



NEW YORK STATE
Adirondack
parkagency

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In the matter of the apparent
violations of Section 809 of
the Executive Law by:

Agency File E2007-041

LEWIS FAMILY FARM, INC.

Respondent.
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MEMORANDUM OF LAW IN SUPPORT OF AGENCY STAFF'S
REQUEST FOR A DETERMINATION BY
THE ENFORCEMENT COMMITTEE
PURSUANT TO 9 NYCRR 581-2.6(d)

Respectfully submitted by:

Paul Van Cott, Associate Attorney
Adirondack Park Agency Staff

December 14, 2007

PRELIMINARY STATEMENT

This administrative enforcement proceeding is brought by Adirondack Park Agency ("Agency") staff to address violations by Lewis Family Farm, Inc. ("Respondent") of the Executive Law ("APA Act") and the Wild, Scenic and Recreational Rivers Act ("Rivers Act"). Specifically, Respondent has undertaken a subdivision into sites and is constructing three single family dwellings in Resource Management and within a Recreational River Area without first obtaining an Agency permit.

Respondent undertook these violations after being told by senior Agency staff that permits were required. Respondent continued these violations after Agency staff issued a Cease and Desist Order and then again after Acting Justice Ryan of NYS Supreme Court, Essex County, confirmed Agency jurisdiction over the single family dwellings.

Agency staff seek a determination from the Enforcement Committee finding Respondent in violation of the Executive Law and the Rivers Act, requiring Respondent to seek an after-the-fact permit for the violations, and imposing a substantial penalty for Respondent's violations.

STATEMENT OF FACTS

The Lewis Family Farm ("Lewis Farm") is a property of approximately 1,111 acres located in the Adirondack Park, in the Town of Essex, Essex County, New York. See Affirmation of Paul Van Cott, dated December 13, 2007 and the Affidavit of Douglas Miller ("Miller Aff."), dated July 20, 2007, ¶¶ 5-6, attached thereto. Respondent placed three modular single family dwellings on the Lewis Farm in Resource Management, on lands within the designated Boquet River Recreational River area, without an APA permit. See Miller Aff., ¶¶ 4, 10, 20, Exhibits F and H. Upon information and belief, the dwellings were initially secured to foundations but not fully installed. See Miller Aff. ¶¶ 17, 20. The APA Act requires an Agency permit for subdivisions and placement of single family dwellings in Resource Management areas within the Adirondack Park. See Executive Law § 809(2)(a).

In December 2005, at the invitation of S.B. "Sandy" Lewis (a shareholder of Lewis Family Farm), senior Agency staff visited the Lewis Farm and informed Mr. Lewis that an Agency permit was required prior to construction of single family dwellings on the property. See Affirmation of Paul Van Cott, dated December 13, 2007 and the Affidavit of John Banta ("Banta Aff."), dated July 23, 2007, ¶¶ 4-6, attached thereto. On or about March 14, 2007, after being advised to do so by the Town

of Essex, Respondent submitted an application to the APA for a permit for the construction of three single family dwellings on the Lewis Farm. See Affirmation of Paul Van Cott, dated December 13, 2007 and the Affidavit of John L. Quinn ("Quinn Aff."), dated July 23, 2007, ¶ 4, Exhibit A, attached thereto. On or about March 15, 2007, the APA issued a Notice of Incomplete Permit Application and Receipt of Application in response to Respondent's application. See Quinn Aff., ¶ 5, Exhibit B.

On March 19, 2007, Respondent notified the Agency that it had already constructed the foundations and septic systems for the dwellings. See Quinn Aff., ¶¶ 6-7. Upon further investigation, including visits to the site and discussions with Respondent, the Agency concluded that a violation had occurred and sought to resolve the matter through a proposed settlement agreement and penalty. See Affirmation of Paul Van Cott, dated December 13, 2007 and the Affirmation of Sarah Reynolds ("Reynolds Aff."), dated July 20, 2007, ¶¶ 23-28, attached thereto; see also Quinn Aff., ¶ 8. Respondent objected to paying a penalty, failed to enter into a settlement agreement, and on June 27, 2007, Respondent installed the three single family dwellings on the Lewis Farm in violation of the Executive Law and the Rivers Act. See Reynolds Aff., ¶¶ 29-38; see also Banta Aff., ¶ 7; Miller Aff., ¶¶ 17, 20-21. Upon learning the

dwellings were being installed, Agency staff immediately served a Cease and Desist Order on Respondent. See Miller Aff., ¶ 18-19, Exhibit G. Upon information and belief two dwellings were installed prior to the Cease and Desist Order and the third home was installed after the Order was served. See Miller Aff. ¶¶ 17-20.

