis, and the legislative leaders were openly hostile to a Convention. "There are a substantial number of issues that require hefty analysis," said a key staffer to the Speaker of the Assembly. "The Legislature for the past several years has been dealing with daily crises."[58] On November 8, 1977, the electorate voted against a

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http://128.121.13.244/awweb/main.jsp?flag=collection&smd=1&cl=library1_lib&field11=4116707&tm=1442777963096 (last visited on Sept 20, 2015).

[54] William J. van den Heuvel, *Reflections on Constitutional Conventions*, 40 N.Y.S.B.J. 261 (June 1968) [hereinafter *Reflections*].

[55] GALIE, ORDERED LIBERTY, *supra* note 6, at 309; Williams, *Constitutional Commission, supra* note 4, at 50. The 1967 Constitutional Convention convened on April 4, 1967 and adjourned on September 26, 1967.

[56] DONNA E. SHALALA, THE CITY AND THE CONSTITUTION: THE 1967 CONVENTION'S RESPONSE TO THE URBAN CRISIS 134 (1972); *see* Galie & Bopst, *A Worthy Tradition, supra* note 18, at 1313 ("the reports were largely ignored by the convention . . . .").

[57] Williams, *Constitutional Commissions, supra* note 3, at 50.

[58] Gerald Benjamin, *A Convention for New York: Overcoming Our Constitutional Catch-22*, 12 GOVT. LAW & POLICY J. 13, 15 (Spring 2010) (quoting Michael DelGiudice, a key staffer to Assembly Speaker Stanley Steingut).

Constitutional Convention by a substantial margin (1,668,137 to 1,126,902). The State's failure to prepare for a Convention was used as an argument against calling it.[59]

F. Temporary Commission on Constitutional Revision (1993-1995)

In May of 1993, four years in advance of the next mandatory Convention vote, Governor Mario M. Cuomo established by executive order the "Temporary New York State Commission on Constitutional Revision."[60] The Commission had 18 members. Its chair was Peter Goldmark, Jr., President of the Rockefeller Foundation, and its work was supported by the Rockefeller Institute of Government of the State University of New York.[61]

In his executive order creating the Commission, Governor Cuomo called attention to the mandatory Convention vote to be held in 1997 and the need to prepare for and educate the public about it (or an earlier Convention if one were called).[62] Specifically, Governor Cuomo directed the Commission to:

- consider the constitutional change process and the range of constitutional issues to be considered by the people;
- study the processes for convening, staffing, holding and acting on the recommendations of a Convention;
- determine the views of New Yorkers on constitutional matters;

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[59] *Id.*

[60] Exec. Order No. 172 (May 1993).

[61] *Id.*; DECISION 1997, *supra* note 4, at viii.

[62] *See* Exec. Order No. 172 ("WHEREAS, it is important that the people be educated so that they make an informed decision on whether a convention is desirable in 1997 or earlier if the Legislature agrees to pose the question; . . . "WHEREAS, the State government must be prepared if the people decide that a convention should be held . . .").

- develop "a broad-based agenda" of constitutional issues and concerns;

- provide "an objective and non-partisan outline" of the range of constitutional issues; and

- engage in a range of activities designed to focus attention on constitutional change.[63]

The Commission lacked the approval or financial support of the Legislature.[64] It did have a distinguished (albeit small) staff of seven persons who operated on a budget of approximately $200,000 to $250,000.[65] The Commission held hearings throughout the State and in March 1994 issued an interim report that explored and made recommendations regarding the delegate selection process.[66] It also issued a periodic newsletter entitled *Constitutional Matters* and a briefing book relating to the State Constitution.[67]

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[63] *Id.* ¶¶ II-IV; GALIE, ORDERED LIBERTY, *supra* note 6, at 351 (citing TEMPORARY NEW YORK STATE COMMISSION ON CONSTITUTIONAL REVISION, MISSION STATEMENT (1993)).

[64] GALIE, ORDERED LIBERTY, *supra* note 6, at 353.

[65] The Commission's Counsel and Executive Director was Professor Eric Lane of the Hofstra University Law School, and its Research Director was Dean Gerald Benjamin of the State University of New York at New Paltz. Both of their work for the Commission was on a part-time basis. They were supported by a staff of five.

[66] *Id.*; TEMPORARY NEW YORK STATE COMMISSION ON CONSTITUTIONAL REVISION, THE DELEGATE SELECTION PROCESS: AN INTERIM REPORT (Mar. 1994) [hereinafter DELEGATE SELECTION PROCESS].

[67] GALIE, ORDERED LIBERTY, *supra* note 6, at 353; TEMPORARY NEW YORK STATE COMMISSION ON CONSTITUTIONAL REVISION, THE NEW YORK STATE CONSTITUTION: A BRIEFING BOOK (Mar. 1994).

The Commission's final report was published in February 1995,[68] two years and nine months before the mandated 1997 Convention vote. In particular, the Commission called on the Legislature and the Governor to create "Action Panels" to develop a coherent reform package in four important subject areas: State fiscal integrity, State and local relations, education and public safety. If policymakers failed to adequately address these issues, a majority of the Commission's members maintained that a Convention should be held.[69]

On November 4, 1997, the electorate voted against a Constitutional Convention by a substantial margin (1,579,390 to 929,415).[70]

III. RECOMMENDATIONS

The following recommendations were approved by the Committee voting at its September 30, 2015 meeting when the recommendations were discussed.

Recommendation 1: The State should establish a non-partisan preparatory Constitutional Convention commission as soon as possible.

As it has done several times in the past, the State should create a preparatory Constitutional Convention commission as soon as possible. Nearly 50 years have passed since New York last held a Constitutional Convention. Likewise, 18 years have passed since the last referendum vote in 1997. As a result, the collective memory on preparing for and organizing a Convention has waned significantly. The Commission will face not only a herculean task reviewing New York's Constitution and the numerous

[68] TEMPORARY NEW YORK STATE COMMISSION ON CONSTITUTIONAL REVISION, EFFECTIVE GOVERNMENT NOW FOR THE NEW CENTURY: A REPORT TO THE PEOPLE, THE GOVERNOR AND THE LEGISLATURE OF NEW YORK (Feb. 1995).

[69] *Id.* at 12-21.

[70] Gerald Benjamin, *Mandatory Constitutional Convention Question Referendum: The New York Experience in National Context,* 65 ALBANY L. REV. 1017, 1041 (2001).

subjects it encompasses, but also a massive historical reclamation project to develop and provide information on the mechanics of a Convention itself.

Although past commissions have been created both before and after the referendum vote, we recommend creation of a preparatory commission as soon as possible and, in any event, well in advance of the November 2017 referendum.[71] A hastily set up commission, after an affirmative decision to hold a Convention has been made, will likely be of little use either to the public or the delegates. As Governor Lehman once observed, "[i]t seems to be extremely short-sighted for us to do nothing until the day the convention assembles."[72] "Without adequate planning," he explained, "there will inevitably be great waste of money, time and effort to the end that the very objects of the Convention will be defeated."[73]

Thus, with the 2017 referendum only two years away, there is a pressing need for a preparatory commission to begin work immediately.

The Legislature created the commissions for the 1915 Convention, the 1957 referendum and the 1967 Convention; Governors established commissions for the 1938 Convention and the 1997 referendum. History teaches that regardless how a preparatory commission is formed, it requires the support of all branches of government to produce useful and

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[71] *See* O'ROURKE & CAMPBELL, CONSTITUTION-MAKING, *supra* note 22, at 273-274 (recommending that a preparatory commission "should function, at least, during the two years prior to the submission to the voters of the question of a convention"). In 1956 and 1993, Commissions were created in advance of referendums; whereas in 1914, 1936 and 1965, Commissions were created subsequent to the electorate's call for a Constitutional Convention.

[72] LEHMAN PAPERS, *supra* note 24, at 664.

[73] *Id.*.

comprehensive work product for the benefit of New York voters, lawmakers, interested groups, and delegates if a Convention is held.[74]

Likewise, it is critical that the membership of the preparatory commission be technically proficient, experienced, and diverse in every way. More, the commission must be non-partisan in character and motive, "commanding by its impartial mandate" the confidence of the general public and the delegates if a Convention is held.[75]

> ***Recommendation 2: The commission should be tasked with (a) educating the public about the State Constitution and the constitutional change process; (b) making a comprehensive study of the Constitution and compiling recommended proposals for change and simplification; (c) researching the conduct of, and procedures used at, past Constitutional Conventions; and (d) undertaking and directing the preparation and publication of impartial background papers, studies, reports and other materials for the delegates and public prior to and during the Convention, if one is held.***

Past preparatory commissions have been given various assignments, such as investigating the entirety of the Constitution in 1967, or only selected portions in 1997. Commissions have also varied in their approach to resulting work products. The Poletti Committee reports provided comprehensive study of nearly all areas, while the 1967 Commission's work product to the delegates was primarily questions framing the issues that the Commission felt to be important.[76] However, one contemporary commentator noted that the 1967 Commission's approach of posing

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[74] A cautionary tale is the delay in funding of the Commission created for the 1967 Convention, which delay unsteadied the Commission's leadership and staff. DULLEA, CHARTER REVISION, *supra* note 35, at 132.

[75] Van den Heuvel, *Reflections*, *supra* note 54, at 263.

[76] *Id.*

questions to the delegates as opposed to providing substantive information was ineffective.[77]

The State Constitution and its ramifications "are so complex and the structure of the Government that has been erected within the framework of the constitution has so many wide and varied implications that a broad frame of reference is essential."[78] Therefore, among its other duties, the preparatory commission should:

> Make a comprehensive study of the Constitution and compile recommended proposals for change and simplification;
>
> Research the conduct of, and procedures used at, past Constitutional Conventions;
>
> Study and make recommendations regarding the selection process for Convention delegates;
>
> Undertake and direct the preparation and publication of impartial background papers, studies, reports and other materials for the delegates and public prior to and during the Convention, if one is held;
>
> Brief the principal constitutional questions that were debated and considered at previous Conventions;
>
> Collect data on the constitutional amendments proposed and adopted in other states on subjects of substantial interest to New Yorkers; and

[77] *Id.*

[78] Rockefeller, *Work of the State Constitutional Convention Commission*, *supra* note 30, at 317.

Collect and collate data on the important changes that have been made in the State's structure of government since the adoption of the present Constitution in 1894/1938.

Finally, the preparatory commission should recommend ways to educate the public about the State Constitution and the constitutional change process. Indeed, "[s]ome New Yorkers do not know there is a state constitution, much less how it may affect their lives."[79]

Recommendation 3: The preparatory commission should have an expert, non-partisan staff.

The preparatory commission must have a dedicated, full-time, expert staff under the direction and assistance of an executive director, a research director and a counsel. Adequate support staff will be necessary, too. The commission will face the daunting task not only of examining the substantive areas of the Constitution and related issues, but also surveying and educating the public, and helping to plan and prepare for a Convention, if one is held. The preparatory commissions created for the 1915 and 1938 Conventions, and the one created in the 1957 Convention referendum — all hailed as successful — had the support of sizable research and support staffs, state agencies, good government groups, and leading academics. Nothing less is required today for a preparatory commission to successfully plan and prepare the State for the mandatory referendum in 2017 and a potential Convention in 2019.

Recommendation 4: The preparatory commission and its staff should be supported by adequate appropriations from the State government.

A preparatory constitutional convention commission will require significant appropriations to accomplish its substantial task. As noted, the preparatory commission created for the 1967 Convention received an initial

[79] DELEGATE SELECTION PROCESS, *supra* note 66, at 36.

$150,000[80] that grew to approximately one million dollars by the time its work was completed in 1967.[81]

Based on past experience, a preparatory commission will require financial support from the State government in order to hire qualified staff and ensure a high quality work product. Given the substantial governmental expenditure that an actual Constitutional Convention would require, a significant appropriation for a commission's work is a wise investment. Should the voters approve the call for a Constitutional Convention in 2017, additional appropriations will be necessary.

IV. CONCLUSION

In the November 2017 general election, New York voters will decide whether to hold a Constitutional Convention commencing in April 2019. This will be a constitutional choice of profound importance; a rare opportunity to debate fundamental principles of governance. Absent a legislative initiative, the State will not have this opportunity for another twenty years.

Whatever the outcome of the referendum, the public should be educated about the relevant issues. The establishment of a preparatory commission is a first step in beginning the "deliberative process that could result in our later being offered either an entirely new Constitution or a series of amendments to the existing Constitution."[82] The 1957 and 1997 mandatory Convention votes were preceded by such commissions. The need for a commission today is even greater than those past cycles. There are few living delegates from the last Convention in 1967, and little, if any, institutional memory on how to hold one. The hard, complex work of preparing for a vote and Convention cannot begin too soon.

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[80] L. 1965, ch. 443 § 11.

[81] Van den Heuvel, *Reflections*, *supra* note 54, at 263.

[82] DELEGATE SELECTION PROCESS, *supra* note 66, at 1.

NEW YORK STATE BAR ASSOCIATION

REPORT AND RECOMMENDATIONS

CONCERNING

CONSTITUTIONAL HOME RULE

ADOPTED BY

THE COMMITTEE ON THE NEW YORK STATE CONSTITUTION

Approved by the House of Delegates on April 2, 2016

Membership of the New York State Bar Association's Committee on the New York State Constitution

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INTRODUCTION AND EXECUTIVE SUMMARY

The New York State Constitution mandates that every 20 years voters are asked the following question: "Shall there be a convention to revise the constitution and amend the same?"[1] The next such mandatory referendum will be held on November 7, 2017. What follows is a report and recommendations of the New York State Bar Association's ("State Bar") Committee on the New York State Constitution ("the Committee") concerning Constitutional Home Rule.

In New York State, local government has a greater impact on the day-to-day lives of the public than any tier of government. Our thousands of towns, villages, counties, cities, boroughs, school districts, special districts, authorities, commissions and the like play a vital governance role. They are responsible for drinking water, social services, sewerage, zoning, schools, roads, parks, police, courts, jails, trash disposal — and more. Without local government, public services often taken for granted would not be delivered.

Befitting its stature and importance, local government is a longstanding constitutional concern.[2] Indeed, since the 19th Century, "Home Rule" — the authority of local governments to exercise self-

[1] N.Y. CONST. art. XIX, § 2 ("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. The delegates so elected shall convene at the capitol on the first Tuesday of April next ensuing after their election, and shall continue their session until the business of such convention shall have been completed. . . . .").

[2] Richard Briffault, *Local Government and the New York State Constitution*, 1 HOFSTRA L. & POL'Y SYMP. 79, 79 (1996) ("A longstanding constitutional concern in New York is local government and the relations between local governments and the State.").

government — has been a matter of constitutional principle in New York.[3] The continuing dilemma has been to strike the right balance of furthering strong local governments but leaving the State strong enough to meet the problems that transcend local boundaries.[4] The competing considerations were aptly summarized by the commission tasked with preparing for the last Constitutional Convention held in New York in 1967:

> On the one hand, there is the question of how to leave a legislature free to cope with possible problems of state-wide concern and to intervene in local affairs when, in the judgment of the legislature, they reach a point of state-wide concern. On the other, is the question of how to determine the responsibilities appropriate for local governments, the powers needed for carrying out those responsibilities and the kind of protection from state legislative intervention that should be provided to permit and sustain responsive and responsible local self-government.[5]

Article IX, the so-called "Home Rule" article, contains protections for local government that are more extensive than those in many other states.[6] Constitutional Home Rule is established by granting local governments affirmative lawmaking powers, while carving out a sphere of local autonomy free from State interference.

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[3] *See Kamhi v. Town of Yorktown*, 74 N.Y.2d 423, 428, 548 N.Y.S.2d 144, 146, 547 N.E.2d 346, 348 (1989) (declaring that "[m]unicipal home rule in this State has been a matter of constitutional principle for nearly a century").

[4] *Id.* at 428, 548 N.Y.S.2d at 146, 547 N.E.2d at 348.

[5] N.Y. STATE TEMP. STATE COMM'N ON CONST. CONVEN., LOCAL GOVERNMENT 11 (Mar. 31, 1967) [hereinafter LOCAL GOVERNMENT].

[6] *See* ROBERT B. WARD, NEW YORK STATE GOVERNMENT 545 (2d ed. 2006) ("New York's constitutional and statutory provisions regarding home rule are more extensive than those in many states.").

Despite Article IX's intent to expand the authority of local governments, Home Rule in practice has produced only a modest degree of local autonomy. The powers of local governments have been significantly restricted by two legal doctrines developed through decades of litigation ("preemption" and "State concern"). Local governments must also follow mandates enacted by the State Legislature.

The preemption doctrine is a fundamental limitation on the power of local governments to adopt local laws. Under the preemption doctrine, a local law is unenforceable when it collides with a State statute; that is, the local law prohibits what a State statute allows, or the State statute prohibits what the local law allows. But even in the absence of an outright conflict between State and local law, a local government may not act where the State has acted comprehensively in the same area.

The State concern doctrine represents an exception to the constitutional limitations on the State Legislature's authority to enact special laws targeted at one or more, but not all local governments. Under this doctrine, the State Legislature is empowered to regulate local matters, yet which also relate to State concerns, such as waste disposal on Long Island, sewers in Buffalo, and taxicabs in New York City.

Home Rule is further limited by the State Legislature's imposition of mandates that compel local governments to provide specific services and meet minimum State standards, often without providing fully supporting funds necessary to comply with such mandates. New York imposes more unfunded mandates on localities than any other state in the nation.[7]

Blue ribbon panels and local government scholars have called for revisions to Article IX's Home Rule provisions. Nevertheless, a half-century has passed since the State has had a serious discussion on this subject. The time to do so again is long overdue. This is especially so, given the myriad challenges facing local government today.

[7] PETER J. GALIE & CHRISTOPHER BOPST, THE NEW YORK STATE CONSTITUTION 279 (2d ed. 2012) [hereinafter THE NEW YORK STATE CONSTITUTION].

This report is divided into four sections. Part I summarizes the background of the Committee on the New York State Constitution and the issuance of this report. Part II provides an overview of Constitutional Home Rule. Part III describes legal doctrines and laws that restrict the ambit of Home Rule. Part IV concludes that New Yorkers would benefit from a thorough consideration of Constitutional Home Rule and potential reforms that would strengthen and clarify it.

I. BACKGROUND OF THE REPORT

On July 24, 2015, State Bar President David P. Miranda announced the creation of The Committee on the New York State Constitution. The Committee's function is to serve as a resource for the State Bar on issues and matters relating to or affecting the State Constitution; make recommendations regarding potential constitutional amendments; provide advice and counsel regarding the mandatory referendum in 2017 on whether to convene a State Constitutional Convention; and promote initiatives designed to educate the legal community and public about the State Constitution.

On October 8, 2015, the Committee issued its first report and recommendations, entitled "*The Establishment of a Preparatory State Commission on a Constitutional Convention.*"[8] The Committee recommended that, in advance of the 2017 referendum on a Constitutional Convention, the State should establish a non-partisan preparatory commission, as it has done in the past. The commission's duties should include: (a) educating the public about the State Constitution and the constitutional change process; (b) making a comprehensive study of the Constitution and compiling recommended proposals for change and simplification; (c) researching the conduct of, and procedures used at, past Constitutional Conventions; and (d) undertaking and directing the

[8] N.Y. STATE BAR ASSN. COMM. ON THE N.Y. STATE CONST., REPORT AND RECOMMENDATIONS CONCERNING THE ESTABLISHMENT OF A PREPARATORY STATE COMM'N ON A CONSTITUTIONAL CONVENTION (2015), *available at* http://www.nysba.org/nysconstitutionreport/ (last visited on Mar. 6, 2016).

preparation and publication of impartial background papers, studies, reports and other materials for the delegates and public prior to and during the Convention, if one is held.

