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To be argued by: Julie M. Sheridan
Time Requested: 20 minutes

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : THIRD DEPARTMENT

In the Matter of LEWIS FAMILY FARM, INC.,

Plaintiff-Appellant,

- against -

Essex County
Index No. 498-07

NEW YORK STATE ADIRONDACK PARK AGENCY,

Defendant-Respondent.

(Case No. 1)

In the Matter of LEWIS FAMILY FARM, INC.,

Petitioner-Respondent,

- against -

Essex County
Index No. 315-08

ADIRONDACK PARK AGENCY,

Respondent-Appellant.

(Case No. 2)

ADIRONDACK PARK AGENCY,

Plaintiff-Appellant,

- against -

Essex County
Index No. 332-208

LEWIS FAMILY FARM, INC., SALIM B. LEWIS,
and BARBARA LEWIS,

Defendants-Respondents.

(Case No. 3)

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PRELIMINARY STATEMENT

These three consolidated cases arise out of respondent Lewis Family Farm, Inc.'s ("Lewis Farm") refusal to obtain a statutorily-required permit from appellant Adirondack Park Agency ("APA") before constructing three new single family dwellings on an environmentally sensitive portion of its farm property. The property at issue is located in the Adirondack Park in the Town of Essex in the statutorily-protected Bouquet River recreational river area.

Lewis Farm commenced Case No. 1 in June 2007, seeking judgment declaring that the APA lacked jurisdiction to enforce the permit requirement and, accordingly, enjoining the APA from interfering with the construction of the dwellings. Supreme Court, finding jurisdiction, dismissed the complaint. Lewis Farm has appealed to this Court.

Lewis Farm commenced Case No. 2, an article 78 proceeding, in April 2008, challenging the APA's March 25, 2008 determination that Lewis Farm violated the Adirondack Park Agency Act ("APA Act"), Executive Law § 801, et seq., and the Wild, Scenic and Recreational Rivers System Act (the "Rivers Act"), Environmental Conservation Law ("ECL") § 15-2701, et seq., by failing to obtain the necessary permit. The APA's determination directed Lewis Farm to apply for an "after-the-fact" permit and pay a \$50,000 civil penalty, but did not direct Lewis Farm to demolish the dwellings or relocate them.

The APA commenced Case No. 3 in April 2008 for enforcement of the APA Act, the Rivers Act, and the March 25, 2008 administrative determination. The court below consolidated Case No. 3 with Case No. 2, and then granted Lewis Farm's article 78 petition in Case No. 2, annulled the APA's determination, and dismissed the APA's enforcement complaint in Case No. 3. The APA now appeals to this Court.

The core issue in all three cases involves the scope of the APA's regulatory jurisdiction over the construction of new single family dwellings. In Case Nos. 2 and 3, the court below held that the APA does not have jurisdiction over the three new single family dwellings at issue here where Lewis Farm stated that it intends to use the dwellings to house farm workers. Under these circumstances, the court concluded, the dwellings are not "single family dwellings" subject to the permit requirement but, rather, fall within the statutory definition of "agricultural use structures," which are exempt from the APA's regulatory jurisdiction under the APA Act and the Rivers Act, with certain exceptions not applicable here.

Supreme Court's construction and application of the APA Act and the Rivers Act is erroneous. The APA properly determined that the structures at issue are "single family dwellings," and that Lewis Farm's intent to use them to house farm workers does not make them "agricultural use structures" that do

not require a permit. If the fundamental nature of a structure is such that it falls within the definition of a "single family dwelling" in the APA Act and the Rivers Act, it retains that classification even if it is occupied by farm workers.

Moreover, Supreme Court's decision creates a loophole that undermines the APA's statutory mandate and threatens effective enforcement of the APA Act and the Rivers Act. New York's Constitution and legislation establishes that protecting and preserving the extensive natural resources and open space in the Adirondack Park is a matter of critical public concern. To that end, the Legislature created the APA and authorized it to implement a permit process to ensure careful review of proposed land uses and developments that impose pressures on park and river resources, including housing projects and their attendant septic systems, and to make decisions on permit applications by balancing local concerns with regional and state concerns.

Lewis Farm's stated goal of providing high quality housing for its farm workers, other staff, and students is laudable, and the APA staff has consistently advised Lewis Farm that it would recommend approval of a permit application, subject to appropriate conditions. But the APA's jurisdiction over a single family dwelling under the APA Act and the Rivers Act does not hinge on the nature of the dwelling's occupants. "Single family dwellings" and their attendant septic systems have great potential to adversely impact the natural resources and

scenic vistas in the Adirondack Park. The permit requirements in the APA Act and the Rivers Act ensure that these adverse impacts are assessed before a new dwelling is constructed in a protected resource management and recreational river area, and should be uniformly applied regardless of who lives in the dwelling.

ISSUE PRESENTED

Does the APA, which has regulatory jurisdiction under the APA Act and the Rivers Act over the construction of new single family dwellings in protected resource management land use areas and recreational river areas, lose jurisdiction if the landowner states that it intends to use the dwellings to house farm workers?

The court below answered in the affirmative.

CONSTITUTIONAL AND STATUTORY BACKGROUND

Conserving and protecting the unique natural resources, forest lands, wild life, scenic beauty and agricultural lands found in the six-million acre Adirondack Park has long been an established policy of New York State. An extensive constitutional, statutory and regulatory scheme has been enacted to accomplish this policy. A brief statement of the relevant provisions is helpful to

understand the APA's argument that it has jurisdiction over the construction of the single family dwellings at issue here.

A. New York Constitution Article XIV

The Conservation Article in the New York State Constitution was adopted in 1894. N.Y. Const., article XIV. In 1969, the Conservation Article was amended to provide, in relevant part:

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. . . .

N.Y. Const., article XIV, § 4. This amendment requires the Legislature to provide for the protection of all of the State's natural resources - - from wetlands and rivers to agricultural lands.

B. The APA's Regulatory Jurisdiction Under the APA Act

In 1971, the Legislature enacted the Adirondack Park Agency Act ("APA Act"), codified at Article 27 of the Executive Law, to further the goals expressed in the Conservation Article. See L. 1971, ch. 706, § 1; Executive Law § 801. The APA Act created the APA, a state executive agency, and charged it with

administering the APA Act, drafting necessary rules and regulations, and carrying out the purposes of the APA Act, including land use planning for both private and public land within the park. See Executive Law § 803.

The use and development of privately-owned land within the Adirondack Park is governed in part by the Adirondack Park Land Use and Development Plan (the "Plan"). The Plan was prepared by the APA as directed by law, approved by the Legislature, and signed into law by Governor Rockefeller in 1973 as an amendment to the APA Act. See L. 1973, ch. 348; Executive Law §§ 804, 805. The Plan classifies non-State-owned land in the Adirondack Park into six different land use categories, and sets density guidelines and defines compatible uses for each category. The provisions in the Plan strike a careful balance between protecting the natural resources of the Park and encouraging the development and improvement of agricultural land.

