STATE OF NEW YORK SUPREME COURT
ESSEX COUNTY

LEWIS FAMILY FARM, INC.,

Petitioner,

v.

NEW YORK STATE ADIRONDACK PARK AGENCY,

Respondent.

Hon. Richard B. Meyer
INDEX No. 315-08

ADIRONDACK PARK AGENCY,

Plaintiff,

v.

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

Defendants.

INDEX No. 332-08

MEMORANDUM OF LAW IN OPPOSITION TO PETITIONER'S MOTION FOR COUNSEL FEES

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Preliminary Statement

Petitioner has moved for attorneys fees and expenses under CPLR article 86, based upon this Court's November 19, 2008 Decision and Order, as affirmed by the Appellate Division, Third Department on July 16, 2009. The Adirondack Park Agency ("APA" or "Agency") respectfully submits that this Court should deny petitioner's application for attorney fees because the APA's position was "substantially justified" within the meaning of CPLR § 8601(a). Moreover, special circumstances make an award unjust.

In the event this Court determines that Article 86 attorney fees are warranted, the APA requests that the Court exercise its discretion to exclude ineligible fees and costs, and to reduce petitioner's remaining claim to an amount constituting reasonable fees at "prevailing market rates" within the meaning of CPLR § 8601.

Facts

A complete recitation of the pertinent factual and procedural background is provided in this Court's November 19, 2008 Decision and Order, as well as in the Memorandum and Order of the Appellate Division, Third Department dated July 16, 2009.[1] Briefly, this article 78 proceeding challenged a determination of the APA dated March 25, 2008, which found Lewis Family Farm, Inc., ("Lewis Farm") in violation of the Adirondack Park Agency Act ("APA Act" Executive Law § 801 et seq.) and the Wild, Scenic and Recreational Rivers Act ("Rivers Act"), ECL § 15-2701, et seq., for its construction of three single-family dwellings in the Adirondack Park, along a protected river corridor without an APA permit. See August 24, 2009 Affidavit of Cecil Wray ("Wray Aff.") Exhibit A, March 25, 2008 APA Determination.

This Court annulled the APA's Determination on the ground that it was affected by error of law in its interpretation of the

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[1] The Agency disputes the characterization of the facts in petitioner's August 13, 2009 memorandum of law as containing numerous inaccuracies and omissions.

statutory definition of "agricultural use structure" under the APA Act and the Rivers Act, finding that the three single-family dwellings on Lewis Farm qualified as "agricultural use structures" because they would house farm laborers and, therefore, did not require an APA permit. The court did not address five of petitioner's claims (three due process claims, one claim involving the Local Government Review Board, and one claim relating to substantial evidence). In addition, Supreme Court found for the APA on two claims. First this Court held that the doctrine of res judicata barred Lewis Farm from asserting a violation of § 305-a of Agriculture and Markets Law (Claim 3). The Court also granted the Agency's motion to dismiss petitioner's fourth claim relating to Agriculture and Markets Law's presumptive effects, "since there is no legal requirement that the Agency defer to an opinion of the Commissioner of Agriculture and Markets when interpreting the Agency's own statutory scheme." See Decision and Order dated July 2, 2008.

Relevant Statute

The New York State Equal Access to Justice Act ("EAJA") is codified in CPLR article 86. EAJA, modeled after the Federal Equal Access to Justice Act ("FEAJA"), 28 U.S.C. § 2412, provides that attorney fees should be awarded to a prevailing party in a civil action against the State, unless the Court finds that the government was substantially justified in its position, or that

special circumstances make an award unjust. See CPLR § 8601(a) and 28 U.S.C. § 2412(d)(1)(A). Moreover, fees are limited to prevailing market rates, and are not awarded for any portion of the litigation in which the party did not prevail or has unreasonably protracted the proceedings. CPLR § 8601 (a).