On November 7, 2015, the State Bar's House of Delegates unanimously adopted the Committee's report and recommendations.[9] Two months later, during his State of the State Address, Governor Andrew M. Cuomo proposed as part of his Executive Budget the creation of a preparatory commission on a Constitutional Convention. The Governor proposed investing $1 million to create the commission to develop a blueprint for a convention. The commission would also be authorized to recommend fixes to the current Convention delegate selection process.[10]

The Committee has now turned its attention to the subject of Constitutional Home Rule. At its meeting on December 17, 2015, the Committee heard a presentation from Professor Richard Briffault, the Joseph P. Chamberlin Professor of Legislation at Columbia Law School, and a nationally respected authority on local government. At its next meeting, on January 27, 2016, the Committee heard from another eminent authority on local government, Michael A. Cardozo, a partner at the law firm of Proskauer Rose and the former Corporation Counsel for the City of New York from 2002 through 2013. As the City's 77th and longest serving Corporation Counsel, Mr. Cardozo was the City's chief legal officer, headed the City's Law Department of more than 700 lawyers, and served as legal counsel to Mayor Michael Bloomberg, elected officials, the City and its agencies.

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[9] Press Release, N.Y. State Bar Assn., *New York State Bar Association Calls on State Government to Prepare Now for Statewide Vote on State Constitution in 2017* (Nov. 13, 2015), *available at* http://www.nysba.org/NYSConstitutionVote/ (last visited on Mar. 6, 2016).

[10] Press Release, N.Y. State Div. of Budget, *Governor Cuomo Outlines 2016 Agenda: Signature Proposals Ensuring That New York is — and Will Continue to Be Built to Lead* (Jan. 13, 2016), *available at* http://www.budget.ny.gov/pubs/press/2016/pressRelease16_eBudget.html (last visited on Mar. 6, 2016).

After further discussion and review, the Committee concluded that the public and legal profession would be well served to have a serious conversation about, and debate over, whether the Home Rule provisions in Article IX of the State Constitution should be clarified and strengthened. This position is set forth and elaborated on in this report, which was unanimously approved by the Committee at a meeting held on March 10, 2016.

II. CONSTITUTIONAL HOME RULE — GENERALLY

Home rule — the right of localities to exercise control over matters of local concern[11] — has long "been a matter of constitutional principle"[12] in New York State. Beginning in the 19th Century, the home rule movement represented a determined effort to provide local governments with autonomy over local affairs and freedom from State legislative interference.[13] The path of home rule has been "unsettled and tortuous" through the years, reflecting "the difficult problem of furthering strong local governments but leaving the

[11] *See People ex. rel. Metropolitan St. Ry. Co. v. State Board of Tax Comm'rs*, 174 N.Y. 417, 431, 67 N.E. 69, 70 (1903), *aff'd*, 199 U.S. 1 (1905) ("The principle of home rule, or the right of self-government as to local affairs, existed before we had a constitution."); *see also* John R. Nolon, *The Erosion of Home Rule Through The Emergence of State-Interests in Land Use Control*, 10 PACE ENVTL. LAW REV. 497, 505 (1993) ("[Home Rule's] purpose is to permit local control over matters that are best handled locally and without state interference."); James D. Cole, *Constitutional Home Rule in New York: "The Ghost of Home Rule,"* 59 ST. JOHN'S L. REV. 713, 713 n.1 (1985) ("'home rule' can be described as a method by which a state government can transfer a portion of its governmental power to a local government") [hereinafter *Ghost of Home Rule*].

[12] *See Kamhi*, 74 N.Y.2d at 428, 548 N.Y.S.2d at 146, 547 N.E.2d at 348 (declaring that "[m]unicipal home rule in this State has been a matter of constitutional principle for nearly a century").

[13] Note, *Home Rule and the New York Constitution*, 66 COLUM. L. REV. 1145, 1145 (1966).

State just as strong to meet the problems that transcend local boundaries, interests and motivations."[14]

New York's basic system of local governance is set forth in Article IX of the State Constitution. Adopted in 1963 with high hopes,[15] Article IX was intended to expand and secure the powers enjoyed by local governments.[16] Governor Nelson A. Rockefeller predicted at the time that Article IX and its implementing legislation would "strengthen the governments closest to the people so that they may meet the present and emerging needs of our times."[17]

Article IX declares "[e]ffective local self-government and intergovernmental cooperation are purposes of the people of the state";[18]

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[14] *Kamhi*, 74 N.Y.2d at 428, 548 N.Y.S.2d at 146, 547 N.E.2d at 348 (internal quotation marks & citations omitted).

[15] *See* GALIE & BOPST, THE NEW YORK STATE CONSTITUTION, *supra* note 7, at 266 (Article IX was "meant to embody a new concept in state-local relationships by constitutionally recognizing that the 'expansion of powers for effective local self-government' is a purpose of the people of the state.") (citation omitted).

[16] *See Wambat Realty Corp. v. State of New York*, 41 N.Y.2d 490, 496, 393 N.Y.S.2d 949, 953, 362 N.E.2d 581, 585 (1977) ("Undoubtedly the 1963 home rule amendment was intended to expand and secure the powers enjoyed by local governments."); *Matter of Town of E. Hampton v. State of New York*, 263 A.D.2d 94, 96, 699 N.Y.S.2d 838, 839 (3d Dep't 1999) ("The unquestioned purpose behind the home rule amendment was to expand and secure the powers enjoyed by local governments.") (internal quotation marks omitted); James L. Magavern, *Fundamental Shifts Have Altered the Role of Local Government*, N.Y. ST. B.J., Jan. 2001, at 52, 53 (the Home Rule Amendments to the State Constitution were "presented as 'a significant new contribution to the principle that local problems can best be solved by those familiar with them and most concerned with them'") (quoting N.Y. STATE OFFICE FOR LOCAL GOVERNMENT, NEWSLETTER, No. 15, Sept. 18, 1963).

[17] WARD, THE NEW YORK STATE GOVERNMENT, *supra* note 6, at 547 (quoting Governor Rockefeller's memorandum of approval of Article IX's implementing legislation, the Municipal Home Rule Law (L. 1963, ch. 843 & 844), upon its adoption on Apr. 30, 1963).

[18] N.Y. CONST. art. IX, § 1. "Local government" is defined in Article IX to consist of counties, cities, towns, and villages. *Id.* § 3(d)(2).

creates a "Bill of Rights" for local governments to secure certain enumerated "rights, powers, privileges and immunities";[19] and vests in the State Legislature the power to create and organize local governments.[20]

Constitutional home rule is established through two assertions of local government power in Article IX.[21] One is affirmative grants of power to local governments to manage their affairs through the adoption of local laws. The other restricts the State Legislature from intruding upon matters of local, rather than State, concern, except as provided in the Constitution.[22] Each is described more fully in turn.

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[19] *Id.* § 1. The local government Bill of Rights sought to lay the groundwork for stronger and more effective local government. *See Town of Black Brook v. State of New York*, 41 N.Y.2d 486, 488-89, 393 N.Y.S.2d 946, 362 N.E.2d 579, 581 (1977). It lists various rights, amongst which are: the right to have an elective body with authority to adopt local laws; the right to elect and appoint local residents or officers; the power to agree, as authorized by the Legislature, with the federal government, a State or other government to provide cooperatively governmental services and facilities; the power of eminent domain; the power to make a fair return on the value or property used in the operation of certain utility services, and the right to use the profits therefrom for refunds or any other lawful purpose; and the power to apportion costs of governmental services of functions upon portions of local areas as authorized by the Legislature. N.Y. CONST. art. IX, §§ (1)(a)-(b), (c), (e)-(g).

[20] *Id.* § 2(a) ("The legislature shall provide for the creation and organization of local governments in such manner as shall secure to them the rights, powers, privileges and immunities granted to them by this constitution.").

[21] *See* James D. Cole, *Local Authority to Supersede State Statutes*, N.Y. ST. B.J., Oct. 1991, 34, 34 ("Under Article IX of the State Constitution, home rule in New York has two basic components.").

[22] *See City of New York v. Patrolmen's Benevolent Assn. of City of New York*, 89 N.Y.2d 380, 385-86, 654 N.Y.S.2d 85, 87, 88, 676 N.E.2d 847, 849 (1996) ("Article IX, § 2 of the State Constitution grants significant autonomy to local governments to act with respect to local matters. Correspondingly, it limits the authority of the State Legislature to intrude in local affairs. . . ."); *Kamhi*, 74 N.Y.2d at 428-29, 548 N.Y.S.2d at 146, 547 N.E.2d at 348 ("two-part model for home rule: limitations on State intrusion into matters of local concern and affirmative grants of power to local governments").

A. Grants of Lawmaking Authority

Section 1 of Article IX declares that "[e]very local government shall have power to adopt local laws as provided by this article."[23] Section 2(c) — the "center of home rule powers"[24] — elaborates on the lawmaking power, by providing that local governments "shall have power to adopt and amend local laws not inconsistent with the provisions of this constitution or any general law relating to its property, affairs or government."[25]

Section 2 also confers on local governments the power to adopt local laws regarding ten specified areas, regardless of whether or not they relate to the local government's property, affairs or government.[26] These ten areas include: membership and composition of the local legislative body;[27] powers, duties, qualifications, number, mode of selection, and removal of officers and employees;[28] transaction of the local government's business;[29]

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[23] N.Y. CONST. art. IX, § 1(a).

[24] PETER J. GALIE, ORDERED LIBERTY: A CONSTITUTIONAL HISTORY OF NEW YORK 290 (1996) [hereinafter ORDERED LIBERTY].

[25] N.Y. CONST. art. IX, § 2(c)(i). The phrase "property, affairs or government" was first codified in the 1894 State Constitution, and has been at the center of the Home Rule dialogue ever since. "Although, literally construed, it might cover an extremely broad area, it has never been accorded its literal significance but has been treated as excluding all matters of state concern." N.Y. STATE TEMP. STATE COMM'N ON CONST. CONVEN., LOCAL GOVERNMENT, *supra* note 5, at 67. *See also Adler v. Deegan*, 251 N.Y. 467, 473, 167 N.E. 705, 707 (1929) ("When the people put these words in . . . the Constitution, they put them there with a Court of Appeals' definition, not that of Webster's Dictionary.").

[26] RICHARD BRIFFAULT, *Intergovernmental Relations* [hereinafter *Intergovernmental Relations*], *in* DECISION 1997: CONSTITUTIONAL CHANGE IN NEW YORK 156-57 (Gerald Benjamin & Hendrik N. Dullea eds., 1997); GALIE, ORDERED LIBERTY, *supra* note 24, at 290.

[27] N.Y. CONST. art. IX, § 2(c)(ii)(2).

[28] *Id.* §§ 2(c)(ii)(1).

[29] *Id.* § 2(c)(ii)(3).

the incurring of obligations;[30] presentation, ascertainment and discharge of claims against the local government;[31] acquisition, care, management and use of highways, roads, streets, avenues and property;[32] acquisition of transit facilities and the ownership and operation thereof;[33] levying and collecting local taxes;[34] wages or salaries, the hours of work or labor, and the protection, welfare and safety of persons employed by any contractor or sub-contractor performing work, labor or services for the local government;[35] and the government, protection, order, conduct, safety, health and well-being of persons or property therein.[36]

Outside of the ten enumerated subjects, the State government retains all power otherwise delegated to it by law.[37] Unlike the State government, local governments are not sovereigns in their own right.[38] Accordingly,

[30] *Id.* § 2(c)(ii)(4).

[31] *Id.* § 2(c)(ii)(5).

[32] *Id.* § 2(c)(ii)(6).

[33] *Id.* § 2(c)(ii)(7).

[34] *Id.* § 2(c)(ii)(8).

[35] *Id.* § 2(c)(ii)(9).

[36] *Id.* § 2(c)(ii)(10).

[37] *See id.* § 3(a)(3) ("Except as expressly provided, nothing in this article shall restrict or impair any power of the legislature in relation to: . . . [m]atters other than the property, affairs or government of a local government.").

[38] *See* GALIE & BOPST, THE NEW YORK STATE CONSTITUTION, *supra* note 7, at 265 ("In American constitutional theory, there is no inherent right of local self-government. Local Government units are creatures of the state.").

local governments have only the lawmaking powers delegated by the State Constitution and Legislature.[39]

Article IX requires the State Legislature to enact a "statute of local governments" granting local governments additional powers "including but not limited to" matters of local legislation and administration.[40] A power granted in such statute has quasi-constitutional protection against challenge, because it can be "repealed, diminished, impaired or suspended" only by a law passed and approved by the Governor in each of two successive calendar years.[41] In 1964, the Legislature complied with the constitutional directive and enacted a Statute of Local Government,[42] as well as the Municipal Home Rule Law,[43] both of which are to be liberally construed.[44]

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[39] *See Kamhi*, 74 N.Y.2d at 427, 548 N.Y.S.2d at 145, 547 N.E.2d at 347 ("In general, towns have only the lawmaking powers the Legislature confers on them . . . . Without legislative grant, an attempt to exercise such authority is ultra vires and void.").

[40] *See* N.Y. CONST. art. IX, § 2(b)(1) ("Subject to the bill of rights of local governments and other applicable provisions of this constitution, the legislature: . . . (l) Shall enact, and may from time to time amend, a statute of local governments granting to local governments powers including but not limited to those of local legislation and administration in addition to the powers vested in them by this article.").

[41] *Id.* § 2(b)(1) ("A power granted in such statute [of local governments] may be repealed, diminished, impaired or suspended only by enactment of a statute by the legislature with the approval of the governor at its regular session in one calendar year and the re-enactment and approval of such statute in the following calendar year."); *see also Wambat Realty Corp.*, 41 N.Y.2d at 496, 393 N.Y.S.2d at 953-54, 362 N.E.2d at 586 ("In particular, the direction to enact a Statute of Local Government, including the innovative double enactment procedure to impede encroachment on the granted local powers, was expressly aimed at 'proving a reservoir of selected significant powers.'") (citations omitted); GALIE, ORDERED LIBERTY, *supra* note 24, at 290 ("although it was not feasible to grant the home rule powers contained in the statute constitutional status, the statute provided quasi-constitutional protection for these powers").

[42] *Wambat Realty Corp.*, 41 N.Y.2d at 490, 393 N.Y.S.2d at 951, 362 N.E.2d at 583. The powers in the Statute of Local Governments include the ability to acquire real and personal property, adopt, amend, and repeal ordinances, resolutions, etc., acquire, construct, and operate recreational facilities, and levy, impose, collect, and administer rents, charges and fees. N.Y. STAT. LOCAL GOV. § 10. The Legislature also made certain reservations, and if State legislation which impinged on a power granted to local

The Legislature may confer on local governments powers not relating to their property, affairs or government and not limited to local legislation and administration "in addition to those otherwise granted by or pursuant to this article" and may withdraw or restrict such additional powers.[45]

Other constitutional provisions authorize the Legislature to grant additional powers to local governments.[46] For example, the Legislature may grant the power to apportion the cost of a government service or function upon any portion of the area within the local government's jurisdiction and exercise of eminent domain outside local boundaries.[47] The

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governments by the statute is within the ambit created by those reservations, the change can be achieved by ordinary legislative process. *Id.* § 11. In the view of an eminent constitutional scholar, the powers granted local governments by the Legislature in the Statute of Local Governments are not significant. GALIE, ORDERED LIBERTY, *supra* note 24, at 290.

[43] *See DJL Rest. Corp. v. City of New York*, 96 N.Y.2d 91, 94, 725 N.Y.S.2d 622, 625, 749 N.E.2d 186, 189 (2001) ("To implement Article IX, the Legislature enacted the Municipal Home Rule Law."). The Municipal Home Rule Law put in one place and organized, for the first time, the statutory provisions relating to Home Rule for various types of local government. This replaced Home Rule provisions previously contained in the City Home Rule Law, the Village Home Rule Law, the Town Law, the County Law and a number of other laws. N.Y. STATE TEMP. STATE COMM'N ON CONST. CONVEN., LOCAL GOVERNMENT, *supra* note 5, at 68; *see also* N.Y. MUN. HOME RULE L. § 10 (describing general powers of local governments to adopt and amend local laws).

[44] *See* N.Y. MUN. HOME RULE LAW § 51 (providing that home rule powers "shall be liberally construed"); N.Y. STAT. LOCAL GOV. § 20(5) (same).

[45] N.Y. CONST. art. IX, § 2(b)(3) ("Subject to the bill of rights of local governments and other applicable provisions of this constitution, the legislature: . . . (3) Shall have the power to confer on local governments powers not relating to their property, affairs or government including but not limited to those of local legislation and administration, in addition to those otherwise granted by or pursuant to this article, and to withdraw or restrict such additional powers.").

[46] Briffault, *Intergovernmental Relations*, *supra* note 26, at 158.

[47] *See* N.Y. CONST. art. IX, §§ 1(e) ("The legislature may authorize and regulate the exercise of the power of eminent domain and excess condemnation by a local government outside its boundaries."), (g) ("A local government shall have power to

Legislature is also authorized to grant various powers to cities, towns and villages for the financing of low-rent housing and nursing home accommodations for persons of low income.[48]

Article IX, Section 3(c) provides that the "[r]ights, powers, privileges and immunities granted to local governments by this article shall be liberally construed."[49]

B. Immunity from Legislative Interference

At the same time that Article IX authorizes local governments to adopt local laws in a wide range of fields, it also sets procedural limits on the ability of the State Legislature to impinge on local authority. Specifically, Section 2(b)(2) of Article IX — the so called "Home Rule clause" — limits the State Legislature's power to enact laws regulating matters that fall within the purview of local government. The Home Rule clause states as follows:

> [T]he legislature . . . [s]hall have the power to act in relation to the property, affairs or government of any local government only by general law, or by special law only (a) on request of two-thirds of the total membership of its legislative body or on request of its chief executive officer concurred in by a majority of such membership, or (b) except in the case of the city of New York, on certificate of necessity from the governor reciting facts which in the judgment of the governor constitute an emergency requiring enactment of such law and, in such latter

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apportion its cost of a governmental service or function upon any portion of its area, as authorized by act of the legislature.").

[48] BRIFFAULT, *Intergovernmental Relations, supra* note 26, at 158 (citing N.Y. CONST. art. XVIII).

[49] N.Y. CONST. art. IX, § 3(c).