The Lewis Farm property is located in an area classified as a "resource management" land use area. Resource management lands are defined as those "[l]ands where the need to protect, manage and enhance forest, agricultural, recreational and open space resources is of paramount importance because of overriding natural resources and public considerations." Executive Law § 805(3)(g)(1). The basic purposes and objectives of land use planning in resource management areas is to "protect the delicate physical and biological

resources” and “preserve the open spaces that are essential and basic to the unique character” of the Adirondack Park, while at the same time “encourage proper and economic management of . . . agricultural . . . resources.” Id. § 805(3)(g)(2). Development in resource management areas is limited to fifteen “principal buildings” per square mile (an average lot size of 43 acres per principal building), in order to preserve the open space character of the areas. Id. § 805(3)(g)(3). Agriculture and “agricultural use structures” are primary compatible uses in resource management areas, and a “single family dwelling” is a secondary compatible use. Id. § 805(3)(g)(4).

The APA Act requires private landowners in resource management areas that are not governed by an APA-approved local land use program to apply to the APA for approval and receive a permit before undertaking certain projects that constitute new uses, development or subdivision of their land. See Executive Law § 809(2)(a). The construction of a new “single family dwelling” or individual mobile home are two such projects, and are characterized in the APA Act as “Class B regional projects.” Id. § 810(2)(d)(1), (2). “Single family dwelling” is defined as “any detached building containing one dwelling unit, not including a mobile home.” Id. § 802(58). Since the Town of Essex does not have an APA-approved local land use program, the construction of a new single family

dwelling on a resource management land use area in the Town of Essex requires an APA permit.

The APA's regulatory jurisdiction over farmland that is located in the Adirondack Park is subject to limitations that effectuate the constitutional directive to encourage the development and improvement of agricultural lands in the Park and recognize the economic importance of agricultural areas in certain segments of the Park. For example, the density requirements set forth in the APA Act are relaxed for certain farm structures. Generally, one "single family dwelling" constitutes one "principal building" for density purposes. Executive Law § 802(50)(a). But the APA Act provides that "all agricultural use structures and single family dwellings or mobile homes occupied by a farmer of land in agricultural use, his employees engaged in such use and members of their respective immediate families, will together constitute and count as a single principal building" for density purposes. *Id.* § 802(50)(g) (emphasis supplied). Of course, this provision is only relevant under the APA Act when the APA has jurisdiction over a project and must determine whether a structure counts as a principal building to ensure compliance with the APA's overall density guidelines.

Also, "agricultural use structures" on farmland are excepted from APA approval, provided they comply with applicable shoreline restrictions, even if

they exceed forty feet in height. See Id. § 806; § 810(1)(a)(4), (b)(5), (c)(5), (d)(5), (e)(8). “Agricultural use structure” is defined in the APA Act as “any barn, stable, shed, silo, garage, fruit and vegetable stand or other building or structure directly and customarily associated with agricultural use.” Id. § 802(8). “Structure” is defined as any “object constructed, installed or placed on land to facilitate land use and development or subdivision of land, such as buildings, sheds, single family dwellings, mobile homes . . . and any fixtures, additions and alterations thereto.” Id. § 802(62).

Executive Law §§ 813(1) and (2) empower the APA to commence an action for civil penalties and injunctive relief against “any person” who violates any provision of the APA Act, the APA’s rules and regulations, or the terms of any APA order or permit. It provides for a civil penalty of “not more than \$500.00 for each day . . . during which such violation continues.” Executive Law § 813(1).

C. The APA’s Regulatory Jurisdiction Under the Rivers Act

In addition to its regulatory jurisdiction under the APA Act, the APA has complementary jurisdiction over the management, protection, enhancement, and control of land use and development of privately-owned land in the immediate environs of certain river areas of New York State pursuant to the Rivers Act. See ECL §§ 15-2705, 15-2709(1). The river areas that are protected by the

Rivers Act are those that have been deemed to “possess outstanding natural, scenic, historic, ecological and recreational values,” and require protection against “improvident development and use” in order to preserve their free-flowing condition and ensure that present and future generations can benefit from and enjoy them. Id. § 15-2701. River areas are classified as either wild, scenic, or recreational, based on criteria including accessibility to the public, the extent of existing development, and the existence of diversions or impoundments. Id. § 15-2707. The land located within one-quarter mile from each bank of the Bouquet River running through Essex County in the Adirondack Park has been designated a protected “recreational river” area. Id. § 15-2714(3)(e); 9 N.Y.C.R.R. § 577, Appendix Q-6, “Recreational River” § 5a. The new single family dwellings that Lewis Farm constructed were placed on a portion of its land that is within this protected corridor.

The APA has promulgated regulations to implement its regulatory jurisdiction under the Rivers Act, pursuant to an express statutory delegation of authority. See ECL § 15-2709(1); 9 N.Y.C.R.R. § 577.1 et seq. The regulations provide that an APA permit must be obtained before undertaking a “rivers project,” which is defined to include all new “land uses and developments classified compatible uses” in a resource management land use area by the APA Act. See 9 N.Y.C.R.R. §§ 577.4, 577.5(c)(1); Executive Law § 805(3)(g)(4). Since

the construction of a new single family dwelling is a compatible use in a resource management land use area, an APA permit must be obtained before a new single family dwelling may be erected on privately-owned land in a recreational river area protected by the Rivers Act. However, "agricultural uses" and the erection of new "agricultural use structures" in such an area do not require an APA permit, provided they otherwise comply with the restrictions set forth in section 577.6 of the regulations, which include water quality protections and set-back requirements. Id. § 577.4(b)(3)(ii). The definition of "agricultural use structure" in the Rivers Act is identical to the definition in the APA Act. Id. § 577.2 (b).

Violators of the Rivers Act are subject to a civil penalty ranging from \$100 to \$1,000 per day per violation. ECL § 15-2723.

STATEMENT OF THE CASE

Respondents Barbara and Salim Lewis have purchased approximately 1200 acres of farmland in the Town of Essex within the Adirondack Park (R1174).¹ They maintain a residence and operate a large organic farm on the property (R1252, 1174). The farm, known as Lewis Family Farm, Inc. ("Lewis

¹ References in parentheses to "R" followed by a number are to pages in the Joint Record on Appeal.

was incorporated by Salim Lewis in 1985 (R535). Salim and Barbara Lewis are the shareholders and officers of Lewis Farm (R537, 542, 552, 1252).

A portion of the Lewises' property is classified as a resource management land use area (R1421). On December 5, 2005, the APA's Executive Director, Counsel, and Deputy Director of Regulatory Programs visited Lewis Farm's property at the invitation of Salim Lewis (R61). During the visit, Mr. Lewis informed the APA staff that he was planning to build dwellings on the property to house farm workers (R61). The APA found that its officials advised Mr. Lewis that if those dwellings were located on the resource management portion of the parcel, he would have to obtain an APA permit prior to undertaking construction (R61; 860). Mr. Lewis claims that he does not recall the conversation (R1254).

