

LEWIS FAMILY FARM, INC.,

Plaintiff,

-against-

NEW YORK STATE ADIRONDACK PARK AGENCY,

Defendant.

AFFIDAVIT

Index No.: 0498-07
RJI No.: 15-1-2007-0153

**AFFIDAVIT IN SUPPORT OF MOTION TO
EXTEND TIME TO PERFECT APPEAL**

STATE OF NEW YORK)
) ss.:
COUNTY OF ALBANY)

JOHN J. PRIVITERA, being duly sworn, deposes and states as follows:

1. I am duly licensed and admitted to practice law in the State of New York, and I am a principal with the law firm of McNamee, Lochner, Titus & Williams, P.C., attorneys for the Lewis Family Farm, Inc. (hereafter "Lewis Family Farm" or "Appellant"), plaintiff in this action (Essex County Index No. 0498-07) (hereafter "*Action No. 1*"). I am also counsel to the Lewis Family Farm in an Article 78 proceeding (Essex County Index No. 315-08) (hereafter "*Action No. 2*") and an action (Essex County Index No. 332-08) (hereafter "*Action No. 3*"), both of which involve the same parties herein. *Action No. 2* and *Action No. 3* were consolidated and are currently pending before Hon. Richard B. Meyer, Acting J.S.C., Essex County Supreme Court. As such, I am fully familiar with the pleadings and proceedings had in this action, and with the matters set forth herein.

2. This affidavit is submitted in support of a motion to extend the time in which the Appellant has to perfect its appeal in *Action No. 1* in the interest of judicial economy.

3. This action involves the Adirondack Park Agency's (hereafter "Agency" or "Appellee") attempt to regulate farming by claiming jurisdiction over the Lewis Family Farm's farm worker housing structures.

4. In November 2006, upon receiving approval from the Town of Essex, the Lewis Family Farm began construction of four farm worker housing structures on its land within the Adirondack Park and within Essex County Agricultural District No. 4. Three of these agricultural structures, which are situated in a horseshoe-shaped cluster adjacent to the Hamlet of Whallonsburg, are at the center of this dispute.

5. Construction proceeded until mid-March 2007, when Barbara Lewis, an officer of the Lewis Family Farm, contacted the Agency staff after hearing rumors of complaints.

6. The Lewis Family Farm voluntarily halted construction of the employee houses in March 2007 after speaking with staff in order to clear up any misunderstandings about the agricultural nature of the project.

7. In May 2007, staff proposed a "settlement agreement" demanding that the Lewis Family Farm subdivide the farm, waive the right to challenge Agency jurisdiction to regulate farming, allow Agency review of all future farm buildings, and pay a substantial \$10,000 fine by June 15, 2007.

8. On June 26, 2007, the Lewis Family Farm commenced *Action No. 1* in Essex County Supreme Court seeking a declaratory judgment that the Agency could not prohibit the completion of the farm employee housing project because it is beyond the Agency's authority to regulate farms.

9. The next day, on June 27, 2007 the Executive Director of the Agency issued a purported cease and desist letter prohibiting the completion of the farm employee houses. The Agency never attempted to enforce the cease and desist letter.

10. On August 16, 2007, the Honorable Kevin K. Ryan, Acting J.S.C. converted *Action No. 1* to an Article 78 proceeding and summarily dismissed it as premature. Justice Ryan's Decision and Order states as follows:

[T]his situation is not ripe for judicial intervention. While the plaintiff may not wish to proceed to a hearing before the APA commissioners...that is clearly the next step in the process. This Court has only the jurisdiction that the Legislature gave it over disputes involving the APA. It does not have concurrent jurisdiction over this situation. (*Sohn v Calderon*, 78 NY2d 755, 766-767 (1991)). This Court's jurisdiction is limited to a review of the APA's actions under CPLR Article 78 (*Ibid.*). Otherwise, as the Court of Appeals pointed out in *Flacke v Onondaga Landfill Sys.*, 69 NY2d 355, 363 (1987), the Court condones a breach of the separation of powers between the branches of government.