Thereafter, Respondent commenced a declaratory judgment action by order to show cause in NYS Supreme Court, Essex County, seeking a restraining order against the Agency's enforcement action. Affirmation of Paul Van Cott, dated December 13, 2007 ("Van Cott Affm."), ¶ 3. The Agency, represented by the Attorney General's office, moved to dismiss Respondent's action. The Court granted the Agency's motion in a decision and order issued August 16, 2007. Id., ¶ 4, Exhibit B. The decision was served on Respondent on August 31, 2007.

On August 31, 2007, Agency staff observed Respondent's property from an off-site location and discovered that Respondent had resumed construction work on the new single family dwellings. Affidavit of Douglas Miller ("Douglas Miller Affd."), dated December 12, 2007, ¶ 3, Exhibit A. By telefaxed letter of that same date, Agency staff advised Respondent's lawyers of the ongoing construction and that the June 27, 2007 Cease and Desist Order remained in effect. Staff asked whether Respondent would comply with that Order. Van Cott Affm., ¶ 5,

Exhibit C. On September 5, 2007, a follow-up inspection by Agency staff revealed that Respondent was continuing construction work on the dwellings. Douglas Miller Affd., ¶ 4, Exhibit B.

Agency staff commenced this proceeding by Notice of Apparent Violation ("NAV") served on Respondent on September 5, 2007. Respondent timely answered the NAV in October, 2007.

On December 7, 2007, Agency staff inspected Respondent's property from off-premises and found that, since September 5, 2007, Respondent has undertaken additional construction work on the new single family dwellings. Douglas Miller Affd., ¶ 5, Exhibit C. They appear to be fully installed, with doors and windows, finished roofs and siding. Id. There are even curtains in the windows of one of the dwellings. Id. Staff also discovered that Respondent has removed the pre-existing single family dwelling from the property. Id.

REGULATORY FRAMEWORK

The APA Act

The Official Adirondack Park Land Use and Development Plan Map classifies private lands in the Adirondack Park under the following land use categories: Hamlet, Moderate Intensity Use, Low Intensity Use, Rural Use, Resource Management, and Industrial Use. Executive Law § 805.

Resource Management lands "are those lands where the need to protect, manage and enhance forest, agricultural, recreational and open space resources is of paramount importance because of overriding natural resource and public considerations." Executive Law § 805(3)(g).

Executive Law § 809(2)(a) requires individuals and corporations to obtain a permit from the Agency prior to the undertaking of any Class A regional project or the undertaking of any Class B regional project in any town not governed by an Agency-approved local land use program in the Adirondack Park.

Pursuant to 9 NYCRR § 570.3(ai)(1), "undertake" is defined as the commencement of a material disturbance of land, including clearing of building sites, excavation (including excavation for the installation of foundations, footings and septic systems), or any other material disturbance of land preparatory or incidental to a proposed land use or development or subdivision.

Executive Law § 810(1)(e) lists the Class A regional projects in a Resource Management land use area that require an Agency permit pursuant to Executive Law § 809(2)(a). These projects include, inter alia, any subdivision of land (and all land uses and development related thereto) involving two or more lots, parcels or sites. Executive Law § 810(1)(e)(3).

Pursuant to Executive Law § 802(63), a "subdivision" is any division of land into two or more lots, parcels, or sites for

the purpose of any form of separate ownership or occupancy (including any grading, road construction, installation of utilities or other improvements or any other land use and development preparatory or incidental to any such division).

9 NYCRR § 570.3(ah)(3) defines a subdivision into sites as occurring where one or more new dwelling(s) or other principal building(s) is to be constructed on a parcel already containing at least one existing dwelling or other principal building, and regardless of whether the existing building is proposed to be removed after completion of the new building(s). In addition, 9 NYCRR § 573.6(e) states that, where an existing dwelling will not be removed until after the new dwelling is emplaced or constructed, an Agency permit is required for the subdivision into sites which would result if the subdivision is a class A or class B regional project as provided in Section 810 of the Adirondack Park Agency Act.

Executive Law § 810(2)(d) lists the Class B regional projects in a Resource Management land use area that are subject to Agency review in the Town of Essex pursuant to Executive Law § 809(2)(a). These projects include, inter alia, the construction of any new single family dwelling. Executive Law § 810(2)(d)(1). Executive Law § 802(58) defines a "single family dwelling" as any detached building containing one dwelling unit, not including a mobile home.