A. Lewis Farm Undertakes Construction of Three Single Family Dwellings Without an APA Permit and the APA Issues a Cease and Desist Order

In or about November 2006, having obtained a building permit from the Town of Essex but not an APA permit, Lewis Farm began constructing foundations for three single family dwellings on a portion of its property that is located in a resource management land use area, and within the protected Bouquet River recreational river area (R1137, 1179). Several months later, on or about March 14, 2007, Barbara Lewis submitted a "Minor Project Permit Application" to the APA for a permit to construct what she characterized as

"3 single-family dwellings" on the property (R99).² The application did not reveal that construction had, in fact, already begun.

By letter dated March 15, 2007, the APA notified the Lewises that their application had been received but, due to the "major" nature of the project, a different application form supplemented with certain specific additional information was required (R111-114). The notice expressly warned the Lewises that they may "not undertake [their] project until the above information is submitted and a permit has been issued" (R112).

Four days later, Barbara Lewis phoned the APA and admitted that the construction was already underway (R93-94). The matter was therefore referred to the APA's enforcement section for resolution (R95, 116). APA staff visited the farm and confirmed that three dwelling foundations had been installed on a portion of the property that was designated as resource management and that lay within the protected Bouquet River recreational river area (R119). The APA then proposed to settle the matter if Lewis Farm applied for an after-the-fact permit and paid a \$10,000 civil penalty (R70, 76-80, 120-121). But after months of negotiations, the parties were unable to agree on a settlement (R70-73).

² The three single family dwellings are two-story "modular" homes with attached garages. Pictures of the dwellings appear in the Record on Appeal at pages 1088-1089.

On June 27, 2007, the APA received a report that Lewis Farm had resumed construction of the dwellings (R62). That day, APA staff visited the site, observed that three modular homes were being installed on the newly built foundations, and personally served a Cease and Desist Order on Barbara Lewis (R121-122). The order prohibited “any and all land use and development related to the construction of the single family dwellings. . . until this matter is resolved and the enforcement case is concluded” (R150-151).

B. Lewis Farm’s Declaratory Judgment Action Against the APA (Case No. 1)

On or about June 26, 2007, the day before the APA served its Cease and Desist Order, Lewis Farm filed an action for declaratory judgment and injunctive relief in Supreme Court, Essex County (R13-20). Lewis Family Farm, Inc. v. APA, Essex County Index No. 498-07 (Case No. 1). As amended, the complaint sought a declaration that the APA lacked jurisdiction under the APA Act over the Lewis Farm project because Lewis Farm intended to use the dwellings to house employees, and the dwellings were therefore “agricultural use structures” (R43, 47). Alternatively, Lewis Farm argued that the APA lacked jurisdiction over the project because Agriculture and Markets Law § 305-a superseded the APA Act and divested the APA of jurisdiction (R47).

Case No. 1 was randomly assigned to Acting Justice Kevin K. Ryan (R38). In a decision and order dated August 16, 2007, Justice Ryan granted the APA's motion to convert the action to a C.P.L.R. Article 78 proceeding pursuant to C.P.L.R. § 103(c), denied Lewis Farm's application for a restraining order, and granted the APA's motion to dismiss the petition (R5-12). The court rejected Lewis Farm's argument that the three dwellings were exempt "agricultural use structures" under the APA Act, and held that the APA had regulatory jurisdiction because the building project involved the construction of new single family dwellings and was therefore a Class B regional project (R9). The court also held that the APA had regulatory jurisdiction over the Lewis Farm building project under the Rivers Act because the project involved the construction of single family dwellings in a recreational river area (R8). The court rejected Lewis Farm's argument that Agriculture and Markets Law § 305-a preempted the APA's jurisdiction, holding that section 305-a applied only to local laws (R10). Finally, the court held that inasmuch as the APA had jurisdiction, Lewis Farm's attempt to seek judicial intervention before the APA heard argument and issued a determination in the matter was premature (R10-11).

Lewis Farm filed a notice of appeal on or about October 1, 2007 (R3). By order entered January 15, 2009, this Court has extended Lewis Farm's time to perfect its appeal to April 1, 2009 (R275-276).

C. The APA's March 25, 2008 Administrative Enforcement Determination

Shortly after Justice Ryan issued his decision in Case No. 1, the APA issued a Notice of Apparent Violation to Lewis Farm, thereby initiating an enforcement proceeding before the APA (R927-934). See 9 N.Y.C.R.R. §§ 581-2.3, 581-2.6(b). Lewis Farm submitted responding papers, and oral argument before the APA's Enforcement Committee took place on March 13, 2008 (R872-919, 936-942). Lewis Farm was represented by counsel.

On March 25, 2008, the APA issued a unanimous, 12-page determination that Lewis Farm was subject to the APA's jurisdiction, and had violated the APA Act and Rivers Act by constructing the three single family dwellings without an APA permit (R858-870).³ The APA directed Lewis Farm to apply for an after-the-fact permit, accompanied by detailed information about the dwellings and their septic systems, and imposed a \$50,000 civil penalty (R869). The determination also prohibited Lewis Farm from occupying the dwellings until it obtained a permit. Id. The APA issued a corrected determination on or about April 18, 2008, deleting a provision that purported to limit Lewis Farm's ability to challenge the APA's jurisdiction (R855).

³ The APA also determined that Lewis Farm violated the APA Act and the Rivers Act by not obtaining a permit before subdividing its property within the meaning of those statutes (R867-868). The APA does not here press this basis for asserting jurisdiction.

D. Lewis Farm's Article 78 Proceeding Challenging the APA's Determination (Case No. 2)

On April 8, 2008, Lewis Farm commenced an Article 78 proceeding in Supreme Court, Essex County, challenging the APA's March 25, 2008 administrative determination (R277). Lewis Family Farm, Inc. v. APA, Index No. 315-08 (Case No. 2). The petition as amended on April 14, 2008, made the same argument that Lewis Farm had made in its earlier declaratory judgment action (Case No. 1) - that the APA lacked regulatory jurisdiction over the three single family dwellings (R325). Case No. 2 was assigned to Justice Richard B. Meyer.⁴

⁴ By order dated April 11, 2008, Justice Meyer stayed enforcement of the APA's March 25, 2008 determination except for the prohibition against occupancy of the dwellings and the payment of the \$50,000 civil penalty (R252-256). Lewis Farm subsequently placed \$50,000 in escrow with the Essex County Treasurer's Office, but the money was returned to it after Justice Meyer issued his November 21, 2008 order (discussed below). As for the prohibition against occupancy, in a decision and order entered May 19, 2008, this Court granted Lewis Farm's motion for leave to appeal from Justice Meyer's April 11, 2008 order, and enjoined the APA from prohibiting occupancy of one of the three single family dwellings (R263). Lewis Farm's appeal from the April 11, 2008 order is extant, and is not one of the three consolidated appeals now before this Court. The APA has moved for an order maintaining the status quo (i.e. prohibiting occupancy of two of the three dwellings) pending determination of these appeals. That motion was returnable in this Court on February 23, 2009.