> case, with the concurrence of two-thirds of the members elected to each house of the legislature.[50]

Under this provision, the State Legislature may freely regulate the property, affairs or government of local governments through the enactment of a "general law" that "in its terms and in effect applies to all counties . . .[,] all cities, all towns or all villages."[51] However, if the Legislature seeks to enact a special law that would apply to one or more, but not all local governments,[52] it must follow one of two procedures intended to protect the Home Rule powers of the affected localities.[53] The State Legislature must receive either (1) a request of two-thirds of the total membership of the local legislative body or of the local chief executive officer concurred in by a majority of the membership of the local legislature; or (2) a certificate of necessity from the Governor reciting facts that constitute an emergency requiring enactment of such law and the concurrence of two-thirds of each house of the State legislature.[54] The first option's directives are commonly referred to as the "Home Rule message" requirement "because whenever a special law is enacted it should be at the locality's request."[55] "The second

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[50] CONST. art. IX, § 2(b)(2).

[51] *See id.* § 3(d)(1) ("'General law.' A law which in terms and in effect applies alike to all counties, all counties other than those wholly included within a city, all cities, all towns or all villages.").

[52] *See id.* § 3(d)(4) ("'Special law.' A law which in terms and in effect applies to one or more, but not all, counties, counties other than those wholly included within a city, cities, towns or villages.").

[53] *Id.* § 2(b)(2).

[54] BRIFFAULT, *Intergovernmental Relations, supra* note 26, at 158 (construing Home Rule clause).

[55] *Greater N.Y. Taxi Assn. v. State of New York,* 21 N.Y.3d 289, 301, 993 N.E.2d 970 N.Y.S.2d 907, 914, 993 N.E.2d 393, 400 (2013).

option — the Governor's emergency message and legislative super-majority — is unavailable for special laws concerning New York City."[56]

A particularly striking example of special laws enacted pursuant to either Home Rule message or Gubernatorial message of necessity are State legislative enactments establishing emergency financial control boards for distressed municipalities, which effectively allow the State government to temporarily assume control of these municipalities' finances and daily operations.[57]

III. RESTRICTIONS ON HOME RULE

While Home Rule is provided for in Article IX, it has been left to the State's judiciary to interpret the constitutional Home Rule provisions. Drawing lines between what is properly the domain of local government under Home Rule and the State's ability to legislate has been a recurring role for the courts.[58] Home rule "reflects a far-flung effort over more than a century's time" to find meaning in the ambiguous phrases "property, affairs or government" and "matters of state concern."[59] "The result of these efforts has been a highly developed, and still developing, case law . . . ."[60]

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[56] BRIFFAULT, *Intergovernmental Relations, supra* note 26, at 158-59 (citing N.Y. CONST. art. IX, § 2(b)(2)).

[57] *See, e.g.*, City of Yonkers Financial Emergency Act, L. 1975, ch. 871, § 5 (legislation passed on both message of necessity and Home Rule message establishing emergency financial control board for City of Yonkers).

[58] Lynn A. Baker & Daniel B. Rodriguez, *Constitutional Home Rule and Judicial Scrutiny*, 86 DENVER L. REV. 1337, 1338 (2009) [hereinafter *Constitutional Home Rule*]; *see also* N.Y. STATE TEMP. STATE COMM'N ON CONST. CONVEN., LOCAL GOVERNMENT, *supra* note 5, at 67 ("The duty of determining whether particular matters pertain to the property, affairs or government of local governments or are matters of state concern has devolved upon the judiciary with, at least to many persons, unsatisfactory results.").

[59] Baker & Rodriguez, *Constitutional Home Rule, supra* note 58, at 1338.

[60] *Id.*

Indeed, the current status of Home Rule in New York has been largely shaped by the judicial development of two legal doctrines: (1) the State preemption doctrine and (2) the State concern doctrine. The former represents a fundamental limitation on local government's lawmaking powers; the latter carves out an exception to the constitutional limitations on the State Legislature's authority to enact special laws. The impact of each on the relationship between the State and local governments cannot be overstated. The same can be said for the stresses placed on local governments by unfunded State mandates.

A. The Preemption Doctrine

As noted, the State preemption doctrine is a "fundamental limitation on home rule powers."[61] Although Article IX vests local governments with substantial lawmaking powers by affirmative grant, "the overriding limitation" of the preemption doctrine embodies "the untrammeled primacy of the Legislature to act with respect to matters of State concern."[62]

In general, preemption occurs in one of two ways; first, when a local government adopts a law that directly conflicts with a State statute; and second, when a local government legislates in a field for which the State legislature has assumed full regulatory responsibility.[63] Conflict preemption

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[61] *Albany Area Builders Assn. v. Town of Guilderland*, 74 N.Y.2d 372, 377, 547 N.Y.S.2d. 627, 629 546 N.E.2d 920, 922 (1989).

[62] *Id.*; *see also Jancyn Mfg. Corp. v. County of Suffolk*, 71 N.Y.2d 91, 96, 524 N.Y.S.2d 8, 10, 518 N.E.2d 903, 905 (1987) ("although the constitutional home rule provision confers broad police powers upon local governments relating to the welfare of its citizens, local governments may not exercise their police power by adopting a law inconsistent with the Constitution or any general law of the State"); BRIFFAULT, *Intergovernmental Relations, supra* note 26, at 171 ("The sources of home rule authority generally provide that local enactments must not be inconsistent with the Constitution or genera laws. In other words, although a subject may fall within the grant of home rule authority, local action may be preempted by state law.").

[63] *DJL Rest. Corp.*, 96 N.Y.2d at 95, 725 N.Y.S.2d at 625, 749 N.E.2d at 190 (internal quotations omitted).

represents an outright conflict or "head-on collision" between a local law and State statute.[64] A local law is unenforceable if it prohibits what a State statute explicitly allows, or if the State statute prohibits what the local law explicitly allows.[65]

But even in the absence of an outright conflict, a local law is preempted if the State Legislature "has evidenced its intent to occupy the field."[66] Field preemption occurs when "a local law regulating the same subject matter as a state law is deemed inconsistent with the State's transcendent interest, whether or not the terms of the local law actually conflict with a State-wide statute."[67] "Such local laws, were they permitted to operate in a field preempted by State law, would tend to inhibit the operation of the State's general law and thereby thwart the operation of the State's overriding policy concerns."[68]

Field preemption may be express or implied. Express field preemption occurs when a State statute explicitly provides that it preempts all local laws on the subject.[69] Field preemption is implied when "either the purpose and scope of the regulatory scheme will be so detailed or the nature of the subject of regulation will be such that the court may infer a legislative

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[64] *See Lansdown Entertainment Corp. v. N.Y.C. Dep't of Cons. Affairs*, 74 N.Y.2d 761, 764, 545 N.Y.S.2d 82, 83, 543 N.E. 2d 725, 726 (1989).

[65] *Sunrise Check Cashing & Payroll Servs., Inc.*, 91 A.D.3d 126, 134, 933 N.Y.S.2d 388, 395 (2d Dep't 2011) (internal quotation marks and citations omitted).

[66] *Albany Area Builders Assn.*, 74 N.Y.2d at 377, 547 N.Y.S.2d. at 629, 546 N.E.2d at 922.

[67] *Id.* (internal quotation marks, alteration, and citations omitted).

[68] *Id.* at 377, 547 N.Y.S.2d. at 629, 546 N.E.2d at 922.

[69] *See Consol. Edison Co. v. Town of Red Hook*, 60 N.Y.2d 99, 105, 468 N.Y.S.2d 596, 599 456 N.E.2d 487, 490 (1983).

intent to preempt, even in the absence of an express statement of preemption."[70]

Examples of local laws that have been found to be impliedly preempted include the following activities:

- Residency restrictions for sex offenders;[71]
- Minimum wage laws;[72]
- Regulating local taxation for roadway construction;[73]
- Hours of operations of taverns and bars;[74]

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[70] Laura D. Hermer, *Municipal Home Rule in New York: Tobacco Control at the Local Level*, 65 BROOKLYN L. REV. 321, 349 (1999) (citations omitted).

[71] *See People v. Diack*, 24 N.Y.3d 674, 681, 3 N.Y.S.3d 296, 26 N.E.3d 1151 (2015) (holding that design and purpose of State laws regulating registered sex offenders evidenced intent to preempt subject of sex offender residency restriction legislation and to "occupy the entire field" so as to prohibit local governments from doing so).

[72] *See Wholesale Laundry Bd. of Trade, Inc. v. City of New York*, 17 A.D.2d 327, 329, 234 N.Y.S.2d 862, 865 (1st Dep't 1962), *aff'd*, 12 N.Y.2d 998, 239 N.Y.S.2d 128, 189 N.E.2d 623 (1963) (invaliding New York City minimum wage law which set a rate higher than that set in the State minimum wage law; "it is entirely clear that the state law indicates a purpose to occupy the entire field").

[73] *Albany Area Builders Assn.*, 74 N.Y.2d at 377-78, 547 N.Y.S.2d at 629, 546 N.E.2d at 922 (invalidating local law regulating taxation for roadway construction, where State's "elaborate budget system" provided for how towns were to budget for roadway improvements and repairs, and the State explicitly regulated at local level amount of taxes collectible for roadway improvements and the expenditure of such funds).

[74] *People v. DeJesus*, 54 N.Y.2d 465, 468-70, 446 N.Y.S.2d 207, 210, 430 N.E.2d 1260, 1263 (1981) (holding that State's Alcohol Beverage Control Act was "exclusive and statewide in scope, thus, no local government could legislate in field of regulation of establishments which sell alcoholic beverages"). *Cf., Vatore v. Commissioner of Consumer Affairs of City of New York*, 83 N.Y.2d 645, 650, 612 N.Y.S.2d 357, 359, 634 N.E.2d 958, 960 (1994) (upholding City of New York's ability to regulate the location of tobacco vending machines, including within taverns).

- Regulating where abortions may be performed;[75] and,
- Power plant siting.[76]

Implied preemption has provided a fertile ground for litigation. By no means are all challenges to local laws based on implied preemption successful.[77] However, because the dispositive inquiry turns on interpreting the State Legislature's intent, it is often difficult to predict whether a given local law will or will not withstand judicial scrutiny. As one commentator has explained:

> The Legislature rarely makes a clear declaration of policy. The courts therefore have no clear standard for determining whether

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[75] *See Robin v. Village of Hempstead*, 30 N.Y.2d 347, 350-351 285 N.E.2d 285, 287, 334 N.Y.S.2d 129, 132 (1972) (holding that State law preempted local law regulating where abortions may be perform because of the scope and detail of State medical and hospital regulation).

[76] *See Consolidated Edison Co.*, 60 N.Y.2d at 105, 468 N.Y.S.2d at 599, 456 N.E.2d at 490 (holding that a local zoning ordinance was preempted partially based on State law's establishment of a Siting Board that "is required to determine whether any municipal laws or regulations governing the construction or operation of a proposed generating facility are unreasonably restrictive, and has the power to waive compliance with such municipal regulations").

[77] *See, e.g.*, *Eric M. Berman, P.C. v. City of New York*, 25 N.Y.3d 684, 691-92, 16 N.Y.S.3d 25, 30, 37 N.E.3d 82, 87 (2015) (finding "no express conflict between the broad authority accorded to [New York] courts to regulate attorneys under the [New York] Judiciary Law and the licensing of individuals as attorneys who are engaged in debt collection activity falling outside of the practice of law," and further finding that the "authority to regulate attorney conduct does not evince an intent to preempt the field of regulating non-legal services rendered by attorneys"); *Matter of Wallach v. Town of Dryden*, 23 N.Y.3d 728, 992 N.Y.S.2d 710, 16 N.E.2d 1188 (2014) (holding that State Oil and Gas Law did not preempt town zoning ordinances banning hydrofracking); *New York State Club Assn. v. New York*, 69 N.Y.2d 211, 221-22, 513 N.Y.S.2d 349, 354, 505 N.E.2d 915, 920 (1987) (upholding New York City law prohibiting discrimination in private clubs; State's Human Rights Law's failure to define "distinctly private" suggested "an intent to allow local government to act"); *People v. Judiz*, 38 N.Y.2d 529, 531-32, 381 N.Y.S.2d 467, 469, 344 N.E.2d 399, 401 (1976) (upholding a local ordinance prohibiting possession of an "imitation pistol" despite a State statute covering the same subject area).

> the extent and nature of state regulation of an area is "comprehensive," and therefore preemptive, or "piecemeal," and therefore not preemptive. The result is ad hoc judicial decision making and considerable uncertainty as to when state legislation will be considered preemptive of local action.[78]

The implied preemption doctrine has drawn its share of critics. Local government scholars have cautioned that the ever-present, seemingly inchoate possibility that a court may find implied preemption "casts a shadow over local autonomy, often leading local governments to question whether they have the authority to act,"[79] and, therefore, imposing "severe constraints on local policy innovation and choice."[80]

In 2008, the New York State Commission on Local Government Efficiency and Competiveness, chaired by former Lieutenant Governor Stanley N. Lundine, noted that the implied preemption doctrine does not appear in the State Constitution,[81] and has created "confusion and uncertainty" for local governments when exercising their home rule powers.[82] The Lundine Commission called for a constitutional amendment

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[78] Briffault, *Intergovernmental Relations, supra* note 26, at 173.

[79] *See* Briffault, *Local Government and the New York State Constitution, supra* note 2, at 90. *See also* Paul Diller, *Intrastate Preemption*, 87 BOSTON UNIV. L. REV. 1113, 1133 (2007) (arguing that field preemption can be a "tool of interest groups," through which particular focused groups "seek relief from the local laws they dislike by turning to the courts, rather than — or in addition to — pursuing other options to further their interests.").

[80] *See* Daniel B. Rodriguez, *Localism and Lawmaking,* 32 RUTGERS L.J. 627, 639-40 (2001).

[81] N.Y. STATE COMM'N ON LOCAL GOVT. EFFICIENCY & COMPETITIVENESS, 21ST CENTURY LOCAL GOVERNMENT 36 (Apr. 2008), *available at* http://www.greaterohio.org/files/policy-research/new-york-final-report.pdf.

[82] *Id.* at 37.

prohibiting the judicial application of implied preemption.[83] Such an amendment, the Lundine Commission explained, "would allow local governments to act except where state law has expressly declared state authority in the area to be exclusive or has specifically limited local governments' ability to act in that area or field."[84]

In a similar vein, one local government scholar has called for the establishment in New York of a judicial presumption against preemption.[85] And, a court of last resort in another state has adopted a default rule that the state legislature has not occupied the field unless it has said so explicitly.[86]

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[83] *Id.* at 3, 36-37.

[84] *Id.* at 36. The State of Illinois is an example of a State that has followed this approach. The Home Rule provision in the Illinois State Constitution allows for preemption only when the Legislature expressly so provides in legislation. *See* ILL. CONST. 1970, art. VII, § 6(i) ("Home rule units may exercise and perform concurrently with the State any power or function of a home rule unit to the extent that the General Assembly by law does not specifically limit the concurrent exercise or specifically declare the State's exercise to be exclusive."). *See also* Alaska CONST. art X, § 11 ("A home rule borough or city may exercise all legislative powers not prohibited by law or by charter.").

[85] *See* Roderick M. Hills, Jr., *Hydrofracking and Home Rule: Defending and Defining an Anti-Preemption Canon of Statutory Construction in New York*, 77 ALB. L. REV. 647, 648 (2014) ("Article IX, section 3(c) of the New York Constitution requires that the home rule powers of municipalities be 'liberally construed.' Such liberal construction, this article suggests, requires a qualified presumption against preemption: Unless statutory text manifestly and unambiguously supersedes local law, courts should presume that state law does not preempt local laws. This presumption is not irrebuttable: it can be overcome where local laws encroach on some substantial state interest that local residents are likely to ignore.").

[86] *See Municipality of Anchorage v. Repasky*, 34 P.3d 302, 311 (Alaska 2001) ("In general, for state law to preempt local authority, it is not enough for state law to occupy the field. Rather, if the legislature wishes to preempt an entire field, it must so state.') (internal quotation marks, citation & brackets omitted). *See also, e.g., City of Ocala v. Nye*, 608 So.2d 15, 17 (Fla. 1992) (implying in dicta that Florida does not recognize field preemption); *Cincinnati Bell Tel. Co. v. City of Cincinnati*, 693 N.E.2d 212, 218 (Ohio 1998) ("(T)here is no constitutional basis that supports the continued application of the doctrine of implied preemption.").

Whatever one may think of such proposals, the fact remains that implied preemption is a significant constraint on local authority, even when a local government acts well within the sphere of specific Home Rule powers.[87] It has also generated considerable litigation, with often unpredictable results, creating confusion and uncertainty for local governments.

B. The State Concern Doctrine

Article IX's Home Rule clause carves out a sphere of autonomy for local governments over their "property, affairs or government" by limiting the State Legislature's power to act with respect to such local matters through special legislation. However, the Home Rule clause is subject to a significant limitation — the "State concern" doctrine — derived from the case of *Adler v. Deegan*[88] in 1929.

In *Adler*, the New York Court of Appeals addressed the power of the Legislature to enact the Multiple Dwelling Law,[89] which required housing to comply with minimum standards for fire-prevention, light, air and sanitation.[90] This salutary act applied, in effect, only to New York City, but did not conform to the Home Rule requirements for special legislation.[91] Nevertheless, the Court found the subject matter of the Multiple Dwelling Law addressed a "state concern" and on that ground upheld its enactment as a valid exercise of State legislative power.[92]

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[87] *See Jancyn Mfg. Corp.*, 71 N.Y.2d at 97, 524 N.Y.S.2d at 11, 518 N.E.2d at 905.

[88] 251 N.Y. 467, 167 N.E. 705 (1929).

[89] L. 1929, ch. 713, § 3.

[90] *Adler*, 251 N.Y. at 491-92, 167 N.E. at 714 (Lehman, J., dissenting).

[91] *Adler*, 251 N.Y. at 470, 167 N.E. at 706-08 (Pound, J. concurring).

[92] *Id.* at 473-78, 167 N.E. at 706-09.

In a seminal concurring opinion, then-Chief Judge Benjamin Cardozo argued that, if a subject, like slum clearance, "be in a substantial degree a matter of State concern, the Legislature may act, though intermingled with it are concerns of the locality."[93] Thus, even if legislation relates to the property, affairs, or government of a local government, if the legislation is also a matter of substantial state concern, the Home Rule clause is inoperative and the Legislature may act through ordinary legislative processes.[94]

Although *Adler* predated the adoption of Article IX by over 30 years, the Court of Appeals has continuously and expansively interpreted the "state concern" doctrine.[95] Time and again, the Court has upheld legislation

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[93] *Id.* at 491, 167 N.E. at 714 (Cardozo, Ch. J., concurring). *See Patrolmen's Benevolent Assn. of City of New York*, 97 N.Y.2d at 386, 740 N.Y.S.2d at 663, 767 N.E.2d at 120 ("A recognized exception to the home rule message requirement exists when a special law serves a substantial State concern.").