> § 8601. Fees and other expenses in certain actions against the state
>
> (a) When awarded. In addition to costs, disbursements and additional allowances awarded pursuant to sections eight thousand two hundred one through eight thousand two hundred four and eight thousand three hundred one through eight thousand three hundred three of this chapter, and except as otherwise specifically provided by statute, a court shall award to a prevailing party, other than the state, fees and other expenses incurred by such party in any civil action brought against the state, unless the court finds that the position of the state was substantially justified or that special circumstances make an award unjust. Whether the position of the state was substantially justified shall be determined solely on the basis of the record before the agency or official whose act, acts, or failure to act gave rise to the civil action. Fees shall be determined pursuant to prevailing market rates for the kind and quality of the services furnished, except that fees and expenses may not be awarded to a party for any portion of the litigation in which the party has unreasonably protracted the proceedings.

CPLR § 8601(a). Section 8602(b) limits fees and other legal expenses to those which are "reasonable."

> "Fees and other expenses" means the reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, consultation with experts, and like expenses, and reasonable attorney fees, including fees

> for work performed by law students or paralegals under the supervision of an attorney incurred in connection with an administrative proceeding and judicial action.

CPLR § 8602(b).

ARGUMENT

POINT I

AN AWARD UNDER CPLR ARTICLE 86 SHOULD BE DENIED BECAUSE THE AGENCY'S POSITION WAS SUBSTANTIALLY JUSTIFIED

In deliberating and issuing its March 25, 2008 Determination finding that the three single-family dwellings were subject to APA permitting requirements under both the APA and Rivers Act, the APA was substantially justified in relying on long-standing application of its statutes and the August 16, 2007 decision of Justice Kevin Ryan confirming the Agency's regulatory jurisdiction over the subject houses. This case presents a clear and obvious paradigm of substantial justification. In fact, given Justice Ryan's August 2007 decision, it would have been unreasonable for the APA to handle the Lewis Farm permitting issues otherwise.

The threshold standard for exposure to attorney fees in a proceeding against the State is whether the State's position was "substantially justified." See CPLR § 8601(a). "Substantially justified" means that if there was a reasonable basis for the position, then the defendant was substantially justified and

there is no liability for attorney fees. See Sutherland v. Glennon, 256 A.D.2d 984, 985 (3d Dep't 1998)(where APA position on wetlands was based on evidence that would lead a reasonable person to conclude its position had a sound basis, no fees awarded), see also Apollon v. Giuliani, 246 A.D.2d 130, 136 (1st Dep't 1998) lv. dismissed, 92 N.Y.2d 1046 (1999); Bio-Tech Mills v. Jorling, 152 Misc. 2d 619 (Sup. Ct. Albany Co, 1991). The United States Supreme Court has interpreted the phrase "substantially justified" to mean "justified to a degree that could satisfy a reasonable person" or having a "reasonable basis in both fact and law." See Pierce v. Underwood 487 U.S. 552, 565 (1988). There is no requirement for the government to show that its position was correct, or even "justified to a high degree." Id. at 565-566 & n.2. Moreover, the determination as to whether the government was substantially justified is to be based solely on the record before the agency. See CPLR 8601(a).

In enacting Article 86, the Legislature deliberately limited the circumstances in which an award of counsel fees can be made to make a fee award the exception, rather than the rule with respect to New York courts. Indeed, as demonstrated by the legislative history, earlier versions of the statute were vetoed by the Governor because they did not sufficiently restrict fee awards. See New York State Clinical Lab. v. Kaladjian, 85 N.Y.2d 346, 354 (1995)(citing 1983 S434-A, Veto No. 71), at 356