E. The APA's Enforcement Action (Case No. 3)

On April 11, 2008, the APA commenced an action against Lewis Farm, and Salim and Barbara Lewis individually, to enforce the APA Act and the Rivers Act, as well as its March 25, 2008 determination (R518). APA v. Lewis Family Farm, Inc., Salim B. Lewis and Barbara Lewis, Index No. 332-08 (Case No. 3). On April 25, 2008, Justice Meyer granted Lewis Farm's motion to consolidate its Article 78 proceeding (Case No. 2) with the APA's enforcement action (Case No. 3), but denied the APA's cross-motion to transfer both cases to Justice Ryan, who had already decided Case No. 1 (R267-271). On May 15, 2008 the APA filed an Amended Complaint (R571-586).

F. Justice Meyer's July 2, 2008 Order

Next, the APA filed a pre-answer motion to dismiss some of Lewis Farm's claims in Case No. 2 on the ground, among other things, that Lewis Farm was precluded by collateral estoppel from relitigating them in light of Justice Ryan's finding in Case No. 1 that the APA had regulatory jurisdiction (R331, 413-423). Lewis Farm cross-moved to dismiss Case No. 3 as duplicative of the administrative enforcement determination, and to dismiss all claims against the individual defendants, Salim and Barbara Lewis (R598-601).

In a decision and order entered July 2, 2008, Justice Meyer held, inter alia, that collateral estoppel was not a bar to any of Lewis Farm's claims, but that

the doctrine of res judicata barred it from asserting a cause of action based on Agriculture and Markets Law § 305-a (R234-244). As for Lewis Farm's motion, the court dismissed the APA's claims against the individual defendants on the ground that they were not named as respondents in the APA's Notice of Apparent Violation or the administrative enforcement determination, but otherwise denied the motion (R243).

The APA appealed from the July 2, 2008 order (R230), and filed an answer and return in response to the amended petition in Case No. 2 (R333-365, 842).

G. Justice Meyer's November 2008 Order and Judgment

Both parties then filed motions for summary judgment in Case Nos. 2 and 3 (R639-731). In a decision and order dated November 19, 2008, Justice Meyer granted Lewis Farm's article 78 petition in Case No. 2, annulled the APA's March 25, 2008 determination, and dismissed the APA's complaint in Case No. 3, the enforcement action (R213-227). The court held that the term "agricultural use structure" has a specific, definite meaning, and where, as here, a single family dwelling is "directly and customarily associated with agricultural use," the Legislature intended it to be exempt from APA jurisdiction under the APA Act. The court reasoned that had the Legislature intended otherwise, it would have inserted appropriate language in the definition section of the APA Act. The court concluded that its interpretation of the statute was consistent

with public policy in favor of encouraging the development and improvement of agricultural lands, as expressed in the New York Constitution. The court did not separately address the APA's argument that it had regulatory jurisdiction over the housing project under the Rivers Act.

Judgment was entered accordingly on November 21, 2008 (R209-210), and the APA filed its notice of appeal on December 18, 2008. (R206).

ARGUMENT

POINT I

THE APA HAS REGULATORY JURISDICTION OVER THE NEW SINGLE FAMILY DWELLINGS LEWIS FARM CONSTRUCTED ON THE RESOURCE MANAGEMENT AND RECREATIONAL RIVER AREA PORTION OF ITS PROPERTY UNDER BOTH THE APA ACT AND THE RIVERS ACT

The APA Act and the regulations implementing the Rivers Act require a private landowner to obtain a permit from the APA before undertaking construction of a new "single family dwelling" in a resource management land use area or a designated recreational river area. See Executive Law §§ 809(2)(a), 810(2)(d)(1); 9 N.Y.C.R.R. §§ 577.4(a), 577.5(c)(1). Lewis Farm does not dispute that the three dwellings at issue here are located within a resource management area, or that they are located within a designated recreational river area under the Rivers Act.

Significantly, Lewis Farm does not even dispute that the three dwellings are “single family dwellings” as defined in the APA Act and the Rivers Act. Indeed, in its March 2007 permit application to the APA it characterized the dwellings as “single family dwellings” (R996). And in Lewis Farm’s brief to the APA in connection with the administrative proceeding, it admitted that the Lewises’ residence on the farm property “must be considered a single family dwelling” under the APA Act “since [it] is not an agricultural use structure,” despite the fact that the Lewises are involved in operating the farm and their residence is the same type of structure as the three dwellings at issue here (R1161). Nevertheless, Lewis Farm argues that the three new “single family dwellings” are “agricultural use structures” exempt from the statutory and regulatory permit requirements because Lewis Farm plans to use the dwellings to house farm workers. This argument is wrong.

The APA’s interpretation of the statutory and regulatory language at issue here should be accepted, and Lewis Farm’s interpretation should be rejected, for three main reasons. First, the APA’s classification of a structure as a “single family dwelling” rather than an “agricultural use structure” is entitled to deference where, as here, it involves knowledge of operational practices and a factual evaluation based on the APA’s knowledge, experience and expertise. Second, the APA’s interpretation comports with the plain meaning of the terms

“single family dwelling” and “agricultural use structure” as they are used in the APA Act and the Rivers Act. Finally, Lewis Farm’s interpretation creates a large loophole that undermines consistent enforcement of the statutory and regulatory permit requirements, contrary to the spirit and purpose of the APA Act and the Rivers Act.

A. The APA’s Classification of a New Land Use or Development Entails a Factual Evaluation That is Entitled to Deference

The APA Act and the Rivers Act state that certain enumerated new land uses and developments, referred to as “Class A” and “Class B” regional projects, may not be undertaken without a permit from the APA. Where the APA evaluates a particular project and determines, based on its knowledge, experience and expertise, that the project has certain characteristics that warrant classification as a particular type of Class A or Class B regional project, that determination is entitled to deference. Accordingly, here, the APA’s determination that the new dwellings Lewis Farm constructed are appropriately classified as Class B “single family dwellings” and not “agricultural use structures” should be upheld.

It is well-established that where the “interpretation of a statute or its application involves knowledge and understanding of underlying operational practices or entails an evaluation of factual data and inferences to be drawn

therefrom, the courts regularly defer to the governmental agency charged with the responsibility for the administration of the statute.” Town of Lysander v. Hafner, 96 N.Y.2d 558, 564-565 (2001) (emphasis in original), citing Kurcsics v. Merchants Mut. Ins. Co., 49 N.Y.2d 451, 459 (1980). See also Flacke v. Onondaga Landfill Systems, Inc., 69 N.Y.2d 355, 363 (1987) (“[W]here, as here, the judgment of the agency involves factual evaluations in the area of the agency’s expertise and is supported by the record, such judgment must be accorded great weight and judicial deference”); Matter of Riverkeeper v. Johnson, 52 A.D.3d 1072, 1074 (3d Dep’t 2008). The court’s role in such a case is limited to ascertaining whether the agency’s construction or application of the statute is irrational or unreasonable. Samiento v. World Yacht Inc., 10 N.Y.3d 70, 79 (2008); Matter of Chesterfield Assocs. v. N.Y. State Dept. of Labor, 4 N.Y.3d 597, 604 (2005); Kennedy v. Novello as Commissioner of NYSDOH, 299 A.D.2d 605 (3d Dep’t 2002), lv. denied, 99 N.Y.2d 507 (2003).