The Commissioners of the APA have the authority to review this situation under Executive Law §809. If, after receiving a determination from the Commissioners, the plaintiff is still dissatisfied, they are free to file an Article 78 proceeding at which time this Court may review the actions of the APA. Until that time, this matter constitutes an internal matter in which the Court will not interfere.

(August 16, 2007 Decision and Order, pp. 6-7). A copy of the August 16, 2007 Decision and Order is attached hereto as **Exhibit "A"**.

11. Inexplicably, Justice Ryan's August 16, 2007 Decision and Order also contained several pages of dicta that contradict the principles of law that the Court cited above. Essentially, the lower court improperly reached some of the merits of the dispute and advised that the Agency had jurisdiction over the Lewis Family Farm's farm worker housing project. (See August 16, 2007 Decision and Order, pp. 4-6).

12. Therefore, on September 26, 2007, the Lewis Family Farm timely filed a notice of appeal of the August 16, 2007 Decision and Order in order to preserve all of its rights in the

event that the yet-to-occur Agency enforcement determination ultimately found that the Lewis Family Farm's farm buildings were under Agency jurisdiction. A copy of the September 26, 2007 Notice of Appeal is attached hereto as **Exhibit "B"**.

13. Justice Ryan's dismissal of this action was proper since the Agency had yet to render a final determination. However, he made an error of law in reaching the merits of the case. See Jeffreys v. Griffin, 301 A.D.2d 232, 247 (1st Dep't 2002) (holding that a determination is not binding under the doctrines of res judicata and collateral estoppel unless it was made in the context of an adjudication, otherwise it is an unwarranted advisory opinion); Nuro Transp. v. Judges of Civil Court, 95 A.D.2d 779, 780 (2d Dep't 1983) (holding that "the prohibition against advisory opinions is to prevent the judicial determination of unripe claims in which a current controversy does not exist"); see also New York Public Interest Research Group, Inc. v. Carey, 42 N.Y.2d 527, 531 (1977) (stating that a court's determination of any issue beyond what is necessary to dispose of a case is "merely advisory" when the request for a declaratory judgment is premature).

14. On September 5, 2007, several weeks following Justice Ryan's dismissal of the premature action (and nearly one year since the construction project began), the Agency finally commenced its internal enforcement proceeding by serving a Notice of Apparent Violation, which alleged that the Lewis Family Farm's employee housing structures are illegal unless it received a permit from the Agency. Thereafter, my firm was retained by the Lewis Family Farm.

15. The Agency's enforcement proceeding culminated in a final determination of the Agency on March 25, 2008 ("March 25 Determination"), whereby the Agency's Enforcement Committee determined that the Lewis Family Farm had violated the Adirondack Park Agency

Act by failing to obtain a permit for the construction of the agricultural use structures and "subdivision" of land.

16. On April 8, 2008, the Lewis Family Farm commenced an Article 78 proceeding against the Agency seeking to vacate and annul the March 25 Determination (*Action No. 2*, Essex County Index No. 315-08). On April 11, 2008, the Agency commenced a duplicative action seeking to enforce the March 25 Determination (*Action No. 3*, Essex County Index No. 332-08). Those actions were consolidated by order of the lower court on April 25, 2008 and are currently pending before Hon. Richard B. Meyer, Acting J.S.C.

17. The time in which to perfect this appeal of Justice Ryan's August 16, 2007 Decision in *Action No. 1* has not yet expired, but will expire on June 26, 2008.

18. The Lewis Family Farm is justified in not perfecting the appeal at this time because the matters at issue in this appeal concerning the Agency's jurisdiction over the farm structures will be decided in the consolidated actions currently pending before Justice Meyer.