[94] Eliot J. Kirshnitz, *Recent Developments: City of New York v. State of New York: The New York State Court of Appeals, in Declaring the Repeal of the Commuter Tax Unconstitutional, Strikes Another Blow Against Constitutional Home Rule*, 74 ST. JOHN'S L. REV. 935, 947 (2000) [hereinafter *Strikes Another Blow*]. *See also Empire State Ch. of Associated Bldrs. & Contrs., Inc. v. Smith*, 21 N.Y.3d 309, 313, 970 N.Y.S.2d 724, 726, 992 N.E.2d 1067, 1069 (2013) (holding that "where the Legislature has enacted a law of state-wide impact on a matter of substantial State concern but has not treated all areas of the State alike, the Home Rule section of the State Constitution does not require an examination of the reasonableness of the distinctions the Legislature has made"). *See also Matter of Town of Islip v. Cuomo*, 64 N.Y.2d 50, 52, 484 N.Y.S.2d 528, 529, 473 N.E.2d 756, 757 (1984) (Article's IX limitations on special laws "applies only to a special law which is directly concerned with the property, affairs or government of a local government and unrelated to a matter of proper concern to State government"). *See, e.g., Osborn v. Cohen*, 272 N.Y. 55, 59-60, 4 N.E.2d 289, 290 (1936) (striking down a statute that provided for submission of issue of firemen's hours to referendum in cities of one million or more inhabitants; no "foundation in the record" that the establishment and control of fire departments are matters of state concern).

[95] *See Wambat Realty Corp.*, 41 N.Y.2d at 494, 393 N.Y.S.2d at 952, 362 N.E.2d at 584 (terming *Adler* a "decisively enlightening case"); Cole, *Ghost of Home Rule*, *supra* note 11, at 718 ("In virtually every subsequent judicial decision dealing with these matters, *Adler* has been cited for the proposition that as to matters of state concern, the legislature may act through the ordinary legislative process, unrestricted by the home rule provisions of the constitution."); GALIE, ORDERED LIBERTY, *supra* note 24, at 291 ("In

relating to local property, affairs, or governments, yet which also related to a State concern, despite the failure of those laws to conform to Home Rule requirements.

For example, the Court has found the following local matters to also be matters of state concern sufficient to sustain the Legislature's power to address them by special law, without either a Home Rule or Gubernatorial message or legislative supermajority:

- Waste disposal in Nassau and Suffolk Counties;[96]
- Municipal sewers in Buffalo;[97]
- Protection of the Adirondack Park's resources;[98]
- Salaries of District Attorneys in certain counties;[99]

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general, the Court of Appeals has followed decisions made prior to the adoption of the article, giving 'matters of state concern' an expansive reading.") (citation omitted).

[96] *See Matter of Town of Islip*, 64 N.Y.2d at 56-58, 484 N.Y.S.2d at 531-33, 473 N.E.2d at 759-61 (upholding special law regulating waste disposal in Nassau and Suffolk counties; state interest in pollution protection).

[97] *See Robertson v. Zimmerman*, 268 N.Y. 52, 61, 196 N.E. 740, 743 (1935) (upholding special law establishing a sewage authority for the City of Buffalo through an act which imposed restrictions and obligations on one particular municipality; state concern for the life and health of communities taking water supply from Lake Erie, the Niagara River and Lake Ontario).

[98] *See Wambat Realty Corp.,* 41 N.Y.2d at 494-95, 393 N.Y.S.2d at 952-53, 362 N.E.2d at 584-85 (upholding special law, the Adirondack Park Agency Act, in which State set up a zoning and planning program for all public and private lands within the park despite the zoning and planning powers of local government; statute addressed subject of state concern).

[99] *See Matter of Kelley v. McGee*, 57 N.Y.2d 522, 536-39, 457 N.Y.S.2d 434, 439-41, 443 N.E.2d 908 913-15 (1992) (holding that section in Judiciary Law which required district attorneys in counties with a certain population to be paid the same salary as county court judges did not conflict with Home Rule provisions of State Constitution; statutory classification was reasonable and related to an area of state concern).

- Local taxation;[100]
- Housing projects exempt from zoning laws;[101]
- Rent controls;[102]
- Serial bonds issued to cover pension and retirement liabilities;[103]
- Dispute-resolution mechanisms for local public employees;[104]
- Cultural institutions;[105]

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[100] *See New York Steam Corp. v. City of New York,* 268 N.Y. 137, 143, 197 N.E. 172, 173 (1935) (upholding statute authorizing cities with a population over one million to pass local tax laws for unemployment relief; state concern given law was designed to combat high unemployment during an unstable time period).

[101] *See Floyd v. New York State Urban Dev. Corp.*, 33 N.Y.2d 1, 7, 347 N.Y.S.2d 161, 164, 300 N.E.2d 704, 706 (1973) (upholding statute under which New York State Urban Development Corporation ("UDC") could acquire land in urban core areas by purchase or condemnation and undertake the development of projects, exempt from local restrictions; State interest in allowing UDC to solve housing problems).

[102] *See City of New York v State of New York,* 31 N.Y.2d 804, 805, 339 N.Y.S.2d 459, 459, 291 N.E.2d 583, 583 (1972) (affirming lower court ruling decision which held that rent control was a matter of State concern and not within New York City's "property, affairs and government" powers).

[103] *See Bugeja v. City of New York,* 24 A.D.2d 151, 152, 266 N.Y.S.2d 80, 81, *aff'd,* 17 N.Y.2d 606, 268 N.Y.S.2d 564, 215 N.E.2d 684 (finding no Home Rule impediment to State Legislature's authorization for the issuance of serial bonds to cover New York City's pension and retirement liabilities; continuance of sound civil service system matter of State concern).

[104] *See Patrolmen's Benevolent Assn. of City of New York v. City of New York,* 97 N.Y.2d at 381-389, 740 N.Y.S.2d at 660-65, 767 N.E.2d at 117-22 (2001) (upholding special law implementing dispute resolution mechanisms for disputes between New York City policemen and New York City; law addressed "substantial State concern").

[105] *See Hotel Dorset Co. v. Trust for Cultural Resources,* 46 N.Y.2d 358, 368-69, 413 N.Y.S.2d 357, 361-62, 383 N.E.2d 1284, 1288 (1978) (upholding statute that had

- Bidding requirements on public contracts;[106]
- Exempting firefighters from local residency requirements.[107]
- Taxes on New York City commuters' incomes;[108] and,
- Regulation of taxicabs in New York City.[109]

The State concern doctrine has narrowed the Home Rule clause's guarantee of a modicum of local legislative autonomy.[110] Today, the line

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specifications resulting in it being applied to only one museum, the Museum of Modern Art).

[106] *See Empire State Ch. of Associated Bldrs. & Contrs., Inc. v. Smith*, 21 N.Y.3d 309, 313, 318-19, 970 N.Y.S.2d 724, 726, 729-31, 992 N.E.2d 1067, 1069, 1072-73 (2013) (upholding amended Wicks law for public contracting that included differing threshold requirements; statute bears "a reasonable relationship to a substantial statewide concern which concern falls within the State Legislature's purview and must be accorded great deference by this court").

[107] *See Uniformed Firefighters Assn. v. City of New York*, 50 N.Y.2d 85, 90, 428, N.Y.S.2d 197, 198-99, 405 N.E.2d 679, 680 (1980) (upholding State law that eliminated a local requirement that New York City firefighters live in New York City; residency of employees a matter of State concern).

[108] *See City of New York v. State of New York*, 94 N.Y.2d 577, 591–92, 709 N.Y.S.2d 122, 128–29, 730 N.E.2d 920, 926–27 (2000) (upholding special law that repealed New York City's commuter tax; State had a substantial interest in easing burden on non-City residents who work in New York City).

[109] *See Greater N.Y. Taxi Assn.*, 21 N.Y.3d at 302-308, 970 N.Y.S.2d at 914-19, 993 N.E.2d at 400-405 (upholding special law that allowed livery cabs to accept passengers in the outer boroughs of New York City and outside Manhattan's central business district who hail the livery cabs from the street, and also expanded the number of traditional yellow cabs accessible to passengers with disabilities, notwithstanding that it had always been assumed previously that laws regulating New York City taxicabs required a Home Rule message; statute "addresses a matter of substantial state concern" and was "not a purely local issue").

[110] *See Empire State Ch. of Associated Bldrs. & Contrs., Inc.*, 21 N.Y.3d at 319, 970 N.Y.S.2d at 730, 992 N.E.2d at 1073 ("Home Rule provisions of the Constitution were never intended to apply to legislation" affecting matters of state concern and instead aimed at preventing "unjustifiable state interference in matters of purely local concern").

between matters of State concern and matters of local concern is increasingly indistinct.[111] Few constraints exist on the Legislature's ability to interfere in local affairs by special law.[112] The Court of Appeals said as much in 2013 when it observed:

> there must be an area of overlap, indeed a very sizable one, in which the state legislature acting by special law and local governments have concurrent powers. . . . A great deal of legislation relates *both* to the property, affairs or government of a local government and to [m]atters other than the property, affairs or government of a local government — i.e., to matters of substantial state concern.[113]

See also Gerald Benjamin & Charles Brecher, *Introduction*, *in* THE TWO NEW YORKS: STATE-CITY RELATIONS IN THE CHANGING FEDERAL SYSTEM 11 (Gerald Benjamin & Charles Brecher eds., 1988) ("[I]n a strictly legal sense the State is able to dominate the City. New York's State Constitution and its highest court authorize State officials to exercise control over, including intervention in, matters of local government. The concept of home rule has little legal support.").

[111] *See* N.Y. STATE TEMP. STATE COMM'N ON CONST. CONVEN., LOCAL GOVERNMENT, *supra* note 5, at 68 ("The line between matters of state concern and matters of local concern remains indistinct[.]"); Cole, *Local Authority to Supersede State Statutes*, *supra* note 21, at 34 ("The areas carved out by Article IX of the State Constitution for control by local governments, free from State interference, except by general law — "property, affairs or government" — has been significantly narrowed and lacks identity.").

[112] *See* BRIFFAULT, *Intergovernmental Relations*, *supra* note 26, at 171 ("as long as the state is able to make a colorable case that it is acting within respect to a matter of state concern, the Home Rule clause provides little restriction on the legislature's ability to act by special law").

[113] *Empire State Ch. of Associated Bldrs. & Contrs., Inc.*, 21 N.Y.3d at, 316-17, 970 N.Y.S.2d at 728, 992 N.E.2d at 1070 (internal quotation marks & citations omitted; emphasis in original).

As things now stand, the State Legislature decides whether a home rule message is necessary with respect to a given piece of special legislation. And, this legislative judgment has been treated as "effectively unreviewable."[114]

Proponents of home rule despair over the relative ease with which the State Legislature can overcome constitutional limitations on special legislation.[115] They argue that Article IX's protections of the rights of localities have been "undermined . . . by the many exceptions for 'matters of state concern' with respect to which the Legislature is held free to act without the consent of the local body."[116] "The Legislature is not better suited, and indeed, may be less well-suited," goes the argument, "than the local government to deal with essentially local matters such as providing government services, administering the police department and developing new strategies for providing for the homeless."[117]

On the other hand, advocates for the status quo can point to decades of precedent and a system that, on the whole, has arguably served the State

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[114] Report of the Task Force on the New York Constitutional Convention, 52 RECORD OF THE ASSN. OF THE BAR OF THE CITY OF NEW YORK 522, 619 (1997) [hereinafter "CITY BAR 1997 TASK FORCE REPORT"].

[115] *See, e.g.*, Cole, *Ghost of Home Rule*, *supra* note 11, at 749 ("With the extension of the state concern doctrine into areas that logically should be subject to local determination, there is reason only for gloom."); Roberta A. Kaplan, *New York City Taxis and the New York State Legislature: What is Left of the State Constitution's Home Rule Clause After the Court of Appeals Decision in the Hail Act Case*, 77 ALB. L. REV. 113, 118 (2014) (the "highly deferential" approach the Court of Appeals has taken to claims of state concern "cast[s] a long dark shadow on the future of local government autonomy in New York State"), *id.* (the Court's jurisprudence "raises red flags about how much (if any) of the constitution's home rule clause remains in force going forward, making it difficult (if not impossible) for local governments in New York to delineate the appropriate boundaries of autonomous self-rule").

[116] CITY BAR 1997 TASK FORCE REPORT, *supra* note 114, at 618 (citations omitted).

[117] *Id.* at 619.

well. Home rule is but one of a number of values encompassed by the Constitution, and "the State's commitment to minimal statewide standards of welfare, safety, health, and the like has taken precedence over the goal of local autonomy."[118] No less eminent an authority than Benjamin Cardozo was a staunch guardian of State sovereignty, recognizing, at least in close cases, the need for a dominant State, which represents all, over the power of local governments, which represent only a portion of the State.[119]

C. Unfunded Mandates

Another restriction on Home Rule is State mandates that require local governments to perform certain actions. These can be particularly controversial when unfunded.[120] State mandates cover a wide range of fields, including health care, education and social services. New York imposes more unfunded mandates than any state.[121]

Numerous other states[122] have attempted to resolve the tension between state mandates and Home Rule by adopting constitutional

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[118] GALIE, ORDERED LIBERTY, *supra* note 24, at 292-93.

[119] ANDREW L. KAUFMAN, CARDOZO 378-79 (1998).

[120] *See generally*, Robert M. Shaffer, Unfunded State Mandates and Local Governments, 64 U. CINN. L. REV. 1057 (1996).

[121] GALIE & BOPST, THE NEW YORK STATE CONSTITUTION, *supra* note 7, at 278.

[122] *See* BRIFFAULT, *Intergovernmental Relations*, *supra* note 26, at 179-80 ("Prior to and since [the 1967 Constitutional Convention] fourteen states have adopted constitutional provisions limiting or barring some or all unfunded mandates."); CITY BAR 1997 TASK FORCE REPORT, *supra* note 114, at 620 ("There also is support for a constitutional amendment to restrict unfunded mandates by the legislature on New York's local governments. We view the debate over unfunded mandates as an extension of the home rule question. Again, New York lags behind other states that have considered and resolved this issue."); Deborah F. Buckman, *Construction and Application of State Prohibitions of Unfunded Mandates*, 76 A.L.R.6th 543 (2012) (collecting state court cases that construe and apply state prohibitions of unfunded mandates).

provisions prohibiting or limiting unfunded mandates.[123] Notably, too, in 2011 a "Mandate Relief Redesign Team" established by Governor Cuomo

[123] *See, e.g.*, CAL. CONST. art. 13B, § 6(a) ("Subject to certain exceptions, [w]henever the Legislature or any state agency mandates a new program or higher level of service on any local government, the State shall provide a subvention of funds to reimburse that local government for the costs of the program or increased level of service."); FLA. CONST. art. VII, § 18(a) ("No county or municipality shall be bound by any general law requiring such county or municipality to spend funds or to take an action requiring the expenditure of funds unless the legislature has determined that such law fulfills an important state interest and unless: funds have been appropriated that have been estimated at the time of enactment to be sufficient to fund such expenditure."); HAW. CONST. art. VIII, § 5 ("If any new program or increase in the level of service under an existing program shall be mandated to any of the political subdivisions by the legislature, it shall provide that the State share in the cost."); LA. CONST. art. VI, § 14(a)(1) ("No law or state executive order, rule, or regulation requiring increased expenditures for any purpose shall become effective within a political subdivision until approved by ordinance enacted, or resolution adopted, by the governing authority of the affected political subdivision or until, and only as long as, the legislature appropriates funds for the purpose to the affected political subdivision and only to the extent and amount that such funds are provided, or until a law provides for a local source of revenue within the political subdivision for the purpose and the affected political subdivision is authorized by ordinance or resolution to levy and collect such revenue and only to the extent and amount of such revenue."); MICH. CONST. art. IX, § 29 ("A new activity or service or an increase in the level of any activity or service beyond that required by existing law shall not be required by the legislature or any state agency of units of Local Government, unless a state appropriation is made and disbursed to pay the unit of Local Government for any necessary increased costs."); MO. CONST. art. X, § 21 ("A new activity or service or an increase in the level of any activity or service beyond that required by existing law shall not be required by the general assembly or any state agency of counties or other political subdivisions, unless a state appropriation is made and disbursed to pay the county or other political subdivision for any increased costs."); N.H. CONST. pt. I, art. 28-a ("The state shall not mandate or assign any new, expanded or modified programs or responsibilities to any political subdivision in such a way as to necessitate additional local expenditures by the political subdivision unless such programs or responsibilities are fully funded by the state or unless such programs or responsibilities are approved for funding by a vote of the local legislative body of the political subdivision."); N.J. CONST. art. VIII, § 2, ¶ 5 ("[A]ny provision of . . . law, or of . . . rule or regulation issued pursuant to a law, which is determined . . . to be an unfunded mandate upon boards of education, counties, or municipalities because it does not authorize resources, other than the property tax, to offset the additional direct expenditures required for the implementation of the law or rule or regulation, shall, upon such determination cease to be mandatory in its effect and expire."); N.M. CONST. art. X, § 8 ("A state rule or regulation mandating any county or city to engage in any new activity, to provide any new service or to increase any current level of activity or to

recommended the adoption of a constitutional ban in New York on unfunded mandates on local governments.[124]

IV. CONCLUSION

New York's constitutional and statutory provisions regarding home rule are extensive, evincing a clear intent to protect local autonomy.[125] However, the balance between State and local powers has tipped "away from the preservation of local authority toward a presumption of state concern."[126] Some commentators have even observed that Constitutional Home Rule is a "ghost,"[127] "merely a pleasant myth"[128] and "a near total failure."[129]

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provide any service beyond that required by existing law, shall not have the force of law, unless, or until, the state provides sufficient new funding or a means of new funding to the county or city to pay the cost of performing the mandated activity or service for the period of time during which the activity or service is required to be performed."); TENN. CONST. art. II, § 24 ("No law of general application shall impose increased expenditure requirements on cities or counties unless the General Assembly shall provide that the state share in the cost.").

[124] *See* NEW YORK STATE MANDATE RELIEF REDESIGN TEAM, MANDATE RELIEF, FINAL REPORT 14 (DEC. 2011), *available at* http://www.governor.ny.gov/sites/governor.ny.gov/files/archive/assets/documents/FInal_Mandate_Relief_Report.pdf (last visited on Mar. 4, 2016).

[125] *See* WARD, THE NEW YORK STATE CONSTITUTION, *supra* note 6, at 545 (New York's constitutional and statutory provisions are more extensive than those in many states.).

[126] Cole, *Ghost of Home Rule*, *supra* note 11, at 715 (1985); *see also* Benjamin & Brecher, *Introduction*, *supra* note 110, at 11 ("[I]n a strictly legal sense the State is able to dominate the City. New York's State Constitution and its highest court authorize State officials to exercise control over, including intervention in, matters of local government. The concept of home rule has little legal support.").

[127] Cole, *Ghost of Home Rule*, *supra* note 11, at 715 (1985).

[128] W. Bernard Richland, *Constitutional City Home Rule in New York*, 54 COLUM. L. REV. 311, 326 (1954).

[129] Kirshnitz, *Strikes Another Blow*, *supra* note 94, at 943.

Not since the 1967 Constitutional Convention has the body politic engaged in a serious discussion about Constitutional Home Rule.[130] Intense debates were then waged on this subject, resulting in proposals by the Convention that held the promise for greater local government initiative.[131] But those proposals, along with all others made by the 1967 Convention, failed at the polls.[132]

Today, nearly fifty years later, numerous proposals have been made for constitutional reform in this area. To be sure, "[t]here is no ready solution to the problem of state interference in local government actions."[133] Home Rule "doctrine has reflected in its structure the inherently difficult nature" of drawing lines between what is properly the domain of local government and the State Legislature's ability to legislate.[134] That said, many believe "that the home rule provisions of Article IX are clearly in need

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[130] GERALD BENJAMIN & CHARLES BRECHER, *The Political Relationship* 118 *in* THE TWO NEW YORKS: STATE-CITY RELATIONS IN THE CHANGING FEDERAL SYSTEM (Gerald Benjamin & Charles Brecher eds., 1988).