The APA was established as a “superagency to regulate development in the Adirondack Park Region, which the Legislature has singled out for special protection. . . .” Matter of Hunt Brothers, Inc. v. Adirondack Park Agency, 81 N.Y.3d 906, 909 (1993). As such, the APA’s construction of the APA Act and Rivers Act, which it is charged with enforcing, and the application of the statutes’ provisions to Lewis Farm’s housing project, are entitled to deference.

In its March 25, 2008 determination, the APA concluded that the three dwellings Lewis Farm constructed were appropriately classified as "single family dwellings" subject to the permit requirement, rather than "agricultural use structures." That judgment necessarily entailed a practical evaluation of the nature of the structures that were erected.

The record before the APA included photographs of the three new dwellings that Lewis Farm constructed on its property. Those photos showed that the dwellings were two-story homes, with front entry porches, gravel driveways, and attached two-car garages (R1088-1089, 1257, 1260, 1261, 1266). The record before the APA also included blueprints of the dwellings, including their floor plans, which revealed that each of the dwellings contained a single kitchen on the first floor, three to four bedrooms on the second floor, two and one-half bathrooms, and approximately 2400 square feet of living space (R1187-1193, 1202-1211).

Based on these facts, the APA rationally concluded that the dwellings were in the nature of "single family dwellings," which the APA defines as "any detached building containing one dwelling unit, not including a mobile home." Executive Law § 802(58). The fact that Lewis Farm has stated that it intends to use the dwellings to house farm workers does not alter the dwellings' fundamental nature.

The record before the APA also revealed that all three dwellings - - which together contain at least ten bedrooms and could therefore house at least that many people - - share a new common septic system and leach field, located within the protected Bouquet River recreational river area (R1177). Lewis Farm's March 2007 permit application, while incomplete, stated that a deep-hole test pit dug on the project site at the location of the proposed wastewater treatment system revealed high seasonal groundwater, bedrock, or impermeable soils within 48 inches of the existing grade, which could lead to wastewater disposal and drainage problems (R105-106). In such a case, the APA requires the landowner to submit detailed plans prepared by a licensed engineer showing an acceptable system to address those problems (R106). Lewis Farm failed to submit any such plans, and also revealed on its application that it had not contacted the New York State Department of Health in connection with its project (R108, 114). Thus, the record before the APA gave rise to a legitimate concern, based on the APA's knowledge, experience and expertise, that the new septic system could have an adverse impact upon the nearby Bouquet River recreational river area.

Based on all this factual material in the record before it, it was entirely reasonable for the APA to conclude that it was proper to classify the Lewis Farm housing project as new "single family dwellings" subject to the statutory permit

requirements rather than “agricultural use structures.” Because that determination was based on the APA’s evaluation of factual data, inferences drawn from that data, and knowledge of operational practices, it is entitled to deference. But in any event, as discussed below, the APA’s interpretation of the definition of “single family dwelling” and “agricultural use structure” is wholly consistent with a plain reading of the APA Act and the Rivers Act, the rules of statutory construction, and the APA’s statutory mandate to protect the valuable resources of the Adirondack Park.

B. The APA’s Interpretation of the Statutory Language Comports With the Plain Language in the APA Act and Rivers Act

The APA’s determination that Lewis Farm’s intent to use these “single family dwellings” for farm workers does not convert them to “agricultural use structures” should also be sustained because it comports with the plain language in the APA Act and Rivers Act. There is no exemption in the APA Act or Rivers Act for single family dwellings that are used for farm worker housing. A structure that falls within the definition of a “single family dwelling” in the APA Act and the Rivers Act retains that classification regardless of the nature of the intended occupants.

When a court is presented with a question of statutory interpretation, its “primary consideration is to ascertain and give effect to the intention of the

Legislature.” Samiento v. World Yacht, Inc., 10 N.Y.3d at 77-78, quoting Matter of Daimler Chrysler Corp. v. Spitzer, 7 N.Y.3d 653, 660 (2006). Generally, legislative intent is ascertained from the words and language used, and where, as here, the “language of a statute is clear and unambiguous, courts must give effect to its plain meaning.” Samiento v. World Yacht, Inc., 10 N.Y.3d at 78, quoting Matter of Charter Dev. Co., L.L.C. v. City of Buffalo, 6 N.Y.3d 578, 581 (2006), and Matter of Tall Trees Constr. Corp. v. Zoning Bd. of Appeals of Town of Huntington, 97 N.Y.2d 86, 91 (2001). “The language of a statute is generally construed according to its natural and most obvious sense, without resorting to artificial or forced construction.” McKinney's Cons. Laws of N.Y., Book 1, Statutes § 94, at 191 (1971 ed.). Moreover, all parts of a statute must be read and construed together to determine legislative intent. Id. § 97, at 211.

As explained above, Lewis Farm does not dispute that the buildings at issue here are “single family dwellings” and that classification is amply supported by the record. The APA’s determination that a single family dwelling used to house farm workers is a “single family dwelling” and not an “agricultural use structure” gives effect to the natural and obvious meaning of those terms and the structure of the statutes. Lewis Farm’s interpretation does not. Lewis Farm argues that because the APA Act defines the term “structure” to include a “single family dwelling,” and because “structure” appears in the term

“agricultural use structure,” a single family dwelling should be considered an “agricultural use structure” when it is used to house farm workers. That interpretation rests on a forced and artificial dissection of the statutory terms, and is belied by reading the statute as a whole.

First and foremost, “single family dwellings” and “agricultural use structures” are treated as two separate categories throughout the APA Act. The terms are separately defined, and neither is referred to in the definition of the other. See Executive Law §§ 802(8) and (58). A “single family dwelling” is defined as “any detached building containing one dwelling unit, not including a mobile home.” Executive Law § 802(58). An “agricultural use structure” is defined as “any barn, stable, shed, silo, garage, fruit and vegetable stand or other building or structure directly and customarily associated with agricultural use.” Executive Law § 802(8). Barns, stables, sheds, silos, garages, and fruit and vegetable stands are not typically used to house people. They hold farm equipment, crops, or animals, or are used to sell farm crops or animals. The rule of ejusdem generis (of the same kind) states that where a statute enumerates several classes of things, and an immediately following clause embraces “other” things, the word “other” is read as “other such like.” McKinney’s Cons. Laws of N.Y., Book 1, Statutes § 239(b), at 409 (1971 ed.). See Schulman v. People of the State of New York, 10 N.Y.2d 249, 256 (1961). Thus, the phrase “other building

or structure” in section 802(8) is most plausibly read to include only other types of structures that are akin to barns, stables, and silos, that is, that hold farm equipment, crops or animals, rather than structures designed to house people. The latter are “single family dwellings,” not “agricultural use structures.”

Petitioner also selectively ignores the modifying words that follow “structure” in the definition of “agricultural use structure,” which state that the structure must be “directly and customarily associated with agricultural use” (emphasis added). The APA Act defines “agricultural use” as the “management of any land for agriculture; raising of cows, horses, pigs, poultry, and other livestock; horticulture or orchards; including sale of products grown or raised directly on such land, and including the construction, alteration or maintenance of fences, agricultural roads, agricultural drainage systems and farm ponds.” Exec. Law § 802(7). Thus, “agricultural uses” involve the growing of crops and raising of animals, as well as customary actions that are necessary to process those items for sale. Again, these references to farm crops and animals undercut Lewis Farm’s argument that a single family dwelling used to house people is a structure associated with “agricultural use.”