19. Rule 800.12 of the Rules of this Court permits this Court to extend the time to perfect an appeal upon a showing of a reasonable excuse for the delay and merit to the appeal. The Lewis Family Farm has demonstrated a justifiable and reasonable excuse for their anticipated delay in perfecting the appeal within the nine-month time frame imposed by 22 NYCRR § 800.12, namely that the pendency of the consolidated actions in the lower court will likely dispose of and render moot any issues to be raised on this appeal. In any event, the issues pending in *Action No. 2* and *Action No. 3* overlap, in part, with the erroneous expression of an advisory opinion by Justice Ryan. Accordingly, this Court should review the matters together.

20. No party will be prejudiced if this Court extends the Appellant's time in which to perfect the appeal.

21. Moreover, this Court should grant the extension because the Lewis Family Farm can demonstrate that this appeal has merit, and the extensions would further the interests of justice and judicial economy.

22. This appeal has merit because the portion of Justice Ryan's decision that reached the merits was merely an improper "advisory opinion." See New York Public Interest Research Group, Inc. v. Carey, 42 N.Y.2d 527, 531 (1977); Jeffreys v. Griffin, 301 A.D.2d 232, 247 (1st Dep't 2002); Nuro Transp. v. Judges of Civil Court, 95 A.D.2d 779, 780 (2d Dep't 1983).

23. Moreover, even if the merits of the case are addressed on this appeal, the Agency clearly lacks jurisdiction over the Lewis Family Farm's farm structures. It is undisputed that "agricultural use structures" are outside of the Agency's jurisdiction. However, the Agency is attempting to gain jurisdiction over the Petitioner's agricultural use structures by ignoring the pro-farm development clause of the New York State Constitution and the Right-to-Farm Law. The Adirondack Park Agency Act (the "Act") defines "agricultural use structure" to include "any barn, stable, shed, silo, garage, fruit and vegetable stand or other building *or structure directly and customarily associated with agricultural use.*" N.Y. Exec. Law § 802(8) (emphasis supplied). The Act further defines "structure" to include "...buildings, sheds, *single family dwellings*, mobile homes, signs, tanks, fences and poles and any fixtures, additions and alterations thereto." N.Y. Exec. Law § 802(62) (emphasis supplied). Therefore, a "single family dwelling" that is directly or customarily associated with agricultural use must necessarily be an "agricultural use structure" under the Act. See N.Y. Exec. Law § 802(8). Accordingly, the Agency lacks jurisdiction over the Lewis Family Farm's farm worker houses. Justice Meyer has already expressed an opinion that the Appellant "has established a likelihood of success on the

merits on at least some of the issues raised in the petition" in *Action No. 2*. (See Justice Meyer's April 11, 2008 Decision and Order, attached hereto as **Exhibit "C"**).

24. The time to perfect the appeal of Justice Ryan's August 16, 2007 Decision and Order in *Action No. 1* has not yet expired, but will expire on June 26, 2008. It is respectfully submitted that it would be a waste of judicial resources and the expenses of the parties to require that this appeal be prosecuted during the pendency of the consolidated actions before Justice Meyer. Therefore, it is in the interest of judicial economy to extend the Lewis Family Farm's time in which to perfect this appeal.

25. The Lewis Family Farm respectfully requests that it receive a 90-day extension, until September 26, 2008, to file and serve the record and brief. This timeframe will allow the lower court to decide *Action No. 2* and *Action No. 3*, which is currently returnable before Justice Meyer on June 6, 2008 (Essex County Index No. 315-08). A decision there could very well settle this entire dispute. If not, and one party appeals, the matter should be consolidated with this case.

26. Based on the foregoing, the Lewis Family Farm respectfully requests an order from this Court granting: (i) an extension of the time in which to perfect its appeal of Justice Ryan's August 16, 2007 Decision and Order (which has not yet expired); and (ii) such other relief as to this Court seems just and proper.

/s/ John J. Privitera
John J. Privitera

Sworn to before me this
8th day of May, 2008.

/s/ Notary Public

Notary Public