To Be Argued By: John J. Privitera, Esq.
Time Requested: 15 Minutes

504626 and # 504696

NEW YORK STATE SUPREME COURT
APPELLATE DIVISION: THIRD DEPARTMENT

Matter of LEWIS FAMILY FARM, INC., Appellant.
-against-
ADIRONDACK PARK AGENCY, Respondent.
(Case No. 1)

Matter of LEWIS FAMILY FARM, INC., Respondent,
-against-
ADIRONDACK PARK AGENCY, Appellant.
(Case No. 2)

ADIRONDACK PARK AGENCY, Appellant,
-against-
LEWIS FAMILY FARM, INC., et al., Respondents.
(Case No. 3)

REPLY BRIEF OF RESPONDENT LEWIS FAMILY FARM, INC.

Date: May 8, 2009

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Respondent Farm submits this Reply Brief to correct Appellant's misapprehensions concerning the New York State Constitution and to confirm the immateriality and incorrectness of the *dicta* in the motion court's order of dismissal and remand. (R. 5-12).

ARGUMENT

POINT I

APPELLANT'S EFFORT TO DEFEND THE PUNITIVE ADMINISTRATIVE DETERMINATION AS CONSTITUTIONAL MUST FAIL

Appellant seeks to revive the annulled Administrative Determination, which asserted jurisdiction over Respondent Farm and directed Respondent Farm to (i) forego any right to challenge Appellant's jurisdiction over the farm; (ii) apply for a permit for a four-lot residential subdivision; (iii) pay a $50,000 fine; and (iv) refrain from occupying the farm buildings until a permit was issued and the fine was paid. (R. 869). As the trial court correctly found, the Administrative Decision was affected by an error of law.[1] (R. 227). Reinstatement of any portion of this drastic order impairs Respondent Farm's constitutional right to farm.

Appellant asks this Court to do what no court ever has done before in New York jurisprudence – support an administrative penalty against a farm for its

[1] Because the trial court found that the Administrative Determination was affected by an erroneous interpretation of the Park Act and Rivers Act, the court found it unnecessary to reach Respondent Farm's additional Article 78 claims that the Administrative Determination violated the constitutional right to farm and Agriculture and Markets Law § 305(3), and was otherwise arbitrary and capricious. (R. 289-94).

agricultural use of the land, in the face of the right to farm that exists under the New York State Constitution. Appellant has wandered down a dangerous, untrodden and unmarked path that is far beyond the furthest edges of Appellant's narrow statutory jurisdiction. Because Respondent Farm's farm employee houses are an agricultural use of the land (just like barns, silos and other farm structures)[2] and are constitutionally protected from essentially all land use regulation, a reversal of the trial court's sound Decision and Order will impair Respondent Farm's constitutional right to farm.

In 1969, Article 14 of the New York State Constitution was adopted by the People of New York State to protect the State's agricultural lands as important natural resources. Specifically, Section 4 of Article 14 states as follows:

> 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.

N.Y. CONSTITUTION, Article 14, § 4 (McKinney 2006) (emphasis supplied) (hereafter "Farmland Conservation Clause").

The Farm Conservation Clause, which was adopted as part of the "Conservation Bill of Rights", imposes a mandatory duty upon all state institutions

[2] The Department of Agriculture's formal Right-to-Farm opinion in this case, finding that the houses are an agricultural use, is beyond review. (R. 1389-91). See N.Y. Agric. & Mkts. Law § 308(2) ("The opinion of the Commissioner shall be final...").

to encourage improvement of farms, not penalize farm development. It also specifies that the development of agricultural lands is a matter "of particular importance for action by the legislature." Proceedings of the Constitutional Convention of the State of New York, Vol. XI, Document No. 53, pg. 5 (1967). In fact, the Legislature was directed "to provide for the exercise of various governmental powers to encourage the maintenance of lands in their agricultural state." Id.

The Farmland Conservation Clause states our promise to stand vigilant in conserving our farm soils. Just as all constitutional rights must be exercised, agricultural soils must be farmed to be conserved. Sustainable farming in The Champlain Valley is not practical without on-farm worker housing, (R. 1274-76), so this type of development must be protected.

Ignoring the context and legislative history of this landmark amendment and the Right-to-Farm Law that followed it, Appellant sets up a false dichotomy. It argues that the Farmland Conservation Clause comprises two separate public policies – "promoting the environmental concerns" and encouraging farm development. (See Appellant's Reply Brief, pg. 13). Moreover, Appellant declares that "neither public policy trumps the other", yet demands jurisdiction in complete derogation of the alleged "second" public policy. (Id.). This is a false reading of the Farmland Conservation Clause, which serves one purpose – to preserve

farmland as an irreplaceable natural resource that provides economically sustainable open space and beauty. Appellant's argument denigrates the importance of the Farmland Conservation Clause and seeks to absolve Appellant's constitutional responsibilities related thereto. It also falsely pretends that there must be some environmental concern about the houses at issue here, even though there is none on this record.