Moreover, other sections of the APA Act also consistently treat “single family dwelling” and “agricultural use structure” as separate and distinct uses under the Act, indicating that the Legislature intended them to be entirely

different types of structures. For example, in Executive Law § 802(50), which defines “principal building” for purposes of applying the Act’s overall density guidelines, the terms “single family dwelling” and “agricultural use structure” are used in the same sentence. Section 802(50)(g) states that “all agricultural use structures and single family dwellings or mobile homes occupied by a farmer of land in agricultural use, his employees engaged in such use and members of their respective immediate families” will together count as a single principal building for density purposes (emphasis added). This language, which provides an exception to the overall density guidelines for farms, strongly suggests that the Legislature intended that single family dwellings or mobile homes occupied by farm employees were distinct from “agricultural use structures.” The Legislature logically separated the two terms with the word “and,” consistent with the definition section of the APA Act. See Executive Law §§ 802(8) and (58). The language also leaves no doubt that the Legislature envisioned APA jurisdiction over dwellings used to house farm employees in land areas subject to the APA Act and Rivers Act.

The court below misunderstood the significance of this definition of “principal building.” The court concluded that since the Legislature designated all “agricultural use structures,” “single family dwellings” and “mobile homes” on farm property as “one principal building,” it clearly intended that all such

structures be treated the same under the APA Act (R227). However, as discussed above, the definition of "principal building" is only relevant under the APA Act when the APA has jurisdiction over a project and must determine whether a structure counts as a separate structure in assessing compliance with the APA Act's overall density guidelines. See Executive Law § 809(10)(c). The definition of "principal building" does not reflect an exception to the APA's general regulatory jurisdiction over single family dwellings or from the permit requirements of the APA Act, even if the dwelling is used to house farm workers.

Another example of the APA Act's treatment of "single family dwelling" and "agricultural use structure" as separate and distinct uses can be found in section 805(3) of the APA Act, which lists the primary and secondary compatible uses of the various land use areas. "Agricultural use structure" and "single family dwelling" are always listed as separate uses for compatibility and jurisdictional purposes. Thus, in a resource management area, an agricultural use structure is listed as a "primary compatible use" and a single family dwelling is listed separately as a "secondary compatible use." The court below concluded that this separate listing indicated that the Legislature recognized that most farm workers are housed in mobile homes, not single family dwellings, and thus a single family dwelling would qualify as an agricultural use structure only on rare occasions (R226). But there is no statutory support for this extra-textual

interpretation. The separate listing of both "single family dwellings" and "agricultural use structures" as compatible uses supports the APA's assertion of jurisdiction over single family dwellings even if farm workers live in them.

In short, if the drafters of the APA Act had intended farm worker dwellings to be included within the definition of "agricultural use structure," it would not have needed to include the phrases "single family dwelling" or "mobile home" separately in either § 805(3) or § 802(50)(g) in addition to the phrase "agricultural use structure."

The court below erroneously rejected all of these arguments, and gave additional reasons for its conclusion that the Legislature intended single family dwellings "directly and customarily associated with agricultural use" to be exempt from the APA's jurisdiction in resource management areas. However, none of those reasons withstand scrutiny.

First, the court concluded that "contrary to the [APA's] determination," the term "structure" in the definition of "agricultural use structure" should not be read to mean "accessory structure" (R223). This misstates the language in and the grounds for the APA's determination. The APA determination makes a general, passing reference to the types of structures listed in the statutory definition of "agricultural use structures" as "accessory in nature and related to the storage of agricultural equipment, animals and products" (R865-866).

However, the APA determination does not rely on, or even mention, the statutory definition of “accessory structure,” and the APA did not reach any conclusion regarding whether farm worker dwellings are “accessory structures” as defined in the APA Act. Rather, the ground for the APA’s determination is that the definition of “agricultural use structures” does not include, and was not intended to include, farm worker dwellings, which are more appropriately classified as “single family dwellings.”

Second, the court below erroneously relied on the Court of Appeal’s holding in Town of Lysander v. Hafner, 96 N.Y.2d 558 (2001), that farm residential buildings constitute “farm operations” exempt from town zoning ordinances under the Agriculture and Markets Law. The Agriculture and Markets Law does not supersede the APA’s jurisdiction under the APA Act, and the interpretation given to terms in the Agriculture and Markets Law does not control the meaning of terms in the APA Act (R408-409). Moreover, the overriding policy behind the relevant provisions of the Agriculture and Markets Law is the encouragement of viable farming, whereas the APA Act reflects a careful balance of two separate public policies: protecting the State’s agricultural heritage as well as the natural resources of the Adirondack Park, consistent with the mandate in article XIV, section 4 of the New York State Constitution. Thus, contrary to the lower court’s conclusion, there is every reason to conclude that

the Legislature intended the APA Act to have a broader reach and different scope than the Agriculture and Markets Law.

In sum, the APA's interpretation of the relevant statutory terms comports with the plain language and structure of the APA Act and Rivers Act. Lewis Farm's interpretation, to the contrary, is forced and awkward, and finds no statutory support.

C. The Decision of the Court Below Undermines the APA's Statutory Mandate and Threatens Effective Enforcement of the APA Act and the Rivers Act

The court below held that a single family dwelling is an "agricultural use structure" and not a "single family dwelling" under the APA Act and the Rivers Act if it is used to house farm workers . Accordingly, under the court's reading of the statutes, the APA's regulatory jurisdiction over a single family dwelling varies depending on the nature of the dwelling's intended occupants. As discussed above, this construction of the statute is erroneous. If a structure falls within the definition of a "single family dwelling," it retains that classification regardless of the nature of the intended occupants. The court's decision to the contrary makes it easily possible to evade the statutory and regulatory permit requirements, which in turn undermines the APA's enforcement powers and the spirit and mandate of the APA Act and the Rivers Act.

It is a fundamental rule that if a statute is susceptible to two interpretations, the court should choose the one that avoids objectionable consequences, and should avoid a construction which tends to sacrifice or prejudice the public interests. See Braschi v. Stahl Assoc. Co., 74 N.Y.2d 201, 208 (1989); McKinney's Cons. Laws of N.Y., Book 1, Statutes §§ 141, 148, 152 (1971 ed.). Moreover, in construing statutes, courts should consider the mischief sought to be remedied, and should choose the construction that furthers the object, spirit and purpose of the law. See Matter of Bath Petroleum Storage v. New York St. Dept. of Envir. Conserv., 244 A.D.2d 624, 625 (3d Dep't 1997), lv. denied, 91 N.Y.2d 806 (1998); McKinney's Cons. Laws of N.Y., Book 1, Statutes §§ 95, 96 (1971 ed.). Here, the court below has construed the APA Act and the Rivers Act in a way that leads to objectionable, indeed absurd, consequences that prejudice the public interest.