(referencing Assembly Mem, 1989 NY Legis Ann, at 335). Moreover, because Article 86 shifts to the State the obligation for the payment of counsel fees, albeit "in limited circumstances," it amounts to a partial waiver of the State's immunity, and is "in derogation of the common law rule and thus is to be strictly construed." See Matter of Scibilia v. Regan, 199 A.D.2d 736, 737 (3d Dep't 1993) (determination of disability benefits was annulled, attorney fees award reversed because the State's position substantially justified); see also Matter of Rivers v. Corron, 222 A.D.2d 863 (3d Dep't 1995)(where permit for dwelling was denied and agency applied language of a previously unchallenged regulation, Supreme Court abused its discretion when it awarded fees because the agency position was not substantially justified); Matter of Peck v. New York State Div. of Housing & Community Renewal, 188 A.D.2d 327, 328 (2d Dep't 1992) (denial of fees affirmed where petitioner made no showing that he lacked the resources to sustain litigation). When determining the reasonableness of the agency's position, the court must consider the agency's position "as a whole." New York State Clinical Lab., 85 N.Y.2d at 356-357; see also Apollon, 246 A.D.2d at 136 ("position is deemed 'substantially justified' if, taken as a whole, it had a reasonable basis in law and fact").

Because of the Legislature's deliberate choice, a petitioner is not entitled to attorney fees simply because it prevails in an

article 78 proceeding, nor does prevailing create a presumption that the government's position was not "substantially justified." Article 86 was "never intended to chill the government's right to litigate or to subject the public fisc to added risk of loss when the government chooses to litigate reasonably substantiated positions, whether or not the position later turns out to be wrong." New York State Clinical Lab., 85 N.Y.2d at 357, quoting Comm'r INS v. Jean 496 U.S. 154 (1990); see also Sutherland, supra at 985. The mere fact that a petitioner prevailed in an article 78 proceeding "does not ipso facto signify that [an agency's] position was devoid of any legal or factual support." Matter of Huggins v. Coughlin, 209 A.D.2d 770, 771 (3d Dep't 1994).

In Bio-Tech Mills, Justice Cardona denied an application for Article 86 fees to the prevailing party, and explained the meaning of "substantially justified:"

> For purposes of an application under article 86, "substantially justified" means "'justified in substance or in the main' - - that is, justified to a degree that could satisfy a reasonable person. That is no different from the 'reasonable basis both in law and fact' formulation" (citing Pierce v Underwood, 487 US at 565).

Bio-Tech Mills, 152 Misc. 2d at 620-621. The Court in Bio-Tech Mills granted a petition directing the Department of Environmental Conservation ("DEC") to process petitioner's application for a permit. Despite the court's disagreement with

the respondent DEC's ultimate interpretation of another Justice's injunction order, the court determined "that does not mean that respondent's position was not substantially justified" and, based on the litigation history, DEC had a reasonable basis in law and fact for its position. See Bio-Tech Mills, 152 Misc. 2d at 620; see also Sutherland, 256 A.D.2d at 985 (same definition for "substantially justified").

Even when the State's position had earlier been annulled as irrational or lacking in substantial evidence, courts have denied attorney fee awards because the State's position was held to be "substantially justified." See Matter of Moncure v. New York State Dept. of Envtl. Conservation, 218 A.D.2d 262, 267 (3d Dep't 1996) (DEC determination that lease did not allow cell towers adjoining Catskill Preserve was annulled, but no fees were allowed even where DEC determination was irrational, as lease was open to various interpretations); Matter of Santos v. Coughlin, 222 A.D.2d 870 (3d Dep't 1995) (counsel fees denied where underlying Corrections charges annulled). Acceptance of the government's position by a judge can be persuasive evidence that the position was substantially justified, even if that position is ultimately rejected in a subsequent decision. See U.S v. Paisley, 957 F.2d 1161, 1169 (4th Cir. 1992)(Court reversed award of fees finding government was substantially justified); see also Herman v. Schwent 177 F.3d 1063 (8th Cir. 1999) ("the

Government's ability to convince federal judges of the reasonableness of its position, even if the judges' and Government's position is ultimately rejected in a final decision on the merits, is 'the most powerful indicator of the reasonableness of an ultimately rejected position'") Id. at 1065.