[131] *See* HENRIK N. DULLEA, CHARTER REVISION IN THE EMPIRE STATE: THE POLITICS OF NEW YORK'S 1967 CONSTITUTIONAL CONVENTION 273 (1997) ("Coupled with repeal of the existing constitutional provision allowing the state to enact legislation related to the 'property, affairs, or government' of local municipalities — a phrase which over the years had been narrowly construed by the courts to limit local flexibility — and its replacement by new language referring to 'matters of local concern and the local aspects of matters of state concern,' the proposed article offered considerable hope for greater local government initiative.").

[132] *Id.* at 339-41.

[133] Briffault, *Local Government and the New York State Constitution*, *supra* note 2, at 99.

[134] Baker & Rodriguez, *Constitutional Home Rule and Judicial Scrutiny*, *supra* note 57, at 1342.

of revision, and given the current state of home rule there is little risk of adverse change."[135]

In sum, Constitutional Home Rule is a subject ripe for consideration and debate by all concerned. There is a need to weigh the benefits and costs of amendments to Article IX that would restore local autonomy through greater certainty and clarity. At a minimum, if and when the State establishes a preparatory constitutional commission, Constitutional Home Rule should be a subject to which it devotes significant time and attention.

[135] CITY BAR, 1997 TASK FORCE REPORT, *supra* note 114, at 620; *see also* N.Y. STATE TEMP. STATE COMM'N ON CONST. CONVEN., LOCAL GOVERNMENT, *supra* note 5, at 68 ("Although the recent constitutional and statutory amendments undoubtedly represent great strides forward . . . much work remains to be done.").

NEW YORK STATE BAR ASSOCIATION

ENVIRONMENTAL LAW SECTION

FALL MEETING

October 15, 2016

11:25A.M. – 12:15P.M. Constitutional Convention Panel (1.0 CLE credits)

Implementing New York State Laws Governing The Forest Preserve (Article XIV)

Thomas A. Ulasewicz, Esq.
FitzGerald Morris Baker Firth PC,
Glens Falls, New York

Otesaga Resort
Cooperstown, New York

"*As a man tramps the woods to the lake he knows he will find pines and lilies, blue herons and golden shiners, shadows on the rocks and the glint of light on the wavelets, just as they were in the summer of 1354, as they will be in 2054 and beyond. He can stand on a rock by the shore and be in a past he could not have known, in a future he will never see. He can be a part of time that was and time yet to come."*
from Adirondack Country
by William Chapman White

INTRODUCTION

The Adirondack Park ("Park") was created in 1892 by the State of New York amid concerns for the water and timber resources of the region. Today the Park is the largest publicly protected area in the contiguous United States, greater in size than the Yellowstone, Everglades, Glacier, and Grand Canyon National Parks combined and comparable to the size of the entire state of Vermont. The boundary of the Park encompasses approximately 6 million acres, approximately ½ of that belongs to the people of New York State and is constitutionally protected to remain "forever wild" forest preserve. [1]The remaining 3 million acres are private lands that include settlements, farms, timberlands, businesses, homes and camps.[2]

In 1885, when Article XIV of the NYS Constitution was enacted, New York State owned 681,374 acres in the Adirondacks and 34,000 acres in the Catskills. As of July 2016, the Forest Preserve contains 3 million acres in the Adirondacks and 287,500 acres in the Catskills.[3]

The Adirondack Park Agency ("APA") was created in 1971 by the enactment of the Adirondack Park Agency Act[4] to develop long-range land use plans for both public and private lands within the boundary, commonly referred to as the "Blue Line." The Agency prepared the Adirondack Park State Land Master Plan which was signed into law in 1972.[5] The APA Act further directs that the Master Plan classify all such lands and provide guidelines and criteria for their use and management.

This presentation will focus largely on the Adirondack Park forest preserve because of the enormity of its size, it's very rich and diverse ecological resources, it's serving as the headwaters for 5 major rivers in the Eastern United States and, the fact that nothing that is done to manage these lands is without controversy, emotion and – sometimes – anger. In addition, the creation and implementation of unit management plans in both the Adirondack and Catskill Parks are very similar.

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[1] N.Y. Const. Art. XIV, §1.

[2] *See* N.Y. Zoning & Practice, 4th Ed., Chap. 9A

[3] *See* N.Y. Dept. of Envt;. Conserv., *New York's Forest Preserve*, http://www.dec.ny.gov/lands/4960.html.

[4] Executive Law §§800 et seq.

[5] The Adirondack Park State Land Master Plan is an Executive Document approved by the Governor pursuant to Executive Law §807 (now Executive Law §816). It has been cited as having the "force of law." See Baker v. Department of Environmental Conservation of State of N.Y., 634 F. Supp. 1460. 16 Envtl. L. Rep. 20888 (N.D. N.Y. 1986). *See* N.Y. Dept. of Envtl. Conserv., *Lands and Forest Guidance & Policy Document*, http://www.dec.ny.gov/regulations/2401.html for copies of the Adirondack State Land Master Plan and the Catskill Park State Land Master Plan.

THE STATE LAND MASTER PLAN (SLMP) AND UNIT MANAGEMENT PLANS (UMPS)

The Adirondack Park Agency Act directs that the Department of Environmental Conservation (DEC) develop, in consultation with the Adirondack Park Agency (APA), individual unit management plans for units of State land classified under the Master Plan and that the individual unit management plans conform to the guidelines and criteria set forth in the master plan. Finally, the Adirondack Park Agency Act directs that the master plan and the individual unit management plans shall guide the development and management of State land in the Adirondack Park.

The Adirondack Park State Land Master Plan, developed by the Agency in consultation with the Department of Environmental and approved by the Governor, in addition to classifying all State land and establishing guidelines for their management and use, sets forth requirements for the content of individual unit management plans and procedural requirements for their adoption by the Commissioner of Environmental Conservation. The procedural requirements include that an initial draft Unit Management Plan (UMP) will be submitted to the Agency prior to the preparation of a draft plan for public review. It further provides that an opportunity will be made for review and comment on the draft unit management plans by the public and other interested parties and a public meeting will be convened for that purpose. The Master Plan also provides that the Adirondack Park Agency is responsible for interpreting the Master Plan and will determine whether a proposed unit management plan complies with the guidelines and criteria set forth in the Master Plan.

Finally, the Department of Environmental Conservation and the Adirondack Park Agency have entered into a Memorandum of Understanding (MOU) [6] which establishes procedures for coordination and communication between the Agencies on Master Plan activities, including the preparation of individual unit management plans. With respect to unit planning, this MOU provides: 1) informal consultation with unit management plan teams; 2) Agency review and comment on an "initial draft" plan submitted to the Agency prior to preparation of a draft plan for public review; and 3) formal Agency review of a "final draft" unit management plan as proposed for the approval of the Commissioner of the Department of Environmental Conservation and a determination regarding its compliance with the guidelines and criteria of the Master Plan. The MOU also provides that the Agency will have a minimum of 30 days for review of each draft. The MOU also provides that the Department will advise the Agency in writing of its acceptance or rejection of the Agency's recommendations with respect to any initial draft unit management plan, and that any inconsistencies between a proposed unit management plan and the Master Plan will be resolved prior to the Department providing the

[6] *See* https://fts.dec.state.ny.us/fts/sendfile.php?fid=24841&vercode=e7589fa5 (revised March, 2010; includes 6 Appendices: Policy LF91-2; 1993 Policy on All-Terrain Bicycles; 1992 Policy on Fisheries Management; Standard Snowmobile Trail Bridge Design & Use Of Natural Materials For Design And Construction, APA State Land Master Plan Interpretation and Staff Guidance; Management Guidance: Snowmobile Trail Siting, Construction and Maintenance on Forest Preserve Lands in the Adirondack Park; and Inter-Agency Guidelines for Implementing Best Management Practices for the Control of Terrestrial and Aquatic Invasive Species on Forest Preserve Lands in the Adirondack Park.)

Agency with a final draft unit management plan for its review and determinations regarding compliance with the Master Plan.

The APA Act requires the Agency to classify the State lands in the Adirondack Park according to "their characteristics and capacity to withstand use." [7]

A fundamental determinant of land classification is the physical characteristics of the land or water which have a direct bearing upon the capacity of the land to accept human use. Soil, slope, elevation and water are the primary elements of these physical characteristics and they are found in widely varied associations. For example, the fertility, erosiveness and depth of soil, the severity of slopes, the elevational characteristics reflected in microclimates, the temperature, chemistry, volume and turnover rate of streams or lakes, all affect the carrying capacity of the land or water both from the standpoint of the construction of facilities and the amount of human use the land or water itself can absorb. By and large, these factors highlight the essential fragility of significant portions of the State lands within the Adirondack Park. These fragile areas include most lands above 2,500 feet in altitude, particularly the boreal (spruce-fir), sub-alpine and alpine zones, as well as low-lying areas such as swamps, marshes and other wetlands. In addition, rivers, streams, lakes and ponds and their environs often present special physical problems. [8]

Biological considerations also play an important role in the structuring of the classification system. Many of these are associated with the physical limitations just described; for instance many plants of the boreal, subalpine and alpine zones are less able to withstand trampling than species associated with lower elevation life zones. Wetland ecosystems frequently are finely balanced and incapable of absorbing material changes resulting from construction or intensive human use. In addition, wildlife values and wildlife habitats are relevant to the characteristics of the land and sometimes determine whether a particular kind of human use should be encouraged or prohibited, for example the impact of snowmobiles on deer wintering yards, the effect of numbers of hikers or campers near the nesting habitat of rare, threatened or endangered species like the bald eagle or spruce grouse, or the problems associated with motorized access to bodies of water with wild strains of native trout. [9]

In addition, another significant determinant of land classification involves certain intangible considerations that have an inevitable impact on the character of land. Some of these are social or psychological--such as the sense of remoteness and degree of wildness available to users of a particular area, which may result from the size of an area, the type and density of its forest cover, the ruggedness of the terrain or merely the views over other areas of the Park obtainable from some vantage point. [10]

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[7] *See* SLMP, Sec. III – *Basis and Purpose of Classification*, at 13 (October, 2011 edition)

[8] Id. at 13

[9] Id. at 13

[10] Id. at 14

Finally, the classification system takes into account the established facilities on the land, the uses now being made by the public and the policies followed by the various administering agencies. Many of these factors are self-evident: the presence of a highway determines the classification of a travel corridor; the presence of an existing campground or ski area requires the classification of intensive use. The extent of existing facilities and uses which might make it impractical to attempt to recreate a wilderness or wild forest atmosphere is also a consideration. This is not to imply that when present uses or facilities are degrading the resource they should be continued, but their presence cannot be ignored. The unique mixture of public and private land within the Park also requires that account be taken of facilities and uses being made on contiguous or nearby private lands. Thus a large private inholding subject to, or threatened by, some form of intensive use might prevent the designation of an otherwise suitable tract of State land as wilderness. [11]

There are nine basic categories that result from this land classification system: [12]

Wilderness
Primitive
Canoe
Wild Forest
Intensive Use
Historic
State Administrative
Wild, Scenic and Recreational Rivers
Travel Corridors

If there is a unifying theme to this classification system, it is that the protection and preservation of the natural resources of the State lands within the Park must be paramount. Human use and enjoyment of those lands should be permitted and encouraged, so long as the resources in their physical and biological context and their social or psychological aspects are not degraded.

In closing on this section, I have attached to this Paper as **APPENDIX B** a "Memo" authored by Richard S. Booth titled: "State Land Master Plan Classification of Large - Acreage Forest Preserve Acquisitions Where Special Resource Values Exist and Potential Classification of the Boreas Ponds Tract" dated June 29, 2016. Mr. Booth is a Professor with the Department of City and Regional Planning at Cornell University. He was also a Deputy Commissioner at NYSDEC under Commissioner Peter Berle (Governor Hugh Carey's early administration). He served as a member of the APA Board and Chairman of the Agency's State Land Committee through June of this year when he voluntarily resigned. I have not included this document as something whose positions I endorse; but I do agree with a significant majority of what it says. It is worthwhile reading if you are interested, or need to be interested, in this subject matter. It reflects the controversies and emotions that often are associated with State forest preserve unit management

[11] Id. at 14

[12] For the definition of each of these categories, see **APPENDIX A** attached to this Paper.

plans and their associated classifications. It is but one insight into the complexities of implementing the SLMP.

NYS DEPARTMENT OF ENVIRONMENTAL CONSERVATION, DIVISION OF LANDS AND FOREST[13]

The Division of Lands and Forests manages public lands and conservation easements across New York State and provides oversight in forestry and forest management. The Department of Environmental Conservation cares for about 4 million acres of State owned land and nearly 910,000 acres of conservation easement land in New York State. This includes the Forest Preserve in the Adirondack and Catskill Parks, State Forests, Unique Areas and the State Nature and Historical Preserves.

The Division of Lands and Forests is responsible for the management, protection and recreational use of these lands, the care of the people who use these lands and the acquisition of additional lands to conserve unique and significant resources. The Division is made up of five programs: Conservation Easements, Forest Preserve Management, Private Land Services, Real Property and State Land Management.[14]

A. NYSDEC Policies and Guidelines for Forest Preserve Lands (partial)

1. *Recordkeeping and Reporting of Administrative Use of Motor Vehicles and Aircraft in the Forest Preserve (CP-17)* [15]

This policy became effective on March 29, 2000. The purpose of this policy on Recordkeeping of Administrative Use of Motor Vehicles and Aircraft in the Forest Preserve is to recite existing guidelines and provides recordkeeping and reporting requirements for the administrative use of motor vehicles on roads not open to public motor vehicle use and of aircraft on Forest Preserve lands within the Adirondack and Catskill Parks with the intent of minimizing such use.

The Department of Environmental Conservation's Office of Public Protection ("OPP") is exempt from the reporting requirements of this policy. However, OPP remains subject to Article XIV, Section I of the New York State Constitution and all provisions of the Adirondack Park State Land Master Plan and Catskill Park State Land Master Plan including those which govern motor vehicle and aircraft use for administrative purposes. OPP maintains independent records of such activities as part of its law enforcement responsibility.

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[13] http://www.dec.ny.gov/about/650.html

[14] *See* ECL Parts 190 through 199 (*Chapter II – Lands and Forest*).

[15] Id. at footnote 5 – "Lands and Forest Guidance and Policy" under *Administrative Use of Motor Vehicles in the Forest Preserve (CP-17).*

2. ***Forest Preserve Roads (CP-38)*** [16]

This policy establishes procedures and protocols for the maintenance, rehabilitation, relocation, and, when authorized by the State Constitution, widening and new construction of roads and state truck trails under Department of Environmental Conservation jurisdiction in the Forest Preserve which are situated in units classified by the Adirondack Park State Land Master Plan ("APSLMP") as Wild Forest, Primitive or Canoe Area or classified by the Catskill Park State Land Master Plan ("CPSLMP") as Wild Forest. This policy pertains to all such roads and state truck trails on Forest Preserve lands whether or not they are open for public motor vehicle use, except it does not pertain to roads or state truck trails in Intensive Use Areas and Administrative Areas. Further, this policy establishes that generally Forest Preserve roads are low maintenance seasonal roads which are narrow, surfaced with gravel, suitable for low speeds, lightly traveled by the public, and partially or fully shaded by tree canopy. Such roads are further constructed and maintained to the minimum standard necessary to provide passage by appropriate motor vehicles in a manner which protects the environment.

This policy does not include standards for determining if a road has become legally abandoned. Determinations of road abandonment will be made on a case by case basis in consultation with the Division of Legal Affairs.

3. ***Snowmobile Trails – Catskill Forest Preserve (ONR-2)*** [17]

When "ONR-2 Snowmobile Trails - Forest Preserve" was issued on September 2, 1998, it applied to Forest Preserve lands in both the Adirondack and Catskill Parks. On December 21, 2009, then DEC Commissioner Alexander B. Grannis rescinded ONR-2 as it applied to the Adirondack Forest Preserve and replaced it with "Management Guidance: Snowmobile Trail Siting, Construction and Maintenance on Forest Preserve Lands in the Adirondack Park " (infra.). ONR-2 still applies to Forest Preserve lands in the Catskill Park.

The purpose of this policy is to establish a procedure by which snowmobile trails are to be planned, located, constructed, used and maintained on Forest Preserve lands. Further, it is to outline the types of trails that are permissible and specify standards to be followed.

Over the years, municipalities and private organizations have developed networks of snowmobile trails that benefit the locality. Through interconnecting trails crossing the Forest Preserve, extended travel enhances the snowmobile experience.

In the Forest Preserve, snowmobile trails are permitted only in those areas classified as Wild Forest and Intensive Use.

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[16] Id at footnote 5 – "Lands and Forest Guidance and Policy".

[17] Id.

Where a Wilderness, Primitive or Canoe Area boundary abuts a public highway, snowmobile trails are expected to be located within 500 feet of the highway right - of - way on a site - specific basis in limited instances in conformity with a duly adopted unit management plan.

These general guidelines and policies are derived from the recommendations of the Temporary Study Commission on the Future of the Adirondacks as stated in its report dated December 15, 1970.

4. *Snowmobile Trail Siting, Construction and Maintenance on Forest Preserve Lands in the Adirondack Park*[18]

The October 2006, Snowmobile Plan for the Adirondack Park/Final Generic Environmental Impact Statement (2006 Snowmobile Plan) presents a conceptual snowmobile plan with the goal of creating a system of snowmobile trails between communities in the Adirondack Park. The 2006 Snowmobile Plan outlines the concept of reconfiguring the existing snowmobile trail network across the Forest Preserve through the UMP process. Implementation is supported by a Management Guidance approach establishing a new DEC snowmobile trail classification system with new standards and guidelines for snowmobile trail siting, construction and maintenance.

The designation of a new class of snowmobile trail to establish and improve community connections (Class II trails) is complemented by the designation of another new class of trail (Class I trails) intended to preserve a more traditional type of Adirondack snowmobiling experience. Some existing snowmobile trails (most likely within the interior of Wild Forest areas or adjacent to private inholdings) will be redesignated for non-motorized use or abandoned as trails altogether. These actions will serve to ensure available, wintertime recreational opportunities in Wild Forest areas are not dominated by snowmobile use to the exclusion or near exclusion of passive recreational uses. All snowmobile trails, regardless of class, are to be carefully sited, constructed and maintained to preserve the most essential characteristics of foot trails and to serve, where appropriate, hiking, mountain biking and other non-motorized recreational pursuits in spring, summer and fall. Additionally, this guidance helps ensure protection of sensitive natural resources on public lands and the minimization of snowmobiling safety hazards.

Implementing the broad recommendations of the 2006 Snowmobile Plan is intended to result in the establishment of important new routes on private lands through the acquisition of easements or other access rights from willing sellers. This Guidance does not address the management of those trails, but instead provides standards and guidelines solely for the management of DEC snowmobile trails on Forest Preserve lands throughout the Adirondack Park.

[18] Id.