The Rivers Act

The Rivers Act was enacted pursuant to a legislative finding that many rivers of the state, with their immediate environs, possess outstanding natural, scenic, historic, ecological and recreational values. ECL § 15-2701(1). It implements a public policy that certain selected rivers of the state which possess the aforementioned characteristics shall be preserved in free-flowing condition and that they and their immediate environs shall be protected for the benefit and enjoyment of present and future generations. ECL § 15-2701(3).

Section 15-2705 of the Rivers Act states that the functions, powers and duties encompassed by this section shall be vested in the Adirondack Park Agency as to any privately owned part of a river area within the Adirondack Park. Section 15-2709(1) states that, within the Adirondack Park, the Adirondack Park Agency shall make and enforce regulations necessary for the management, protection, and enhancement of and control of land use and development in the wild, scenic and recreational river areas.

9 NYCRR Part 577 contains the Agency's implementing regulations for the Rivers Act. Pursuant to 9 NYCRR § 577.4(a), "no person shall undertake a rivers project without first obtaining an agency permit." In recreational river areas, rivers projects include, inter alia, all subdivisions of land in

Resource Management land use areas. 9 NYCRR § 577.5(c)(1). In recreational river areas, rivers projects also include all land uses and development classified compatible uses by the Adirondack Park land use and development plan in Resource Management land use areas. 9 NYCRR § 577.5(c)(1). Pursuant to Section 805(3)(g)(4) of the Adirondack Park Agency Act, single family dwellings constitute compatible uses in Resource Management land use areas.

PROCEDURAL BASIS FOR MOTION

This enforcement proceeding is brought pursuant to 9 NYCRR Subpart 581-2. As provided by 9 NYCRR § 581-2.6(a), Agency staff initiated this proceeding by serving a Notice of Apparent Violation ("NAV") on Respondent.

In the NAV, staff advised Respondent that prior to consideration of this matter by the Enforcement Committee, a record consisting of relevant documents, testimony, evidence and any legal briefs must be developed for the Enforcement Committee to consider. Staff further advised Respondent that, if there are no facts in dispute, the record could be developed at the request of either party for a determination pursuant to 9 NYCRR § 581-2.6(d). Finally, staff advised Respondent that, if there are facts in dispute, a hearing would be held to develop the record for consideration by the Enforcement Committee.

Respondent timely submitted its response ("Response") to

Agency staff's Notice of Apparent Violation as required by 9 NYCRR § 581-2.6(b) and requested a hearing. Based on the NAV and the Response, supplemented by Agency staff's affidavits and exhibits, Agency staff maintain that there are no material facts in dispute requiring a hearing. Accordingly, Agency staff request a determination by the Enforcement Committee in this matter pursuant to 9 NYCRR § 581-2.6(d).

ARGUMENT

First and Second Apparent Violations

Pursuant to Executive Law §§ 809(2)(a) and 810(1)(e)(3), and also pursuant to 9 NYCRR § 577.5(c)(1) implementing the Rivers Act, a permit from the Agency is required prior to any subdivision into sites of Resource Management lands in a River Area. 9 NYCRR § 570.3(ah)(3) defines a subdivision into sites as occurring where one or more new dwelling(s) is to be constructed on a parcel already containing at least one existing dwelling, and regardless of whether the existing building is proposed to be removed after completion of the new building(s).

Here, Respondent has constructed three new single family dwellings, one of which replaces a pre-existing single family dwelling. Respondent is violating Executive Law §§ 809(2)(a) and 810(1)(e)(3), and 9 NYCRR § 577.5(c)(1), by failing to obtain a permit from the Agency prior to subdividing the Lewis

Farm into sites through the construction of the three (two new and one replacement) single family dwellings on its property.

Third and Fourth Apparent Violations

Pursuant to Executive Law §§ 809(2)(a) and 810(2)(d)(1), and also pursuant to 9 NYCRR § 577.5(c)(1) implementing the Rivers Act, a permit from the Agency is required prior to the construction of a single family dwelling on Resource Management lands in a River Area.

Respondent is committing two separate violations of Executive Law §§ 809(2)(a) and 810(2)(d)(1), and of 9 NYCRR § 577.5(c)(1), by failing to obtain a permit from the Agency prior to constructing two new single family dwellings on the Lewis Farm property (the third single family dwelling is considered by Agency staff to be a lawful replacement).