If the decision below is left standing, an owner of a vacant resource management parcel of land, or a parcel of land in a protected river area, could construct a single family dwelling and septic system on that land without obtaining an APA permit if he simply claimed that he intended to use the dwelling to house workers to farm the land or tend to horses, sheep or apple orchards on the land. The landowner's assertion of an "agricultural use" for the dwelling would allow him to bypass the review process contemplated by the

permit provisions in the APA Act and the Rivers Act. This, in turn, would eliminate the APA's ability to assess whether the new dwelling and its attendant septic system would have an adverse impact on the nearby protected river area or adversely affect a scenic vista, contrary to the purpose and object of the APA Act and the Rivers Act. Moreover, the APA cannot be expected to evaluate and monitor, on a case-by-case basis, the landowner's actual use of a single family dwelling to ensure that it is used and continues to be used to house farm workers. And nothing would prevent the landowner from ceasing to use the land for agriculture, or from selling his property to someone who does not use the land for agriculture or use the dwelling to house farm employees.

The difficulty Lewis Farm's interpretation would create in administering the statutes is exemplified by Lewis Farm's assertions here. Lewis Farm has stated that it intends to use one of the new single family dwellings it constructed on its property to house "farm consultants," as well as "student interns" and Nepalese farmers who "may learn" the methods of organic farming that Lewis Farm has implemented (R1176-1177). Consultants, students and other visitors are not necessarily farm employees or workers. Requiring the APA to evaluate and monitor who is housed in the dwellings would be unworkable.

Finally, the environmental consequences of single family dwellings and their septic runoff do not depend on who occupies the dwellings. Indeed, to the extent that large numbers of unrelated people live in the dwellings, the environmental impacts of Lewis Farm's planned use may be more severe than if each was occupied by a single family. This, too, supports the APA's jurisdiction here.

The Legislature wisely precluded these objectionable results by requiring landowners who propose to construct a new "single family dwelling" in a resource management land use area or a protected river area, regardless of the nature of the intended occupants, to obtain an APA permit before undertaking construction. This Court should reverse the order of the court below and eliminate the loophole that it would create.

POINT II

THE COURT BELOW ERRED IN DISMISSING THE INDIVIDUAL DEFENDANTS FROM THE APA'S ENFORCEMENT ACTION.

In its July 2, 2008 decision and order, the court below granted the motion by defendants Salim and Barbara Lewis to dismiss all claims asserted in the APA's enforcement action (Case No. 3) against them individually (R243). The court held that dismissal was proper because neither individual was a party to

the administrative proceeding that led to the APA's March 25, 2008 determination. This was error. The individual Lewis defendants can and should be held individually liable in the enforcement action insofar as it seeks injunctive relief because they were directly involved in the decision-making that led to the statutory and regulatory violations that were the basis of the enforcement action.

Executive Law § 813(2) provides that the APA is empowered, through the Attorney General, to institute "any appropriate action or proceeding to prevent, restrain, enjoin, correct or abate any violation of, or to enforce, any provision of this article or any rule or regulation promulgated by the agency, or the terms or conditions of any order or permit issued by" the APA (emphasis supplied). The court below ignored the underlined language and focused, instead, on the language that followed it. The court concluded that to the extent that the APA's March 25, 2008 determination is an "order," an action to enforce it can be initiated only against Lewis Family Farm, Inc., because it was the only party named in the notice of apparent violation that led to the administrative enforcement proceeding.

The APA concedes that the individual defendants were not named parties to the administrative proceeding, and that they therefore may not be held individually liable for the civil penalty the APA imposed in its March 25, 2008

determination. However, even if Executive Law § 813(2) did not authorize the APA to bring an enforcement action against the individual defendants to enforce the administrative determination, the underlined language clearly authorized the APA to institute an action against the individual defendants for injunctive relief to enforce the APA Act, the Rivers Act, and its implementing regulations. The APA's amended complaint does precisely that. It asserts that the APA "brings this action for violation of the permitting requirements and for enforcement of Executive Law §§ 809(2)(a), 810(1)(e)(3), and 810(2)(d)(1) and ECL § 15-2701, and 9 NYCRR Part 577," as well as the March 25 2008 administrative determination (R572). Naming Barbara and Salim Lewis as individual defendants in the enforcement action is critical to ensuring compliance with whatever injunctive relief is granted.

Furthermore, it was entirely proper for the APA to assert its statutory and regulatory enforcement claims against Salim and Barbara Lewis in this case. Executive Law § 813(2) provides that the court may order the joinder of "appropriate persons" as parties, and may order the persons "responsible for the violation" to correct or ameliorate it. Under New York law, an officer of a corporation who participates in the commission of a wrong by the corporation may be held personally liable without having to pierce the corporate veil. See New York v. Shore Realty Corp., 759 F.2d 1032, 1052-53 (2d Cir. 1985).

Individual liability may be predicated upon the actions of the individual, irrespective of compliance with corporate formality. See Jackson's Marina v. Jorling, 193 A.D.2d 863, 866 (3d Dep't 1993)(president of marina, who applied for permits and was listed as marina's agent, could be held liable individually on the basis of his actions, without piercing the corporate veil); State v. Williamson, 8 A.D.3d 925, 929 (3d Dep't 2004) (individual shareholders, owners and/or officers of corporations held liable for violations at waste tire storage and recycling operations, where those individuals were aware of at least some of the violations).

The record establishes that Barbara and Salim Lewis were shareholders and officers of Lewis Farm, and had individual and personal knowledge of and involvement in the violations of the APA Act and the Rivers Act at issue here. They jointly planned and carried out the construction of the three new single-family dwellings on the Lewis Farm property. In a sworn statement, Barbara Lewis stated that the three dwellings were under consideration for years, she sought and obtained local town permits for the construction of the dwellings, and she authorized delivery and installation of the modular dwellings knowing that the APA had asserted jurisdiction over the project and that she did not have the requisite APA permit (R1176, 1178, 1180). As individual "project sponsors," Barbara and Salim Lewis submitted to the APA an application for a permit to

construct the dwellings, and Barbara Lewis affixed her signature to the application as a "landowner from the current deed of record" (R98, 109). Barbara and Salim Lewis also acted individually as officers of Lewis Farm. Salim Lewis signed the Certificate of Incorporation and identified himself as a shareholder of the corporation in a sworn statement, and documents on file with the Department of State list Barbara Lewis as President of Lewis Family Farms, Inc. (R537, 542, 1252).

In short, Barbara and Salim Lewis had personal knowledge of and direct involvement in the construction of the dwellings at issue here and are the shareholders and officers of the corporation that owns the property. Thus, they are properly named as individual defendants in the APA's enforcement action, insofar as it seeks injunctive relief to remedy asserted statutory and regulatory violations. Including them as individual defendants will ensure compliance with whatever injunctive relief is granted.

POINT III

THE REMAINING CLAIMS IN LEWIS FARM'S ARTICLE 78 PETITION ARE MERITLESS AS A MATTER OF LAW AND THIS COURT SHOULD DISMISS THE PETITION IN ITS ENTIRETY

If this Court determines that the APA has jurisdiction over the three single family dwellings Lewis Farm constructed and, accordingly, reverses the orders and judgment below, it should also dismiss Lewis Farm's article 78 petition (Case No. 2) in its entirety. Though not addressed by the court below, none of the remaining claims in the petition have any merit as a matter of law.