Article 86 fees are not warranted because the APA's position regarding its regulatory jurisdiction over Lewis Farm's three single family dwellings had a reasonable basis in law and fact and was therefore substantially justified. There was never any dispute that the dwellings constituted single family dwellings, or a dispute over their location. The administrative record contains multiple examples of evidence that the structures were single family dwellings, that they were constructed on land within 1/4 mile of the Bouquet River, and that they were located on Resource Management land within the Adirondack Park. The evidence included affidavits of both parties, maps, numerous photographs of the dwellings, and permits issued by the local government identifying the houses as "single family dwellings" and identifying their locations. This evidence was the foundation for the Agency's factual findings and application of its statutory requirements [namely that the structures were within its jurisdiction because of their nature and geographic location.] See Exec. Law § 802(58); § 810(2)(b)(1) and 9 NYCRR Part 577, Appendix Q-6, 5a. On these facts, a reasonable person

could conclude that the APA had regulatory jurisdiction, as did the APA. See Wray Aff. ¶¶ 4-8.

Justice Ryan agreed, finding the dwellings at issue to be within the scope of APA jurisdiction under the APA Act and the Rivers Act in Lewis Farm 1. See Wray Aff. Exhibit B (Decision and Order, August 16, 2007, Hon. Kevin K. Ryan, Lewis Family Farm, Inc. v. APA, Sup. Ct. Essex Co., Index No. 498-07 ["Lewis Farm 1"]). Justice Ryan found that the three dwellings were not exempt "agricultural use structures" under APA Act, nor were they exempt from Agency regulation under the Rivers Act. Addressing Lewis Farm's further jurisdictional argument, the court found that Agriculture and Markets Law Section 305-a applied only to local governments and, thus, did not preempt the State Agency's jurisdiction. Finding the APA to be acting within its jurisdictional scope, Justice Ryan dismissed Lewis Farm's action as premature, allowing the Agency to continue with its administrative enforcement process. As explained in the Wray Affidavit, the APA relied heavily on the Order of Justice Ryan, which it referenced in its determination. See Wray Aff., ¶ 8, Exhibit A (APA 3/25/08 Determination). Thus, Justice Ryan's Lewis Farm 1 decision further demonstrates that the Agency had a "reasonable basis in both fact and law" to conclude that its interpretation of its jurisdiction was lawful. See Pierce 487 U.S. at 565. The APA could not foresee or predict that just over

one year later, this Court would issue a second decision on the same facts and statutes, reaching the opposite conclusion.

Finally, the APA was justified in its legal position because the jurisdictional issue presented in this matter was one of first impression. Prior to Justice Ryan's 2007 Decision and Order, there were no reported cases interpreting the APA Act definition of "agricultural use structure" and, more specifically, the Agency's application of the APA Act and the Rivers Act to single family dwellings for farmworker housing within a 1/4 mile corridor of a designated recreational river. Just as Justice Ryan reasonably believed that the APA Act and the Rivers Act ("the Acts") applied to these dwellings, so too the APA reasonably believed the Acts applied. See Wray Aff., ¶¶ 4-8. In light of the fact that both Justice Ryan and the APA, charged by the Legislature with interpreting and enforcing the Acts, read the Acts to require a permit, there can be no doubt that the Agency's position was substantially justified.

The lack of controlling precedent under the APA Act and the Rivers Act is legally significant and weighs strongly in favor of a conclusion that the State's position was "substantially justified." See, e.g., Abramson v. United States, 45 Fed. Cl. 149, 152 (Fed. Cl. 1999) (noting that several Circuits have adopted a presumptive rule that the Government is substantially justified within meaning of EAJA when question is being addressed

for the first time); Edwards v. McMahon, 834 F.2d 796, 802 (9th Cir. 1987)(government's position substantially justified where case involved "matter of first impression"); Martinez v. Secretary of Health & Human Servs., 815 F.2d 1381, 1383 (10th Cir. 1987)(government's position substantially justified where circuit law was uncertain); Crabtree v. New York State Div. of Hous. and Cnty. Renewal, 294 A.D.2d 287, 290 (1st Dep't 2002) affirmed 99 N.Y.2d 606 (2003)(State's position was substantially justified where law was unsettled on two critical issues and its position on third was reasonable in light of the law and facts), aff'd, 99 N.Y.2d 606 (2003); Huggins v. Coughlin, 209 A.D.2d 770, 771 (3d Dep't 1994)("the closeness of the question, or the presence of some evidence supporting the determination, are fair grounds for litigation and may constitute sufficient justification for having taken a position that turns out to be incorrect").