PROPOSED RELIEF

Injunctive Relief

Agency staff recommend a disposition of this matter that requires Respondent to obtain an after-the-fact permit from the Agency for its illegal subdivision into sites and new single family dwellings. Affidavit of John Quinn, dated December 12, 2007, ¶ 4. Only through the permitting process can the Agency ensure that the subdivision and dwellings are properly reviewed under Executive Law 809 and the Rivers Act, and that reasonable and appropriate conditions are required for these jurisdictional

activities. Id. After-the-fact review of Respondent's single family dwellings is also important to assess any adverse visual impacts of the dwellings, and to evaluate the septic systems serving the dwellings to ensure that they comply with NYSDOH and Agency standards. Id., ¶ 6.

Also, because Respondent claims that the single family dwellings are intended to house farm workers, it is important to obtain accurate information regarding the planned use of the dwellings so that the appropriate overall intensity guidelines of the Adirondack Park Agency Act may be applied. Id., ¶ 5. Pursuant to Executive Law 802(50)(g), all agricultural use structures and single family dwellings occupied by a farmer of land in agricultural use, his employees engaged in such use, or their respective families, together constitute and count as a single family dwelling. Id. If Respondent's dwellings fit within this definition, the number of principal buildings on the subject property will be less than if the dwellings are not connected to any agricultural use of the property. Id.

Although Agency staff have not yet had the opportunity to undertake a full review of Respondent's illegal subdivision and new single family dwellings, staff believe that, if Respondent is required to apply for an after-the-fact permit, the Agency could likely approve Respondent's subdivision and single family

dwellings subject to a permit with reasonable and appropriate conditions. Id., ¶ 7

To facilitate after-the-fact review of the Respondent's subdivision and single family dwellings, Agency staff recommend that the Enforcement Committee require Respondent to submit the following as part of any permit application:

- A detailed description of the proposed use of each of the single family dwellings and their connection to Respondent's agricultural use of the property;
- An evaluation by a NYS licensed professional engineer as to whether the septic systems serving the single family dwellings comply with DOH and Agency standards, restrictions and guidelines;
- A visual inventory and impact assessment for Respondent's single family dwellings prepared by a NYS registered landscape architect;
- A landscaping and vegetative planting plan designed to substantially reduce the overall visibility of the Respondent's single family dwellings prepared by a NYS registered landscape architect; and
- A full-size, to-scale site plan map of the Lewis Farm prepared by a NYS licensed surveyor which depicts the lands comprising this property and all principal

buildings and accessory structures on the property, noting their date of construction, size and use.

Id., ¶8.

Penalty

The starting point for any calculation of an appropriate penalty requires an understanding of the maximum penalty allowed by law. Taking into account the fact that Executive Law § 813 allows the Agency to determine a penalty of up to \$500 for each day that a violation of the Executive Law continues and Environmental Conservation Law § 15-2723 authorizes penalties of up to \$1,000 for each day of violation of the Rivers Act, the following table summarizes the potential penalty liability of Respondent for the apparent violations set forth in the NAV:

Violation	Beginning Date	Ending Date	Total Days	Maximum Per Day Penalty	Total Maximum Penalty
Resource Management Subdivision	3/19/07	2/7/08	325	\$500	\$162,500
Rivers Act Subdivision	3/19/07	2/7/08	325	\$1000	\$325,000
Resource Management SFDs (2)	3/19/07	2/7/08	325	\$500 x 2 SFDs	\$325,000
Rivers Act SFDs (2)	3/19/07	2/7/08	325	\$500 x 2 SFDs	\$325,000

Based upon these calculations, as of the date of the Enforcement Committee's consideration of this matter, the maximum statutory penalty that could be imposed upon Respondent is \$1,137,500.

Several factors are relevant when determining an appropriate penalty based on this potential maximum amount: (1) The nature and severity of the violation; (2) The knowledge by the violator of the violated regulatory requirements; (3) The violator's cooperation or lack thereof; (4) The environmental impacts of the violations; (5) The extent to which the violator is benefiting from the violations; and (6) The extent to which the recommended injunctive relief will bring the property into full compliance.

1) Nature and Severity of the Violations

There should be no question about the severity of the alleged violations involved in this case. Pursuant to Executive Law § 805(3)(3), "the need to protect, manage and enhance forest, agricultural, recreational and open spaces resources is of paramount importance because of overriding natural resource and public considerations." Of equal importance, the Rivers Act implements a public policy requiring the Agency to protect the outstanding natural, scenic, historic, ecological and recreational values of river areas for the benefit and enjoyment of present and future generations. ECL § 15-2701(3). By policy and practice, violations on Resource Management lands and in River Areas are a priority concern for the Agency.