A. The March 4, 2008 Resolution of the Adirondack Park Local Government Review Board Was Not Legally Binding on the APA

Lewis Farm's contention (R326) that the APA erroneously failed to consider the March 4, 2008 Resolution of the Adirondack Park Local Government Review Board ("Review Board") is contradicted by the record and lacks merit in any event.

On or about March 4, 2008, the Review Board passed a resolution that made a recommendation to the APA that its enforcement proceeding against Lewis Farm "is in conflict with the terms of the [Adirondack Park Land Use and Development] Plan, which provide that agricultural use structures are non-

jurisdictional” (R1429). Lewis Farm’s counsel submitted the Review Board resolution to the APA Enforcement Committee at the March 13, 2008 proceeding, the resolution was made part of the record of the APA’s March 25, 2008 determination, and the determination expressly states that the Enforcement Committee considered the resolution (R859). Moreover, the Executive Director of the Review Board attended and participated in oral argument before the Enforcement Committee (R872, 916-917). Accordingly, Lewis Farm’s contention that the APA failed to consider the resolution or the Review Board’s position on the Lewis Farm matter is simply wrong.

In any event, the Review Board’s resolution, according to statute, was advisory and not binding on the APA. See Executive Law § 803-a(7) (Review Board shall “monitor the administration and enforcement of the Adirondack park land use and development plan and periodically report thereon, and make recommendations in regard thereto, to the governor and the legislature, and to the county legislative body of each of the counties wholly or partly within the park.”). The APA considered the resolution but ultimately disagreed with the Review Board’s interpretation and found that under the APA Act and the Rivers Act, farm worker dwellings are “single family dwellings” and not “agricultural use structures.” This was entirely proper and does not give rise to a cause of action against the APA.

B. The Substantial Evidence Standard of Review Does Not Apply to the APA's March 25, 2008 Determination

Lewis Farm's argument (R327) that the substantial evidence standard of review applies in its article 78 proceeding need not detain the Court long. The substantial evidence standard applies only to review of determinations made "as a result of a hearing held, and at which evidence was taken, pursuant to direction by law." C.P.L.R. § 7803(4); see Matter of Scherbyn v. Wayne-Finger Lakes Bd. of Coop. Educ. Serv., 77 N.Y.2d 753, 757-758 (1991). Neither the APA Act nor the Rivers Act directed the APA to hold a hearing in the Lewis Farm matter. APA regulations require the APA to conduct an adjudicatory enforcement hearing with an administrative law judge in only two instances: (1) to enforce the Freshwater Wetlands Act; and (2) where the APA has initiated proceedings to modify, suspend or revoke an existing APA permit. See 9 N.Y.C.R.R. § 581-4.1. The Lewis Farm matter does not fall into either category.

Thus, the proper standard² of review here is whether the APA's determination was "arbitrary and capricious" or an "abuse of discretion" under C.P.L.R. § 7803(3). As demonstrated in this brief, the APA's March 25, 2008 determination is a sound, rational and proper exercise of its discretion and statutory authority, and should be confirmed.

C. Lewis Farm's Due Process Rights Were Not Violated

Lewis Farm's amended petition includes several due process claims. To the extent those claims assert procedural due process violations, they lack merit. There was plainly no violation of Lewis Farm's due process rights. Lewis Farm was provided multiple notices, had a full and fair opportunity to be heard before the APA at the March 18, 2008 Enforcement Committee proceeding, and was represented by counsel who vigorously participated in the administrative proceeding and made an oral presentation to the APA. That is sufficient to satisfy procedural due process requirements. See Mathews v. Eldridge, 424 U.S. 319, 348 (1976).

Lewis Farm's contention that it did not have notice that it was required to obtain an APA permit before undertaking construction of the three dwellings (R326-327) is belied by the record and in any event is unavailing. First of all, the plain fact is that the Lewises submitted a permit application to the APA (R995). In its determination, the APA found that before the submission of that application, APA officials visited the farm and advised Salim Lewis that an APA permit would be required before any farm worker housing was constructed on resource management land (R860). The Lewises were well aware of the APA's jurisdiction over their property because they had previously been found in

violation of the APA Act, as noted in the March 25, 2008 determination (R544-552, 862). In any event, even if the Lewises misunderstood the applicability of the APA Act to their housing project, that does not raise a due process claim.

Lewis Farm's other due process arguments (R327) also lack merit. First, Lewis Farm was not entitled to an adjudicatory hearing before an administrative law judge under the State Administrative Procedure Act ("SAPA") because, as explained earlier in this brief, the APA Act did not require one. See SAPA § 102(3); see e.g. Matter of Interstate Indust. Corp. v. Murphy, 1 A.D.3d 751 (3d Dep't 2003); Matter of Mary M. v. Clark, 100 A.D.2d 41 (3d Dep't 1984).

Second, the APA was not required to appoint a hearing officer simply because Lewis Farm requested one. The APA is required to appoint a hearing officer and hold a hearing only "[i]f the permit holder requests a hearing." See 9 N.Y.C.R.R. § 581-3.4(a) (emphasis added). Lewis Farm could not invoke this right because, as it had conceded, it constructed the three new single-family dwellings without an APA permit and was therefore not a "permit holder."

Finally, Lewis Farm's contention that the APA unlawfully delayed commencement of its administrative proceeding is belied by undisputed facts in the record. The APA first learned of the violation in March 2007, when Barbara Lewis informed the APA staff that the foundations and septic systems for the three dwellings had been constructed (R990-991). The Lewises had previously

submitted a permit application, but it did not reveal that construction had already begun. Since APA regulations provide that a permit application cannot be processed while there is an outstanding violation, the APA immediately referred the matter to its enforcement staff for resolution in March of 2007 (R116, 992). Thereafter, the record is replete with the actions taken by the APA to address the apparent violations, including site visits, multiple notices, discussions to resolve the matter, an offer of settlement, issuance of a cease and desist order, and finally the scheduling of the matter to be heard by its Enforcement Committee (R387-390). The APA's administrative process was interrupted in June 2007 when Lewis Farm filed its article 78 petition (Case No. 1). After Justice Ryan confirmed the APA's regulatory jurisdiction and dismissed the complaint on August 16, 2007, the APA immediately issued a notice of apparent violation, Lewis Farm submitted reply papers, and the Enforcement Committee proceeding was held on March 13, 2008. The determination followed shortly thereafter, on March 25, 2008. Given these undisputed facts, Lewis Farm cannot establish that the APA unlawfully delayed its administrative process.

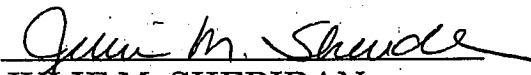
CONCLUSION

For the above-stated reasons, this Court should reverse the order of the court below dated July 2, 2008 insofar as it dismissed Case No. 3 against the individual defendants, reverse the judgment of the court below entered November 21, 2008, dismiss the petition in Case No. 2, confirm the APA's March 25, 2008 determination, and grant the APA's motion for summary judgment in Case No. 3.

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March 2, 2009

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