In many locations, designated snowmobile routes of varying lengths exist on Forest Preserve roads, rather than on trails. DEC's management of all such roads for motor vehicle use, including snowmobiles, is guided by DEC's "CP-38 Forest Preserve Roads" policy and not by this Guidance.

Under the sub-heading "Snowmobile Route Design, Construction and Maintenance Standards," standards are set for alignment and grading, trail width, tree cutting, rock removal, side slope management, drainage and involvement of wetlands.

5. ***Temporary Revocable Permits (TRPs) for State Lands and Conservation Easements (ONR-3)***[19]

This is quite possibly the most delicate program to be administered by DEC. It is recognized by just about everyone as being "a necessary evil;" it clearly flirts with legality when it comes to Article XIV constitutional issues.

ONR-3 sets forth the procedure for issuing Temporary Revocable Permits for the use of State lands and conservation easement lands pursuant to 6NYCRR Parts 190 and 196 and Environmental Conservation Law (ECL) Articles 3, 9, 11 and 51.

The Department issues TRPs in its sole discretion, for the temporary use of State lands and conservation easement lands only for activities that are in compliance with all constitutional, statutory and regulatory requirements; the Adirondack and Catskill Park State Land Master Plans; adopted Unit Management Plans and Recreation Management Plans; and that have negligible or no permanent impact on the environment. This policy applies to State lands and conservation easement lands managed by the New York State Department of Environmental Conservation Division's of Fish, Wildlife and Marine Resources, Lands and Forests, and Operations. These areas include, but are not limited to, Wildlife Management Areas, State Reforestation Areas, Forest Preserve, campgrounds, boat launches/waterway access sites, tidal wetlands, and conservation easements. TRPs are subject to all other applicable State and Federal requirements and subject to any required Federal, State or local permit requirements.

This policy establishes four types of TRPs (Expedited TRPs, Routine TRPs, Non-Routine TRPs, and Research TRPs) and establishes procedures for their issuance by the Department.

Any TRP issued by the Department remains valid only if all necessary permits and/or licenses are obtained and kept current for the full duration of the TRP. TRPs may be revoked or suspended at any time in the sole discretion of the Department. TRPs are issued for a term not to exceed one (1) year, including TRP renewals and extensions. TRPs for Motorized Access Program for People with Disabilities (CP-3) are issued for a term not to exceed five (5) years.

[19] Id.

6. ***Hazardous Tree Guidance (LF 91-2)***

There are two parts to this Guidance document: an Appendix and a Memorandum.

(a). <u>Appendix</u> – The information in this appendix applies to NYSDOT staff in the Main Office, Regional offices, Regional Crews and Residencies. While much of the coordination and permitting work in this Appendix is likely to be performed by managers or coordinators, front-line staff in Residencies or tree crews are essential to the success of this guidance document.

Trees on Forest Preserve Lands: In a non-emergency, NYSDOT staff must obtain a Temporary Revocable Permit from a NYSDEC Regional Land Manager before removing trees. An emergency is a sudden, actual and ongoing event or incident, requiring the protection or preservation of human life or the intrinsic value of Forest Preserve resources.

NYSDEC Commissioner Approval for Mechanized Equipment in Wilderness, Primitive and Canoe Areas: If Forest Preserve land next to a highway is designated Wilderness, NYSDOT staff may not use mechanized equipment on it unless the Commissioner of Environmental Conservation first approves such use in writing. Such use shall be confined to off-peak seasons and normally will not be undertaken at less than 3-5 year intervals, absent extraordinary conditions.

Emergencies: In a sudden, actual and ongoing event or incident, requiring protection or preservation of human life or the intrinsic value of Forest Preserve resources, NYSDOT may perform any and all reasonable tree work without obtaining a TRP. However, after the incident or event is over, NYSDOT must provide a report to NYSDEC and APA with the information normally required for a TRP.

(b). <u>Memorandum</u> - The purpose of this memorandum is to establish administrative procedures for the implementation of "Organization and Delegation Memorandum #84-06" relating to the construction of new facilities, the expansion or modification of existing facilities and routine maintenance projects on lands of the Forest Preserve. In areas classified wilderness, such projects shall be undertaken only for purposes of protecting either user safety or natural resource values.

Such Organization and Delegation Memorandum states, in part: "Section 9-0105 of the Environmental Conservation Law provides that the Division of Lands and Forests has responsibility for the 'care, custody and control' of the Adirondack and the Catskill Forest Preserve. In accordance with this responsibility, all construction of new facilities, expansion or modification of existing facilities and maintenance of facilities, that will result in cutting, removal or destruction of trees and endangered, threatened or rare plants as defined in 6NYCRR subdivision 193.3(b), (c) and (e), on any of the lands constituting the Forest Preserve shall require approval of the Director of the Division of Lands and

Forests …". In order to carry out this direction and policy, the memorandum goes on to identify procedures to be followed by regional and non-regionalized personnel in requesting approval for such projects on lands of the Forest Preserve that involve the cutting, removal and/or destruction of trees and endangered, threatened or rare plants. According to DEC, in all cases, the provisions and constraints of this Organization and Delegation Memorandum are to be recognized and complied with.

ASSESSMENT AND TAXATION OF CERTAIN STATE LANDS

Section 532 of N.Y.'s Real Property Tax law titled "Certain State lands subject to taxation for all purposes" states, in pertinent part:

> "The following state lands shall be subject to taxation for all purposes:
> (a) All wild or forest lands owned by the State within the forest preserve; …".

Section 530.2 of N.Y.'s Real Property Tax law titled "Construction of Terms" defines "Lands" and "State lands" to include:

> "… conservation easements created pursuant to title three of article forty-nine of the environmental conservation law within the Adirondack or Catskill parks, as those areas are defined in such law and common law easements on land within the Adirondack or Catskill parks created for conservation purposes … "Lands" and "state lands" shall in no event include lands used by the state for highway or parkway purposes or lands acquired for such purposes though not in actual use therefor if construction of a highway or parkway thereon is in good faith contemplated.

There are 103 Towns and villages within the Blue Line where approximately 3 million acres of their lands are owned by New York State as forest preserve;[20] approximately 778,000 acres under conservation easements to the State. [21] The economics of those rural communities would become tumultuous if not for this taxation provision. As it is, the vast majority of communities do not look favorably on its lands going into the forest preserve. Legislation has been attempted over the years to limit the amount of lands the State could acquire within the Blue Line.

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[20] *See* SLMP (last revised Feb. 2014), Id. at footnote 5 under "Area Descriptions and Delineations," pages 51-119 for precise statistics on UMPs and other state lands including acreage.

[21] *See* "The Adirondack Park – *Seeking Balance*" – Adirondack Park Regional Assessment 2014 (contact Brad Dake ariettaplanning@wildblue.net).

CONCLUSION

Thus, these are the laws, policies and practices that could be effectuated by any changes to New York's Conservation Article in the State Constitution (Art. XIV, sec. 1). I cannot say things are not broken … but I can say that I believe they can be fixed and, in my opinion, will be fixed. The question is: "Do we need changes to these programs to be expressed at a Constitutional Convention?" In my mind, and clearly only one opinion, what needs to be fixed needs more time and more deliberation by our judicial and executive branches of government, not the Legislature… not yet, in any event.

APPENDIX A

These definitions of the various classifications of units of forest preserve lands come from the Adirondack Park State Land Master Plan, Section II – "Classification System and Guidelines " at pages 19 through 48. "Guidelines for Management' and far more descriptive text can be found throughout these pages for each classification.

I. WILDERNESS

Definition

A wilderness area, in contrast with those areas where man and his own works dominate the landscape, is an area where the earth and its community of life are untrammeled by man--where man himself is a visitor who does not remain. A wilderness area is further defined to mean an area of state land or water having a primeval character, without significant improvement or permanent human habitation, which is protected and managed so as to preserve, enhance and restore, where necessary, its natural conditions, and which (1) generally appears to have been affected primarily by the forces of nature, with the imprint of man's work substantially unnoticeable; (2) has outstanding opportunities for solitude or a primitive and unconfined type of recreation; (3) has at least ten thousand acres of contiguous land and water or is of sufficient size and character as to make practicable its preservation and use in an unimpaired condition; and (4) may also contain ecological, geological or other features of scientific, educational, scenic or historical value.

II. PRIMITIVE

Definition

A primitive area is an area of land or water that is either:

1. Essentially wilderness in character but, (a) contains structures, improvements, or uses that are inconsistent with wilderness, as defined, and whose removal, though a long term objective, cannot be provided for by a fixed deadline, and/or, (b) contains, or is contiguous to, private lands that are of a size and influence to prevent wilderness designation; or,

2. Of a size and character not meeting wilderness standards, but where the fragility of the resource or other factors require wilderness management.

III. CANOE

Definition

A canoe area is an area where the watercourses or the number and proximity of lakes and ponds make possible a remote and unconfined type of water-oriented recreation in an essentially wilderness setting.

IV. WILD FOREST

Definition

A wild forest area is an area where the resources permit a somewhat higher degree of human use than in wilderness, primitive or canoe areas, while retaining an essentially wild character. A wild forest area is further defined as an area that frequently lacks the sense of remoteness of wilderness, primitive or canoe areas and that permits a wide variety of outdoor recreation.

V. INTENSIVE USE

Definition

An intensive use area is an area where the state provides facilities for intensive forms of outdoor recreation by the public. Two types of intensive use areas are defined by this plan: campground and day use areas.

VI. HISTORIC

Definition

Historic areas are locations of buildings, structures or sites owned by the state (other than the Adirondack Forest Preserve itself) that are significant in the history, architecture, archeology or culture of the Adirondack Park, the state or the nation; that fall into one of the following categories;

- -- state historic sites;
- -- properties listed on the National Register of Historic Places;
- -- properties recommended for nomination by the Committee on Registers of the New York State Board For Historic Preservation; and that are of a scale, character and location appropriate for designation as an historic area under this master plan.

VII. STATE ADMINISTRATIVE AREAS

Definition

State administrative areas are areas where the state provides facilities for a variety of specific state purposes that are not primarily designed to accommodate visitors to the Park. [*This category, like the travel corridor category with which it is closely associated, contains a wide variety of developed uses related directly to the activities of many state agencies. It includes the administrative offices of the Department of Environmental Conservation, Division of State Police and the Adirondack Park Agency itself as well as the Department of Environmental Conservation fish hatcheries, Department of Transportation offices and maintenance and storage sites, the Atmospheric Sciences Research Center at Whiteface Mountain, the Sunmount Developmental Center, the Adirondack Correctional Facility, the Dannemora Correctional*

Facility, and several sewage treatment plants operated by the Environmental Facilities Corporation. All of these facilities are in close proximity to public highways and are generally in developed areas of the Park.]

VIII. WILD, SCENIC AND RECREATIONAL RIVERS

Definitions

A wild river is a river or section of river that is free of diversions and impoundments, inaccessible to the general public except by water, foot or horse trail, and with a river area primitive in nature and free of any man-made development except foot bridges.

A scenic river is a river or section of river that is free of diversions or impoundments except for log dams, with limited road access and with a river area largely primitive and undeveloped, or that is partially or predominantly used for agriculture, forest management and other dispersed human activities that do not substantially interfere with public use and enjoyment of the river and its shore.

A recreational river is a river or section of river that is readily accessible by road or railroad, that may have development in the river area and that may have undergone some diversion or impoundment in the past.

IX. TRAVEL CORRIDORS

Definition

A travel corridor is 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.

This document is intended for public distribution.

MEMO

Subject: State Land Master Plan Classifications Of Large-Acreage Forest Preserve Acquisitions Where Special Resource Values Exist and Potential Classification of The Boreas Ponds Tract

To: NYS Adirondack Park Agency Members, Adirondack Park Agency Staff, And Other Interested Parties

From: Richard S. Booth, member of the Agency and chair of its State Land Committee

Date: June 29, 2016

This memo addresses what the Adirondack Park State Land Master Plan (hereafter the SLMP or the Master Plan) requires regarding NYS Adirondack Park Agency (hereafter Agency) decisions to classify large tracts of land added to the Forest Preserve in cases where those lands contain special resource values. It also addresses the Agency's eventual decision regarding classification pursuant to the SLMP of the 20,000 acres plus Boreas Ponds Tract recently added to the Forest Preserve.

I. PRELIMINARY POINTS

1. All specific references made to the SLMP in this document are tied to the SLMP's various sections, and all page references reflect the Agency's February 2014 hard copy publication of the Master Plan.

2. I generally intend the term **"land(s)"** to include both "lands" and "waters."

3. This memo uses the term **"large-acreage Forest Preserve**

acquisition(s)." While there is not an absolute minimum figure for this type of acquisition, in my opinion a 5,000 acre threshold is appropriate. In terms of the logic of using this figure, certainly any Forest Preserve acquisition of 5,000 acres or more is significant; 5,000 acres is 50% of the SLMP's general minimum for the establishment of a Wilderness Area; and the federal Wilderness Act uses the 5,000 acre figure as its general minimum for the designation of federal Wilderness Areas (although a number of those federal areas contain smaller numbers of acres). I recommend that the Agency use the 5,000 acre figure as a guideline and not as a definite standard.

This memo also uses the term **"special resource values."** All pieces of the Forest Preserve contain important resource values. Resource values include natural resources values and social values. (All references in this memo to "social values" encompass the SLMP's focus on "**intangible considerations,**" including those that are **"social or psychological**.") (SLMP, Section II, pages 13-14 and Section I, page 1; underlining and emphasis added) By using the term **"special resource values,"** I intend to convey the idea that a large tract of Forest Preserve land contains particularly significant natural resource values and social resource values when considered in light of the values that exist within the Park's Forest Preserve lands.

4. Given what item #3 above says re a 5,000 acre threshold, it is important to note that I understand, support, and foresee the possibility/desirability of creating new acquired Primitive Areas that are less than 5,000 acres. Nothing in this memo suggests anything to the contrary.

5. This memo's central argument regarding what the SLMP requires when the Agency is classifying large-acreage Forest Preserve acquisitions on which special resource values exist reflects in significant part the argument I made to Agency members in the fall of 2013 regarding the eventual classification of what are now the Essex Chain Lakes and Pine Lake Primitive Areas (plus some additional lands). In its fullest form I made that argument in an October 2013 memo that I gave Agency members. The Agency refused to release that document to the public pursuant to one or more New York State Freedom of Information Law (FOIL) requests, a decision with which I strongly disagreed.

6. This memo focuses on the SLMP's Wilderness, Primitive, Canoe, and Wild Forest classifications because they make up the vast majority of

the Forest Preserve. It does not address the remaining types of classifications created by the Master Plan: i.e., Intensive Use; Historic; State Administrative; Wild, Scenic and Recreational Rivers; and Travel Corridors.

7. Given the provisions of the SLMP and the NYS Adirondack Park Agency Act, clearly the Agency may at any point choose to reconsider the SLMP's existing land area classifications. I want to be absolutely clear that in writing this memo I am not in any way urging that a reclassification analysis be undertaken re any existing classification.

8. This memo makes several references to the Agency's 1979 Final Programmatic Environmental Impact Statement (hereafter FPEIS) that dealt with guidelines for amending the SLMP. The FPEIS is one of the most important documents the Agency has every created regarding the SLMP. Significantly, that document strongly supports the conclusions I state here.

9. An important caveat merits attention. In recent decisions the Agency has decided (not unanimously) to permit the public's use of bicycles on miles of bicycle trails in the Essex Chain Lakes Primitive Area and the Pine Lake Primitive Area **and** to permit the NYS Department of Environmental Conservation (hereafter DEC) to maintain those trails with motor vehicles. **Those decisions reflect the Agency's willingness (as well as willingness on the part of the DEC and the Governor) to ignore what the SLMP requires --- and in particular, to ignore the Master Plan's existing language that defines Primitive Areas as "essentially wilderness in character" and its very clear intention that Primitive Areas should be managed as closely as possible to the ways in which Wilderness Areas are required to be managed.** (SLMP, Section II, pages 25-28) At a minimum those decisions cast doubt on how two very important Primitive Areas will be managed in the future. They also cast doubt on how all areas of the Forest Preserve classified pursuant to the SLMP will be managed because those decisions flow from choices consciously made by state officials to ignore the Master Plan's purposes and mandates. **In writing this memo, I have assumed that those recent Agency decisions were clearly in error and that at some time in the future those errors may be corrected.**

10. This memo reflects my thoughts/conclusions as one member of the Adirondack Park Agency. It does not state any positions on behalf

of the Agency. My tenure on the Agency will end June 30, 2016. I am sending this memo (in both electronic and hard copy form) while I am still a member of the Agency. (In addition, I am likely to send additional copies of this memo after June 30.)

II. THE SLMP's MANDATES APPLICABLE TO CLASSIFICATION OF LARGE, NEWLY ACQUIRED FOREST PRESERVE TRACTS WITH SPECIAL RESOURCE VALUES

1. Primary Conclusions

The SLMP creates a very strong presumption in favor of a Wilderness, Primitive, or Canoe classification for any new, large-acreage Forest Preserve acquisition that contains special resource values. That presumption is especially strong for large newly acquired tracts that contain significant water resources. In other words, when the Agency is classifying any major new Forest Preserve acquisition that exhibits very important natural resource values and social values, the SLMP's various mandates considerably narrow the range of choices the Agency may properly make. **Furthermore, in such a case the Agency should not permit this presumption to be overturned unless there is a very clear showing that designating that particular tract as Wilderness, Primitive, or Canoe would be inconsistent with the purposes of the Master Plan (as more fully discussed below).**

2. The SLMP's Stated Purpose

While not a statute, the SLMP is binding as a matter of state law, and its central mandate is clear: "If there is a **unifying theme to the master plan**, it is that the protection and preservation of the natural resources of the state lands within the Park must be paramount. Human use and enjoyment of those lands should be permitted and encouraged, **so long as the resources in their physical and biological context as well as their social or psychological aspects are not degraded**. This theme is drawn not only from the Adirondack Park Agency Act … and its legislative history, but also from a century of the public's demonstrated attitude toward the forest preserve and the Adirondack Park." (SLMP, Section I, page 1; underlining and emphasis added).

Any and all decisions under the SLMP, including in particular classification decisions, must be measured against their compliance with this

central mandate. In that regard it is critical to note that this mandate emphasizes protection of physical and biological resources and protection of the social/psychological benefits that can be derived from state lands left in as natural a state as possible.

3. The SLMP's Land Classification Mandate

As noted by the SLMP, the Adirondack Park Agency Act (APA Act) establishes a clear and specific mandate regarding the Agency's state land classification decisions: "The Act requires the Agency to classify the state lands in the Park according to **'their characteristics and capacity to withstand use.'**" (SLMP, Section II, page 13; underlining and emphasis added; see also Section 807 of the APA Act as initially adopted in 1971, language from which was incorporated into the SLMP in 1972 when it was initially adopted.)