Respondent has undertaken a Resource Management and Rivers Act subdivision, and has constructed two single family dwellings

in Resource Management and in a River Area, all without the Agency review and approval required by statute. The legislature directed the Agency to implement these mandates, and it is through the permitting requirements of Executive Law § 809 that the Agency performs this responsibility.

2) Knowledge of Applicable Legal Requirements

Senior Agency staff advised Respondent of the permitting requirement for the construction of any new single family dwellings in Resource Management. After starting construction, Respondent voluntarily applied to the Agency for a permit to construct the dwellings, demonstrating clear knowledge of the Agency's jurisdiction. Respondent also applied for, and obtained, building permits from the Town of Essex to construct single family dwellings on its property. When settlement negotiations with the Agency failed, however, Respondent resumed construction of its dwellings in defiance of a Cease and Desist Order which specifically described Respondent's alleged violations. Subsequently, the court order of Acting Supreme Court Justice Ryan dismissed Respondent's challenge to Agency jurisdiction and provided clear notice to Respondent that an Agency permit is required for the dwellings. After issuance of the court's order, Respondent again resumed construction. Agency staff then reminded Respondent of the Cease and Desist Order, and sought Respondent's cooperation. Despite all of

this, Respondent has proceeded with construction of its single family dwellings.

3) Cooperation of the Violator

Respondent started construction on its single family dwellings after being advised by senior Agency staff that an Agency permit was required. Respondent only sought an Agency permit for its single family dwellings after installing the foundations of the dwellings and the septic systems, and after being advised to do so by Town of Essex officials. From the point that settlement negotiations failed and Respondent decided to resume construction of the dwellings, Respondent has actively defied Agency requirements, even after issuance of a Cease and Desist Order, Acting Justice Ryan's Order, and notice by staff of the continuing applicability of the Cease and Desist Order. As a result of this lack of cooperation, Respondent has constructed its single family dwellings in Resource Management and in a River Area without prior Agency review of this land use and development.

4) Environmental Impacts

The environmental impacts of Respondent's activities should be evaluated by the Agency through the after-the-fact permitting process. Potential impacts include visual impacts of the dwellings, which are situated in open farm fields, and the septic systems serving the single family dwellings.

5) Benefit to the Violators

There is no easily discernible benefit to Respondent from its violations apart from its avoidance to date of costs associated with obtaining an Agency permit for its activities. Presumably, Respondent will incur similar costs if it is required to obtain an after-the-fact permit from the Agency. Based on local tax records, the current assessed value of the Lewis Farm is \$4,776,600. It is not clear whether that value includes Respondent's new single family dwellings; however, the estimated construction cost of each of the dwellings exceeded \$300,000.

6) Extent of Compliance to be Required

The extent to which the injunctive relief will bring the property into full compliance is the final factor that is typically relevant in determining an appropriate penalty. Here, if Respondent is required to obtain an after-the-fact permit for its activities, Agency staff anticipate that reasonable and appropriate conditions can be developed to bring the Lewis Farm into full compliance with applicable Agency requirements.

CONCLUSION

Based on the NAV, Respondent's Response, and the affidavits and exhibits in support of Agency staff's Request for an Enforcement Committee Determination, there are no material facts in dispute in this matter. Accordingly, Agency staff request a

determination by the Enforcement Committee pursuant to 9 NYCRR § 581-2.6(d) that the apparent violations alleged in the NAV have occurred, and are occurring. Agency staff further request that the Enforcement Committee require Respondent to obtain an after-the-fact Agency permit for its illegal subdivision and single family dwellings.

Finally, because of the nature and severity of Respondent's violations, Respondent's clear knowledge of the permitting requirements, and its blatant lack of cooperation, Agency staff request that the Enforcement Committee impose a substantial penalty upon Respondent for its violations. In making this request, Agency staff are mindful of the importance under the Executive Law of sustaining the agricultural open space use of Resource Management lands, including the Lewis Farm.

At the same time, however, the Agency's regulatory jurisdiction in this case is absolutely clear, and Respondent's blatant defiance of the Agency's permitting requirements cannot be tolerated. This enforcement case has never been about Respondent's agricultural use. In fact, if Respondent had followed through with the permitting process, an Agency permit would likely have been issued for its project with reasonable and appropriate conditions.

This matter is before the Enforcement Committee because of Respondent's knowing and deliberate avoidance of Agency

permitting requirements in Resource Management and in a River Area. If Respondent and others are to be expected to seek Agency permits in the future, rather than to violate Agency requirements with the expectation of receiving after-the-fact approval of their illegal actions, a substantial penalty must be imposed against Respondent in this case. Absent a substantial penalty here, Respondent and others will not be deterred from future violations.