While Appellant is correct in stating that portions of the New York State Constitution are geared toward protecting the environment in general, the Farmland Conservation Clause, as part of the "Conservation Bill of Rights", was specifically adopted in order to protect what is left of one of New York State's most precious natural resources – farmland.

Appellant's punitive and misguided effort to control farm development, despite its lack of jurisdiction over "agricultural use structures" and in spite of the Farmland Conservation Clause, must not be countenanced. Appellant's unconstitutional interpretation of the Farmland Conservation Clause is demonstrated by Appellant's "settlement" demand that sought to require Respondent Farm to give up its constitutional right to develop its farmland free from Appellant's interference. (R. 78) ("Respondent, its successors and assigns shall not undertake ***any*** new land use or development on the subject property…without first obtaining an Agency permit, variance, or non-jurisdictional

determination") (emphasis supplied). Appellant's Administrative Determination solidified its unconstitutional interpretation of the Park Act by stating that Respondent Farm "forgoes the right to challenge Agency jurisdiction". (R. 869). This assertion of development control over farming renders the Farmland Conservation Clause meaningless and is inconsistent with the broad exemptions in the Park Act, the Rivers Act and the Right-to-Farm Law. This Court must find that the right to farm is the right to house farm workers.[3]

Appellant's unconstitutional interpretation of the Park Act is further evidenced through its refusal to acknowledge the basic truth set forth in the Venn diagram (see Respondents' Brief, pg. 19), which illustrates the explicit statutory directive that the broad exemption for "agricultural use structures" includes any "building or structure directly and customarily associated with agricultural use." See N.Y. Exec. Law § 802(8).[4] The Legislature directed in Appellant's charter that, except for a few select areas where wild rivers are found, the right to farm, as

[3] The constitutional right to farm without the right to build on-farm worker housing is no different from promising freedom of speech and then taxing or censoring every expression. See John Milton, *Areopagitica* (1644) (condemning taxation of expression).

[4] The Department of Agriculture determined that the houses at issue are an agricultural use. (R. 1389-91). Appellant ignored this and continues to ignore the catch-all portion of the definition of "agricultural use structure", which provides that any structure—a term defined to include a "single family dwelling" pursuant to N.Y. Exec. Law § 802(62)—that is directly and customarily related to agriculture is an "agricultural use structure" under the Park Act. See N.Y. Exec. Law § 802(8). Therefore, it is incomprehensible how the Appellant can continue to say that "single family dwellings" cannot be "agricultural use structures". Although Appellant's Administrative Determination makes a poor attempt to argue that the catch-all provision of the definition relates only to accessory use structures, (R. 865-66), Appellant now simply ignores the catch-all provision altogether.

bolstered by the Constitution, ought to be fortified through non-regulation of farm development.

Appellant's denigration of the Constitution is skewed by its grossly mistaken sense of its own statutory power. The Legislature instructed Appellant not to regulate farms, exempted all "agricultural use structures", and defined all "agricultural use structures"—including farm worker houses—as immaterial to the density calculations that constitute the heart of the Park Act's Land Use Plan. (See N.Y. Exec. Law §§ 802(50)(g); 810(1)(e)(1)(f); 815(4)(b); McKinney's 1971 Session Laws of New York, Legislative Memoranda, Adirondack Park Agency-Creation, ch. 706 pg. 2471). Notwithstanding these unambiguous admonitions, Appellant boldly informs this Court that it "regulates farming". (See Appellant's Reply Brief, pg. 5). Thus, Appellant seeks to operate beyond its lawfully designated sphere. See Gerdts v. State, 210 A.D.2d 645, 648-49 (3d Dep't 1994).

There can be no doubt that the Administrative Determination impairs, if not suffocates, farm development by imposing a massive penalty and directing "residential" treatment of a farm asset. Thus, the Administrative Determination necessarily runs afoul of the constitutional obligation of all state institutions to "encourage the development" of all farmland.

No court has ever countenanced an administrative penalty against a farmer for the development of a farm. Appellant's request that this Court affirm such an

order in the face of a resounding defeat before the trial court is unprecedented. This Court cannot sanction an order against farm development at the request of a defeated land use board, see Hunt Brothers v. Glennon, 81 N.Y.2d 906, 909 (1993), without fundamentally impairing Respondent Farm's constitutional right to farm.