4. The SLMP's Classification Determinants

The SLMP identifies **four determinants** for classifying state lands (including newly acquired state lands) and provides some guidance regarding the application of these determinants. They are as follows:

A) "A fundamental determinant of land classification is the **physical characteristics** of the land or water which have a direct bearing upon the capacity of the land to accept human use. Soil, slope, elevation and water are the primary elements of these physical characteristics and they are found in widely varied associations. For example, the fertility, erosiveness and depth of soil, the severity of slopes, the elevational characteristics reflected in microclimates, the temperature, chemistry, volume and turnover rate of streams or lakes, all affect the carrying capacity of the land or water both from the standpoint of the construction of facilities and the amount of human use the land or water itself can absorb. **By and large, these factors highlight the essential fragility of significant portions of the state lands within the Park. These fragile areas include most lands above 2,500 feet in altitude, particularly the boreal (spruce-fir), sub-alpine and alpine zones, as well as low lying areas such as swamps, marshes and other wetlands. In addition, rivers, streams, lakes and ponds and their environs often present special physical problems.**" (SLMP, Section II, page 13; underlining and emphasis added)

B) "**Biological considerations** also play an important role in the structuring of the classification system. Many of these are associated with

the physical limitations just described; for instance many plants of the boreal, subalpine and alpine zones are less able to withstand trampling than species associated with lower elevation life zones. **Wetland ecosystems frequently are finely balanced and incapable of absorbing material changes resulting from construction or intensive human use. In addition, wildlife values and wildlife habitats are relevant to the characteristics of the land and sometimes determine whether a particular kind of human use should be encouraged or prohibited,** for example the impact of snowmobiles on deer wintering yards, the effect of numbers of hikers or campers near the nesting habitat of rare, threatened or endangered species like the bald eagle or spruce grouse, or the problems associated with motorized access to bodies of water with wild strains of native trout." (SLMP, Section II, page 13; underlining and emphasis added)

C) "In addition, another significant determinant of land classification involves **certain intangible considerations** that have an inevitable impact on the character of land. Some of these are **social or psychological** -- such as **the sense of remoteness and degree of wildness available to users of a particular area, which may result from the size of an area, the type and density of its forest cover, the ruggedness of the terrain or merely the views over other areas of the Park obtainable from some vantage point.** Without these elements an area should not be classified as wilderness, even though the physical and biological factors would dictate that the limitations of wilderness management are essential.

In such cases, as will be seen, a primitive designation would be required. Other classification determinants are more concrete, for example **the suitability of a given system of lakes and ponds for canoeing or guideboating,** the ability of larger bodies of water to provide for adequately distributed motorboat use, or the accessibility of a tract of land to a public highway, and its attractiveness, permitting the development of a campground or other intensive use facility."

(SLMP, Section II, pages 13-14; underlining and emphasis added)

D) "Finally, the classification system takes into account the **established facilities on the land, the uses now being made by the public and the policies followed by the various administering agencies.** Many of these factors are self- evident: the presence of a highway determines the classification of a travel corridor; the presence of an existing campground or

ski area requires the classification of intensive use. The extent of existing facilities and uses which might make it impractical to attempt to recreate a wilderness or wild forest atmosphere is also a consideration, ..." (SLMP, Section II, page 14; underlining and emphasis added)

Applying these four determinants is admittedly not precise, and in doing so, the Agency must make a number of judgment calls. In recognition of this point, the SLMP states: **"The above described factors are obviously complex and their application is, in certain instances, subjective, since the value of resource quality or character cannot be precisely evaluated or measured. Nonetheless, the Agency believes that the classification system described below reflects the character and capacity to withstand use of all state lands within the Adirondack Park in conformity with the provisions of the Act. ... Insofar as forest preserve lands are concerned, no structures, improvements or uses not now established on the forest preserve are permitted by these guidelines and in many cases more restrictive management is provided for."** (SLMP, Section II, page 14; underlining and emphasis added)

5. The SLMP's Classification Hierarchy

A) Designed to protect the resources of the Park's Forest Preserve lands, the SLMP creates a three-part hierarchy for nearly all of those lands. **Specifically, it places Wilderness Areas at the top of that hierarchy, and it places Primitive Areas and Canoe Areas on a very close second rung. The third rung of this hierarchy is Wild Forest Areas.** The primary differences between the first and second rungs of the hierarchy on the one hand and the third rung on the other are two-fold, and they are central to the purpose and meaning of the SLMP's land area classification system: **first**, in general lands in Wilderness, Primitive, and Canoe Areas have resource values that require greater degrees of protection than lands in Wild Forest Areas; and **second**, in large part because of these differences in resource values, mechanized uses (e.g., bicycles), motorized uses (including but not limited to use of motors for recreation purposes), and motorized access within an area are severely limited in Wilderness, Primitive, and Canoe Areas compared to what is permissible in Wild Forest Areas.

B) The centrality of this three-part hierarchy to the SLMP's overall purpose and structure is made clear by a substantial number of statements in the Master Plan. For example, the SLMP's basic guidelines for managing Primitive Areas and Canoe Areas make clear that those areas

are to be managed in a condition as close as possible to wilderness. (SLMP, Section II, **Primitive**, page 25 – **"Essentially wilderness ... require wilderness management."** (underlining and emphasis added); and Section II, **Canoe**, page 28 – **"in an essentially wilderness setting"** (underlining and emphasis added)) Moreover, in a number of places the SLMP specifies permissible structures/improvements/uses in Primitive Areas, Canoe Areas, and Wild Forest Areas by first stating that what is permissible in Wilderness Areas is permissible in the other classifications. (SLMP, Section II, **Primitive** at pages 25-28; Section II, **Canoe** at pages 28-31; and Section II **Wild Forest** at pages 31-36)

In addition, the SLMP's policy recommendations regarding state land acquisitions make clear that ~~protection of~~ Wilderness, Primitive, and Canoe Area protection is given greater priority than protection of Wild Forest Areas: i.e., **"4. Highest priority** should be given to acquiring fee title to, fee title subject to a term of life tenancy, or conservation easements providing public use or value or rights of first refusal over, (i) key parcels of private land, the use or development of which could adversely affect the integrity of vital tracts of state land, **particularly wilderness, primitive and canoe areas** and (ii) key parcels which would **permit the upgrading of primitive areas to wilderness areas.**" (SLMP, Section I, page 7; underlining and emphasis added)

C) The existence and importance of the SLMP's classification hierarchy are clearly and very strongly underscored by Section 810 of the Adirondack Park Agency Act. That section defines the scope of the Agency's regional project review authority. With regard to all of the Park's Moderate Intensity Use Areas, Low Intensity Use Areas, Rural Use Areas, and Resource Management Areas, Section 810 designates as **"critical environmental areas"** (among others) all lands **"within one-eighth mile"** of any Forest Preserve lands that the SLMP classifies **"now or hereafter"** as Wilderness, Primitive or Canoe. By way of explanation, the Adirondack Park Agency Act, among other things, establishes Moderate Intensity Use ... Resource Management land use designations, and they cover the vast majority of all non-state lands in the Adirondack Park. The Act grants the Agency substantially greater regional project review authority in areas designated as **"critical environmental areas"** than it does in areas not so designated. Significantly, the statute does not designate as **"critical environmental areas"** lands that lie within one-eighth of a mile of Wild Forest Areas. (Section 810, Adirondack Park Agency Act, NYS Executive

Law, underlining and emphasis added)

D) The existence and importance of the SLMP's classification hierarchy are also clearly and strongly underscored by a number of statements in the 1979 FPEIS previously mentioned. See the FPEIS, for example, at:

" Particularly remote or fragile tracts of land that require Wilderness management but do not meet the 10,000 acre size criterion for Wilderness designation and do not lie adjacent to existing Wilderness should be classified as Primitive. Also, lands which otherwise would receive a Wilderness classification but contain significant non-conforming uses, the removal of which cannot be scheduled, or lands which contain or lie contiguous to private lands that are of a size and influence to prevent Wilderness designation, will be classified as Primitive." (FPEIS, Reclassification Guidelines, page 25; underlining and emphasis added)

AND again at: "4. **Only in exceptional circumstances should lands presently classified as Wilderness, Primitive or Canoe be reclassified to Wild Forest.** This should occur only after it has been demonstrated that a highly unusual condition exists, such as the identification of a mapping error, or the existence of a previously unrecognized non-conforming use of a permanent nature.

5. **Wilderness should be reclassified to Primitive only under the most exceptional circumstances** such as the identification of a mapping error or the existence of a previously unrecognized non-conforming use of a permanent nature."

(FPEIS, Reclassification Guidelines, page 26; underlining and emphasis added)

AND again at: "8. **The reclassification from Wild Forest to Wilderness, Primitive or Canoe would result in added protection of natural resources.** This reclassification could also result in the elimination of existing motorized access or aircraft landings on lakes. **Wild Forest areas which lie adjacent to existing Wilderness, Primitive or Canoe should be reclassified to the above land classifications: a) if substantial management problems are created by the Wild Forest classification;** b) if only limited facilities such as open roads or snowmobile trails exist within

the Wild Forest area; c) if the level of use of existing facilities is unusually slight; d) **if the Wild Forest area has unusual natural resource or open space characteristics which require the protection offered by the Wilderness, Primitive or Canoe classification**; or e) the reclassification from Wild Forest is required **to protect the resources or character of existing, adjacent or nearby designated Wilderness, Primitive or Canoe areas.**" (FPEIS, Reclassification Guidelines, pages 27-28; underlining provided in FPEIS; emphasis added)

AND again at: **"The classification of land by the State Land Master Plan as Wilderness, Primitive or Canoe** prohibits motorized access and, except in cases of actual and ongoing emergencies such as fire, flood, search and rescue or large scale contamination of streams, **provides large acreages of habitat undisturbed by man essential to the reintroduction of certain extirpated species. This opportunity is unavailable elsewhere in New York State and would be protected by the proposed guidelines."** (FPEIS, Impact of Proposed Guidelines on Area Character and Landscape Quality; page 34; underlining and emphasis added)

AND again at: **"Wilderness is vital to the survival of many species of wildlife with highly specialized habitat needs**, and it provides both a natural laboratory and basic standards for the assessment of main effects on non-wilderness ecosystems. The proposed guidelines **should protect existing Wilderness and enable the creation of additional Wilderness areas**." (FPEIS, Impact of Proposed Guidelines on Area Character and Landscape Quality; page 34; underlining and emphasis added)

AND again at: **"The Wilderness, Primitive and Canoe classifications generally prohibit the use of motor vehicles, motorized equipment and aircraft. Any amendment to the Plan which would sanction such uses in these areas would severely diminish the Primitive character of those lands and should not be proposed. Noise intrusion is only one component of an area's character. The mere knowledge that motorized access is permissible diminishes an area's sense of remoteness."** (FPEIS, Impact of Proposed Guidelines on Area Character and Landscape Quality; page 35; underlining and emphasis added)

AND again at: **"Amendments to the Master Plan which diminish the size or deteriorate the character of areas designated as Wilderness, Primitive or Canoe are extremely significant and should not be**

proposed." (FPEIS, Impact of Proposed Guidelines on Area Character and Landscape Quality; page 36; underlining and emphasis added)

AND again at: **"Any amendment to the State Land Master Plan which would diminish the area or resource quality of lands classified as Wilderness, Primitive or Canoe would significantly diminish the educational and research opportunities which those areas now offer. These effects would be particularly acute due to the scarcity of designated wilderness in the northeastern United States."** (FPEIS, Impact of Proposed Guidelines on Area Character and Landscape Quality; page 38; underlining and emphasis added)

E) The SLMP does not state explicitly how this three-part hierarchy is to be used regarding the classification of newly acquired state lands. Nevertheless, the general purposes of the Master Plan, its specific mandates regarding the different land classifications, the clear meaning of its terminology, and the Plan's overall organization suggest strongly what the Agency should generally do when large acreages of newly acquired Forest Preserve lands are classified: **i.e., wherever possible those lands with special resources values should be classified as Wilderness; AND when that is not possible, those lands should be classified as Primitive or Canoe; AND only when that is clearly shown not to be possible, should those lands be classified as Wild Forest.**

F) An additional note regarding the SLMP's classification hierarchy is critically important. Stating that Wild Forest lands are on the third rung of this hierarchy in no way suggests that protection of the resources on those lands is unimportant. Indeed, **"Substantially all ..."** of the lands administered by the DEC in the Park, which obviously include very large acreages of Wild Forest lands, "are protected by the **"forever wild clause"** of Article XIV, Section 1 of the State Constitution." (SLMP, Section I, page 2; emphasis and underlining added) The history of the Park, SLMP's initial adoption in 1972, and the Master Plan's implementation over the past four plus decades make clear that it is the underlying **"forever wild"** protection of the vast majority of the Park's state lands (including Wild Forest Areas) that makes the Master Plan's land classification system both possible and important. The SLMP was designed to insure that large portions of the Park's Forest Preserve would be managed in ways that were significantly more resource protective than the base line of Article XIV protection DEC had determined over many years applies to all Forest Preserve lands.

6. History And Interpretation Of The SLMP

The history of Forest Preserve management in the Park before 1972 led directly to the SLMP's creation/adoption and the establishment of its three-part hierarchy, as discussed above in item #5. While this point often goes unstated due to the sensitivity of relations between the Agency and the DEC, any reasonable review of the Park's Forest Preserve history makes clear that this hierarchy came into existence because in 1971 the state's leaders decided it was necessary to alter, substantially and fundamentally, the manner in which much of the Forest Preserve had been managed up to that point.

In 1971 the State Legislature created the Adirondack Park Agency and required it (among other things) to prepare what is now the SLMP. By that time the state's leaders had become dissatisfied with the overall character of Forest Preserve management by the long existing NYS Conservation Department and (its successor) the very young NYS Department of Environmental Conservation (both agencies referred to collectively as CON/DEC hereafter in this item #6): i.e., they were unhappy that over many years CON/DEC officials had chosen to allow much of the Forest Preserve to become less and less wild. Most critically, those officials had made numerous choices to permit ever increasing amounts of infrastructure to be constructed/installed on the Park's Forest Preserve lands, ever increasing amounts of motorized recreation on those lands, and ever increasing amounts of motorized access within those lands.

The primary motivation of the state's leaders in requiring the SLMP's creation and then approving its classification system flowed directly from their determination that large parts of the Forest Preserve should be managed so that they would be significantly wilder than what the CON/DEC had determined was permissible under the State Constitution's Article XIV "Forever Wild" mandate. As a result, the concept of strongly protecting wilderness values in areas classified as Wilderness and in almost-wilderness areas classified as Primitive and Canoe became the SLMP's central focus. This focus was very consistent with, and in large part inspired by, the approach taken in the federal Wilderness Act adopted by Congress and signed by the President just eight years before the SLMP was created. It is no coincidence, but rather a matter of specific and meaningful intention, that the Master Plan's definition of **"wilderness"** so closely parallels the definition of the same term in the federal statute.

(SLMP at Section II, definition of "**Wilderness**" at page 19; and see 16 U.S.C. sections 1131-1136, at section 1131(c)).

In summary, review of the Park's Forest Preserve history illuminates the purpose and significance of the three-part classification hierarchy contained in the SLMP. What the Master Plan now permits in Wild Forest Areas in large part reflects what the CON/DEC had allowed on much of the Park's Forest Preserve prior to 1972. The SLMP's Wilderness, Primitive, and Canoe Area classifications were designed to protect wilderness values in very large areas of the Forest Preserve far more completely than what had been permitted before the SLMP came into existence.

7. A Presumption

Therefore, the SLMP's various mandates regarding classification of newly acquired Forest Preserve lands, when considered together as an integrated whole, **create a very strong presumption in favor of Wilderness, Primitive, or Canoe classifications where special resource values exist on new large land acquisitions, and that presumption should be set aside only where there is a clear showing that such a classification in a particular case would be contrary to the purposes of the Master Plan:**

A) For any large-acreage land acquisition where special resource values exist, that presumption suggests a Wilderness classification. The presumption is especially strong where the newly acquired lands contain significant acreage covered by lakes or ponds.

B) Notwithstanding this presumption in favor of Wilderness classifications, there are some circumstances in which it is proper under the SLMP, and sometimes necessary, for the Agency not to adopt a Wilderness classification regarding a large land acquisition where special resource values exist: i.e.,

---- **where** the area acquired is less than 10,000 acres (the SLMP's general minimum threshold for Wilderness Areas) and does not adjoin an existing Wilderness Area or Primitive Area; or **where** there is some significant, existing infrastructure on the acquired land that it is important to maintain, which infrastructure prevents a Wilderness classification (e.g., two large dams and an access road at Lows Lake, which are included in the Eastern Five Ponds Access Primitive Area); or **where** there are special

circumstances on newly acquired land that currently prevent a Wilderness classification (e.g., the anticipated long-term presence of float plane use in the vicinity of the Essex Chain Lakes constituted circumstances that properly prevented the Agency from classifying as Wilderness the now-existing Essex Chain Lakes and Pine Lake Primitive Areas); **in these several circumstances that presumption strongly suggests a Primitive classification;** and

---- **where** a large newly acquired tract involves an exceptional abundance of interconnecting lakes, ponds, and/or streams, **that presumption strongly favors a Canoe classification.**

III. THE AGENCY'S EVENTUAL CLASSIFICATION OF THE BOREAS PONDS TRACT

1. Preliminary Points

A) As of this date Agency members have not received from the Agency's staff any summary re the resource values inherent in the Boreas Ponds Tract (hereafter TRACT). However, I have received and reviewed various pieces of information regarding the TRACT. This section of this memo reflects what I have derived from that information.

B) My comments here focus on the broad question of what should be the appropriate classification for the largest portion(s) of the TRACT pursuant to the SLMP. Nothing in this memo addresses where any classification line should be drawn on the TRACT between different state land classifications.

C) Because my term on the Agency expires on June 30, as previously noted, I will not still be on the Agency when it eventually acts to classify the TRACT pursuant to the SLMP.

2. Primary Conclusions

As the previous discussion explains, the SLMP's various mandates create a very strong presumption in favor of a Wilderness classification that covers the great majority of the Boreas Ponds Tract. This conclusion pertains most critically to the TRACT's ponds and considerable amounts of lands around those water bodies. Furthermore,

this presumption should be set aside only if there is a very clear showing that a Wilderness designation for most of the TRACT would be inconsistent with the purposes of the Master Plan.

3. <u>A Large Forest Preserve Acquisition That Contains Exceptional Resource Values</u>

A) By any reasonable definition the TRACT constitutes a major addition to the Forest Preserve. Containing more than 20,000 acres, it is larger than several of the Park's existing Wilderness Areas: **Hurricane Mountain** (13,948 acres), **Jay Mountain** (7,896 acres), **Little Moose** (12,258 acres), **Round Lake** (10,356 acres), and **William C. Whitney** (13,678 acres). In addition, it is nearly as large as several other Wilderness Areas in the Park: **Ha-De-Ron-Dah** (25,272 acres), **Hudson Gorge** (23,494 acres), **Pepperbox** (23,816 acres), and **Sentinel Range** (24,017 acres).