Appellant's Administrative Determination runs afoul of the New York Constitution because it would empower the Appellant to control farm development. However, as the trial court found, the constitutional issue need not be reached if this Court affirms the trial court's holding that Appellant lacks the statutory power it asserted in the Administrative Determination. Indeed, every effort should be made to reconcile the Park Act and Rivers Act with the Constitution. See In re Fay, 291 N.Y. 198 (1943) (recognizing that every statute has a presumption of constitutionality). That reconciliation is rational in fairly reading the broad agricultural exemptions of the Park Act and Rivers Act to include farm employee houses, just as the Court of Appeals found that such housing is part of a farm operation. See Town of Lysander v. Hafner, 96 N.Y.2d 558 (2001). This Court's affirmance that the Appellant cannot regulate farm worker housing saves the Park Act and Rivers Act from constitutional infirmity.

Appellant's abstract rhetoric demanding jurisdiction over farm development is unsupported by the law. Indeed, reinstatement of the erroneous and punitive

Administrative Determination, as Appellant now urges this Court, would render the Park Act and Rivers Act unconstitutional.

POINT II

THE MOTION COURT'S *DICTA* IS IMMATERIAL AND WAS SUPERCEDED BY THE TRIAL COURT

On June 26, 2007, Respondent Farm prematurely commenced an action (Essex County Index No. 0498-07) seeking a declaratory judgment that Appellant could not prohibit the completion of Respondent's farm employee housing project because the regulation of farm development and farm buildings is beyond the Appellant's authority. (R. 13-29, 1181). On August 16, 2007, the motion court (Ryan, J.), issued an Order that converted the action into an Article 78 proceeding and summarily dismissed it as premature with leave to renew since Appellant had not yet issued a final decision or taken any enforcement action against Respondent Farm. (R. 4-12). Respondent Farm does not challenge this conclusion, and the parties agree that this conclusion was proper. (See Appellant's Reply Brief, pg. 2).

However, in dismissing the premature action, the motion court offered improper *obiter dicta* concerning the merits and wrongly advised Appellant that it had jurisdiction over the Respondent Farm's farm buildings.[5] (R. 8-9, 237-42).

[5] Notably, the motion court was wrong, as a matter of law, when it speculated that "if the Court were to accept [Respondent Farm's] interpretation of [the law], the APA could do nothing if a landowner built a cow barn within a few feet of the river." (R. 9). This assumption ignores the law that requires cow barns and all other "agricultural use structures" in resource management areas—including Respondent Farm's employee houses—to be located more than 150 feet from

The motion court failed to consider the regulatory, statutory and constitutional ramifications when it offered the *dicta*. Thus, Respondent Farm filed a prophylactic notice of appeal to protect itself from the motion court's improper *dicta* while the administrative record developed.

Appellant has seized the motion court's *dicta* and relied upon its loose narrative throughout the administrative and trial court proceedings, claiming that the motion court's *dicta* conclusively established that Appellant has jurisdiction over Respondent Farm's farm buildings. (See e.g., R. 379, 415, 880, 930). In fact, Appellant's Administrative Decision expressly recognized and relied upon the improper *dicta*. This was error, as the trial court found.

The trial court properly held that, to the extent that the motion court addressed whether the farm buildings at issue are "agricultural use structures", "[n]one of the court's determinations on those issues were essential to its ultimate decision to dismiss the proceeding as 'not ripe for judicial intervention'". (R. 241-42). See Longton v. Village of Corinth, 49 A.D.3d 995 (3d Dep't 2008) (collateral estoppel did not apply in an Article 78 proceeding where a matter is sent back for an administrative hearing on a proper record); see also Atlantic Mut. Ins. Co. v. Lauria, 291 A.D.2d 492, 492-93 (2d Dep't 2002); New York Public Interest

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the Boquet River. See 9 NYCRR § 577.6(b)(3). Respondent's houses are 800 feet from the River (R. 214)

Research Group, Inc. v. Carey, 42 N.Y.2d 527, 531 (1977); Nassau Roofing & Sheet Metal, Inc. v. Facilities Dev. Corp., 115 A.D.2d 48 (3d Dep't 1986) ("gratuitous and merely incidental" judicial language is not binding).

CONCLUSION

On this record, there is no doubt that Respondent Farm is a steward of conservation providing invaluable leadership in organic farming and environmental conservation. (See *Right to Farm in the Champlain Valley of New York*) (R. 1125-72). As such, Respondent Farm seeks only to house its workers, as protected by the Constitution, without Appellant's improper involvement.

For all of the foregoing reasons, it is respectfully submitted that the August 16, 2007, Decision and Order (Ryan, J.) is moot and immaterial at this point and should be disregarded. The November 19, 2008, Decision and Order of Supreme Court (Meyer, J.), which properly annulled Appellant's erroneous Administrative Determination, should be affirmed in all respects.

Dated: May 8, 2009
Albany, New York

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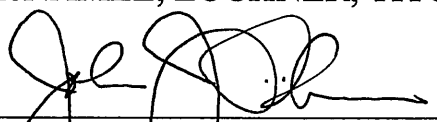

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