B) While my assessment of the TRACT's resources is admittedly preliminary, it is abundantly clear that any detailed and balanced analysis of those resources must conclude that in the context of the Park's Forest Preserve (and the Park more generally) the natural resources values and social resource values present on the TRACT are of exceptionally high order. The materials I have reviewed to date make clear that these special resource values include (but are by no means limited to):

---- fragile soils over considerable areas, including extensive areas with soils with severe potential for erosion;

---- significant areas over 2500 feet elevation;

---- an extensive network of streams, including a significant river segment;

---- extensive areas covered by ponds;

---- extensive wetland habitat, including more than 1,000 acres of peatlands;

---- an abundance of plant and animal species, including a number of boreal species, and a number of rare, threatened or endangered species;

---- **stunning vistas from the TRACT into lands already classified as Wilderness;**

----- **superior location re the protection of wilderness values** (the TRACT adjoins the High Peaks Wilderness Area; if the TRACT is eventually classified as Wilderness and added to the High Peaks Wilderness Area, it will constitute a remarkable addition to the Park's largest and most famous Wilderness Area);

---- **its remoteness and its capacity to provide extensive opportunities for solitude** (These characteristics of the TRACT merit special emphasis. By any reasonable definition, large portions of the TRACT are remote, and the TRACT provides multiple opportunities for people to find solitude, to experience nature's wildness over a large landscape containing widely varying resources, and to traverse this landscape in as non-intrusive ways as possible. The importance of these qualities will be greatly enhanced if the TRACT is added to the High Peaks Wilderness Area.)

4. <u>The TRACT's Prior Use By The Forest Products Industry</u>

The forested lands in the TRACT have been the subject of intensive timber management practices over an extended period (involving among other things the development of an extensive road network to permit truck transportation of logs). Due to that fact, some are arguing that the TRACT's resource values do not justify a Wilderness classification under the SLMP. That argument should be rejected.

If permitted to do so, nature can and will over time renew lands very heavily impacted by human activities. The previous existence of significant logging operations and the road networks built as part of those operations do not prevent regeneration of forested lands and reestablishment of those lands as truly wild lands. This reality is clearly demonstrated in a number of the Park's Wilderness Areas where substantial timber harvesting once occurred (e.g., **Blue Ridge**, **Ha-De-Ron-Dah**, **McKenzie Mountain**, **Round Lake**, **Siamese Ponds**, and **William C. Whitney**). The Park's existing inventory of wilderness would be far less substantial than it now is had the Agency in previous years allowed evidence of past logging activities to prevent designation of qualifying lands as Wilderness Areas. Similarly, pursuant to the federal Wilderness Act, Congress has designated numerous Wilderness Areas since 1964 that had previously been substantially affected by human

activity; this has been particularly true regarding federal Wilderness Area designations in the eastern United States. Nothing relating to past forest management activities on the TRACT in any way prevents its being classified as Wilderness under the SLMP.

5. Application Of The SLMP's Fourth Classification Determinant To The TRACT

As discussed previously, the SLMP's fourth classification determinant requires consideration of "**... established facilities on the land, the uses now being made by the public and the policies followed by the various administering agencies. ....**" (SLMP, Section II, p. 14) This determinant lends no weight to any potential suggestion that the great majority of the TRACT should be classified as something other than Wilderness. Because the TRACT has been in private hands until very recently, there are no established facilities used by the public that could arguably prevent the great bulk of these lands from being classified as Wilderness. In determining how the TRACT should be treated under the SLMP, the Agency will be "writing on an essentially clean slate" with respect to this fourth determinant.

6. Other Potential Classifications For Large Portions Of The TRACT

A) I know of no circumstances that indicate any large portion of the TRACT should be classified as Primitive. However, it is possible that a small portion(s) of the TRACT could properly be classified as Primitive.

B) While the TRACT contains an abundance of stream and pond resources, **I do not think the degree of the water-based recreation opportunities it offers would merit its being classified as a Canoe Area.**

C) I know of no circumstances that suggest that anything approaching a majority of the TRACT acreage should be classified as Wild Forest. Reasonable assessment and application of the SLMP's land classification determinants would prevent such a classification in this case. The TRACT's resources place this acquisition in the high echelons of any reasonable listing of valuable resource areas existing anywhere within the Forest Preserve. While careful review may result in an appropriate determination that some portion of the TRACT should be classified as Wild Forest, that classification cannot be reasonably assigned to the great majority of the TRACT's lands.

D) The SLMP cannot be accurately or logically read to permit a Wild Forest classification of the TRACT with an overlay treating it (or large portions of it) as a Special Management Area. The essential purpose of the Special Management Area concept in the SLMP is to allow special treatment (i.e., more restrictive management) of relatively small areas inside of a larger land area. Nothing in the Master Plan contemplates the notion that the Agency may properly reduce the level of classification for a large area to a lesser level of protection than should be assigned given the resource values of that area and then use the Special Management Area mechanism to modify the impacts that would be generated by utilizing that lesser level of protection. In other words, the SLMP does not permit designating as Wild Forest an area whose resources merit a Wilderness Area classification (or a Primitive Area or Canoe Area classification) and then using Special Management Area guidelines to offset the negative impacts that will be caused by classifying the area as Wild Forest. (SLMP, Section II, pp. 49-50)

(NOTE: the potential Special Management Area treatment of all (or most) of what are now the Essex Chain Lakes Primitive Area and the Pine Lakes Primitive Area was suggested by DEC in 2013. Fortunately the Agency rejected that approach then, and it should similarly reject any suggestion favoring this approach with regard to the TRACT.)

IV. CLOSING THOUGHTS

The present mixture of Wilderness, Primitive, and Canoe Areas in the Adirondack Park is a remarkable reality in the second decade of the 21st Century. That reality exists because in establishing the SLMP in 1972 the Adirondack Park Agency looked past short-term considerations and decided that the broadest interests of the people of New York State (including those who live in the Park) will be best served by very strong protection of those state lands that contain wilderness resource values. As a result, the SLMP requires that the wildest parts of the Park's Forest Preserve be protected as Wilderness, Primitive, and Canoe Areas. Many decisions by the Agency since 1972 have reflected these central, critical mandates of the Master Plan.

This memo has urged close attention to the letter of the SLMP. **In closing, I urge that the Adirondack Park Agency pay very careful attention to its spirit as well.** The Master Plan forcefully favors the

protection of large, wild, remote, high resource value tracts of the Adirondack Park's Forest Preserve lands from intensive human use, including motorized uses and motorized access. The SLMP does so because it is vitally important that people have meaningful and extensive opportunities to experience nature in its unbridled form without many of the intrusions of the modern world. Protecting those opportunities today is increasingly important and difficult because the world in 2016 is so much more crowded and busier a place than it was in 1972. Protecting and enhancing those opportunities will become ever more significant and ever more challenging as the decades proceed, as new generations arrive, and as technology wears away at more and more of the world's natural fabric. **The members of the Agency, now and far into the future, bear and will bear the responsibility --- and must bear the responsibility --- of making certain that the Master Plan's spirit lives and thrives.**

This memo is long. Indeed!!! I appreciate the time you have devoted to reading it, and I hope you find it useful. Thank you.

APPENDIX C

Hiking boom too much for ADK staff

September 10, 2016

By PETER CROWLEY - Managing Editor (pcrowley@adirondackdailyenterprise.com) , Adirondack Daily Enterprise

Save

Adirondack Mountain Club staff say they were overwhelmed by unusually large crowds of hikers this Labor Day weekend - the most they've ever seen, some staff said.

The club's land near Lake Placid, tucked in the heart of the High Peaks Wilderness Area, has long been New York's most popular trailhead, and Labor Day weekend has long been one of its busiest times of year. But the holiday traffic is now too much to handle, Executive Director Neil Woodworth said Friday.

Among the problems the crowds bring, club officials say, are trampling of fragile vegetation on summits, erosion of trails and a proliferation of human fecal waste, left unburied.

Article Photos

A Summit Steward chats with Doug Haney of Saranac Lake atop Algonquin Peak in 2010.

(Enterprise photo — Chris Knight)

ADK, as the club is known, does much of the job of informing hikers in the busy Eastern High Peaks Wilderness. The state Department of Environmental Conservation has fewer forest rangers and assistant rangers there than it used to, just one or two of each, due to budget cuts. Also, there are so many rescues now, in the age of cellphones when it's easy for lost or injured hikers to call for help, that forest rangers often don't go into the woods at all on busy weekends so they're ready to respond wherever needed. It's common now for hikers to never encounter a ranger unless there's an emergency.

"We are the first uniformed presence many of these people encounter," said Summit Steward Coordinator Julia Goren, head of a crew that's posted atop the most popular peaks. It's a partnership program between ADK, the DEC and the Adirondack Chapter of The Nature Conservancy. Goren said the stewards often have to give novice hikers basic advice like "It's a good idea to bring a map."

Gov. Andrew Cuomo has invested millions of state dollars and much attention into promoting tourism, including the Adirondacks, through the I Love NY program. Woodworth and Goren say they think that's a factor in increasing the crowds. Now, they say, the state needs to increase funding for DEC staff and trail maintenance, help spread tourists throughout the Park and promote responsible backcountry practices with some of the same vigor it uses to bring people here.

Article Links

ADK opinion: Summits overrun over Labor Day
Justin Levine: Stinky experience on the trail

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Summit crunch

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ADK officials wrote an opinion piece on the subject of alpine vegetation, published in today's Enterprise. While Summit Stewards share all kinds of information, their primary job is to tell hikers to avoid the fragile plants that live only on a few dozen acres of the state's highest mountaintops.

But those peaks are getting "bombarded" with hikers, Woodworth said.

Goren was out of town to attend a wedding this past weekend, but she said the stewards told her the traffic was "crazy beyond anything they've ever seen before.

"And it's a pretty seasoned group," she added. "All of them who have been stewarding with us have been doing it for a least a couple years."

The numbers bear that out. Goren said six Summit Stewards were on duty this weekend, three paid and three volunteer, posted in shifts atop Mount Marcy, Algonquin Peak, Wright Peak and Cascade Mountain. They counted talking to more than 3,000 people, with about 1,500 on Cascade alone.

"When it's a slow day, you can have a 45-minute conversation with someone and talk about the vegetation and talk about the trail conditions and the peaks," she said. With crowds of this weekend's magnitude, "it's definitely possible that we missed a few people, but we're pretty diligent."

The only time two stewards worked together was on Cascade Saturday, when they talked to 665 people. A solo steward talked about to the same number Sunday, plus another 200-plus on Labor Day.

The high a year ago was 540 on the Sunday before Labor Day, according to the Adirondack Explorer magazine.

When the summits are crowded, people tend to spread out, each seeking their own corner. There just isn't enough room sometimes without them stepping on fragile vegetation, Goren said. Stewards told her they saw people walking through alpine meadows but have not specifically reported any damaged patches.

DEC statistics cited recently in the Explorer show Cascade trailhead registrations more than doubled over the past decade, from 16,091 in 2006 to 33,149 in 2015 - and mostly in the last five years. The increase at the Van Hoevenberg trailhead, which leads to Marcy, Algonquin and other peaks, was 62 percent from 2005 to 2015's total of 53,423.

As stretched as the Summit Stewards are, they can't add more. They're trying to hold the line after a trust, which Goren declined to identify, recently redirected its donations.

"It was about a third of the program's funding that vanished for us," she said. ADK has stepped up with more money and fundraising, but "it puts us in a position where every year we're trying to fill a $24,000 gap."

Waste woes

The problem of people defecating all over the place - including on or near trails - and not burying their feces seems to have gotten worse in the last two or three years, Goren said, even though the DEC has added outhouses and ADK put together a public-service video on the topic.

"Indian Falls is just one big toilet, despite our best efforts," Woodworth said.

In June, he said, as he and his wife helped install a new privy at the Algonquin-Wright trail junction, hikers were asking to use it while the work was underway. Despite it being bug season, he saw "a steady stream of people" going by.

Education needs

When Woodworth first started going into the mountains, he said, more of the people who did had been involved in scouting or gone to summer camps, which gave them some experience with backcountry ethics. Not so much now.

"We're seeing so many people who just don't know what's going on, and it's frightening," he said.

Goren said she doesn't have hard data on whether the percentage of novice hikers had increased, although it seems so to her, but the sheer number of novices in the woods goes up as overall hiker numbers do.

In addition to novices, ADK officials say they're concerned about the increasing popularity of extreme hikers who want to bag the peaks more frequently or ultralight packers who, for the sake of speed, leave behind important gear - like a shovel with which to bury their feces.

There are also people unaware of special rules for the popular Eastern High Peaks, such as a 15-person group limit. The weekend before Labor Day, the DEC ticketed group leaders from Quebec who took a busload of 67 people up Algonquin and were reported by a Summit Steward.

Both Goren and Woodworth said they wish the state would put money toward a public service campaign about outdoor ethics and etiquette. ADK trains people on "Leave No Trace" practices, but they can't do enough.

"It's like a trickle against a flood," Woodworth said.

"We're not the ad execs," Goren said.

Spreading people out

Goren and Woodworth would like to see hotel and other hospitality staff members in the Lake Placid direct visitors to places other than the most popular ones like Cascade.

"We don't want to stop people from coming to the Adirondacks," Goren said. "Certainly the first thing that sets people onto the path to caring for an area is firsthand experience of that area. We just don't want them to keep being directed to the same place on the same day."

Also, Cascade isn't for everyone, she added. She'll never forget seeing one woman trying to hike it in wedge heels, clutching a purse.

Mt. Baker too busy?

Parking crunch at trailhead sparks concerns, but no easy solutions

September 14, 2016

By CHRIS KNIGHT - Senior Staff Writer (cknight@adirondackdailyenterprise.com) , Adirondack Daily Enterprise

Save |

SARANAC LAKE - The town of St. Armand is taking a hard look at parking and congestion problems at the trailhead to Baker Mountain, but Supervisor Charlie Whitson says it will take more than just his town's efforts to get anything done.

The village of Saranac Lake, the town of North Elba and the state Department of Environmental Conservation all have a stake in trying to solve the problems, along with nearby residents and the hikers who use the trail, Whitson said.

Whether those stakeholders will come together, however, remains to be seen.

Article Photos

A long line of cars and trucks is parked around the edge of Moody Pond, near the trailhead to Baker Mountain, in Saranac Lake on July 4.

(Enterprise photo — Lou Reuter)

"It's not something that's going to have a remedy to it overnight," Whitson acknowledged this week.

The Baker trailhead is located on Forest Hill Avenue. There's space for a dozen or so vehicles on the shoulder of the road next to Moody Pond, but the trail gets so much use on summer weekends that vehicles are often parked part way around the pond, sometimes on private property.

"It's been pretty hectic," said Jerry Bough, who lives three houses away from the trailhead. "There's no place to park. There's 'No Parking' signs, and people park right underneath them. People park on a blind corner in front of Dilzer's. The troopers have been here, but they don't write parking tickets. People are having picnics on our properties. Nobody will do anything."

Article Map

Bough noted that many people walk and bike around Moody Pond, which exacerbates the problem.

Whitson said the village's Saranac Lake 6er program is to blame for the trailhead congestion. Modeled after the Adirondack 46er program, it encourages hikers to climb six mountains in the Saranac Lake area: Baker, St. Regis, Ampersand, Haystack, McKenzie and Scarface. Since it started in 2013, more than 1,600 people have completed the challenge.

"That's when the intensity and the use and the hard feelings over there on the parking started to come into play, and it's only increased since then," Whitson said. "I do feel as though Saranac Lake can be partially at fault because the conditions were not taken into consideration as to what it was going to do the area, and the problems that were going to arise."

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"The village is promoting all this being a bicycle path and a walking path, but it's a residential road," Bough said.

It's not just the impact on parking, Whitson noted. The trail itself is in rough shape, he said, comparing it to what he remembers from his childhood. Whitson grew up in a house next to the Baker trailhead and hiked the mountain regularly with his brother and their friends.

"We'd take our backpacks, go up and spend the weekend up there, and come down Sunday afternoon," he said. "That trail now, you could almost drive a truck up through it, it's so worn. It's unbelievable the amount of use that trail gets now."

The municipal boundaries in the area make a solution complicated. The only public land is the sliver of state-owned land where the Baker trail begins. It's bordered on each side by private property. The trailhead area is outside the village in St. Armand, but it's very close to the town of North Elba.

Building a parking lot would be an ideal solution, but there's nowhere to do it, Whitson said.

"The town, we're confined because of the pond on one side, which is literally right up to the edge of the road, and the other side is a swamp, at the early part of it, and the other side is private-owned property," he said. "There's a small section owned by the state. DEC has to take a look at it to see if there is anything that can be done. Many of the other trailheads have parking (lots) there at the beginning, but not over there on Mount Baker."

DEC spokesman David Winchell said the department has seen an increase in trail use across the Adirondacks, including at Baker Mountain.

"Although the trail register numbers have not yet been compiled, observations by DEC staff and the public indicate a significant increase in the number of people using the trail," Winchell wrote in a prepared statement.

"DEC is aware of the issues regarding parking at the trailhead and the condition of the trail. While the construction of a parking area is a challenge because of the area's terrain, DEC is soliciting suggestions from any interested parties for addressing the parking issue."

As for the condition of the trail, Winchell said the state has evaluated re-routing it to the summit from its current trailhead, but no final determination has been made.

Saranac Lake Mayor Clyde Rabideau said the village is prohibited from doing anything outside its boundaries.

"So if the whole neighborhood wanted to annex into the village, then our potential for a role would expand," he said. "Do I see that happening? Not likely. However, Charlie Whitson and his board are very talented and very committed, and they're studying the issue right now, and I'm sure they will come up with some viable solutions."

Rabideau said the 6er program "may have added some hikers (to Baker), but I've noticed a trend among area residents to climb that mountain on a daily basis for a daily workout because it's just the right length.

"I went out on Labor Day weekend and counted 36 cars, which is the most I've ever counted there," Rabideau said. "They were parked there but not illegally and not in front of anybody's driveways. I think the town of St. Armand can manage this."

A group of Moody Pond area residents recently approached North Elba officials to see if the town could get involved, but Supervisor Roby Politi said Tuesday that there isn't an easy solution.

"We've had numerous, numerous discussions about that," he said. "Unfortunately, my understanding is the state police are not interested in enforcing the 'No Parking' signs. DEC doesn't seem to know of a solution. The town of North Elba cannot make the road any bigger. There's no property there for expansion of a parking lot, so I don't know what the answer is. I think we're all kind of chasing our tails."

Politi compared it to similar summertime trailhead congestion issues at Cascade Mountain on Route 73 and the Adirondack Loj Road.

One possible solution would be to relocate the Baker trailhead. Both Bough and Politi said the village has been approached about putting the trailhead on its sewer plant property, on the north side of the mountain, but village officials weren't receptive to it.

Whitson said he's reached out to state Sen. Betty Little and Assemblyman Dan Stec for their help. He said the town will continue working on the issue.

"Over the winter we'll try to push a little heavier to get some action moving forward," he said. "We can't wait until next summer, when the problems start up again, before we start discussing things."

DEC will turn hikers away from Adirondak Loj

September 16, 2016
By staff , Adirondack Daily Enterprise

Save

LAKE PLACID - The state Department of Environmental Conservation announced yesterday that when the parking lot at Adirondak Loj fills up over the Columbus Day weekend, forest rangers will turn hikers away from the area.

Rangers will be posted on Adirondak Loj Road at South Meadow Road.

The DEC has come up with a list of 12 other nearby hikes that hikers can do instead of entering the High Peaks, including Rocky Peak, Whiteface and Poke-O-Moonshine mountains.

Article Photos

Rocky Peak, right, is one of the mountains DEC staff will direct hikers to if Adirondak Loj becomes too busy over the Columbus Day weekend.

(Photo provided by Justin Levine)

For more information, visit www.dec.ny.gov/outdoor/9163.html