Petitioner argues that the State's enforcement of the APA determination cannot be substantially justified "because it was contrary to the New York State Constitution, as the Appellate Division found." See Petitioner's Memo of Law, dated August 13, 2009 ("8/13/09 Memo"), p.11, ¶ 4. Petitioner is simply wrong. No court found that the APA violated the New York State Constitution. Rather, the Appellate Division affirmed this Court's finding that the Agency erred in interpreting the

statutory language. The Appellate Division expressly found, contrary to petitioner's claim, that this Court's interpretation of the APA Act was consistent with Article XIV, Section 4 of the New York State Constitution. See Memorandum and Order of Appellate Division, 3rd Dept., dated July 16, 2009, p. 7, 9. Petitioner cites to Meinhold v. United States 1997 U.S. App. Lexis 35603 (9th Cir.) and Mendenhall v. NTSB, 92 F.3d 871, (9th Cir. 1996) for the proposition that an agency's position cannot be substantially justified if it violates the United States Constitution, a statute or regulation, but neither case is relevant here. Unlike Meinhold where the court found interpretation of a policy was "clear and not disputed" (Meinhold 1997 U.S. App. Lexis 35603 at *7), the provisions of the APA Act and Rivers Act were interpreted differently by two Acting Supreme Court Judges, an obvious indication that the interpretation was not by any means "clear." In any event, the court in Meinhold notes that "Mendenhall does not establish an ironclad rule." Id. at 7. Thus, petitioner's reliance on these cases is misplaced.

Petitioner's other arguments are without merit. Cases cited by petitioner where fees were awarded because the court found the State action to be "irrational" are inapplicable here; neither this Court nor the Appellate Division found the APA's determination irrational. Rather, the Court found that the APA determination was affected by "error of law," a matter of

statutory construction, and the issues here raised a question of first impression for the courts. See Wray Aff., ¶ 3.

Petitioner's arguments regarding the APA's communications with the Department of Agricultural and Markets, and that agency's determination pursuant to Agricultural and Markets Law § 308, are contrary to the record, as well as to this Court's July 2, 2008 Decision and Order. This Court dismissed petitioner's fourth cause of action relating to preemptive effect of Agriculture and Markets Law § 308 finding "no legal requirement for the Agency to defer to an opinion of the Commissioner of Agriculture and Markets when interpreting the Agency's own statutory scheme." See Decision and Order, Supreme Court Essex County, dated July 2, 2008, p. 10; see also Affirmation of Loretta Simon ("Simon Aff.") dated August 28, 2009, Exhibits C and D (correspondence between Department of Agriculture and Markets and the APA; Affirmation of John F. Rusnica). In fact, the Rusnica affirmation demonstrates that Agriculture and Markets was interpreting its own statute, not the APA Act or Rivers Act. Petitioner's arguments regarding the Tax Law and its implications to Lewis Farm are similarly inapposite; no court has ruled on a single Tax Law claim in this litigation.

The Agency had a reasonable and "sound" basis in both fact and law for its March 25, 2008 determination, and its position was therefore substantially justified within the meaning of CPLR

§ 8601(a). The APA made a careful and considered decision on the record before it and relied "heavily" on Justice Ryan's endorsement of the Agency's jurisdiction in Lewis Farm 1. See Wray Aff. ¶ 8. Accordingly, petitioner's attorney fees motion must be denied.

POINT II

SPECIAL CIRCUMSTANCES WEIGH AGAINST AN AWARD

Even if the Court determined that the APA's position was not substantially justified, the fact remains any award of attorneys fees in this proceeding would be unjust and contrary to the spirit and intent of the statute.

Article 86 was designed to lower "economic barriers facing low income individuals and small businesses that lack the resources to contest unjustified governmental action." Fried, Arthur J., "Attorneys' Fees Against The State: The Equal Access to Justice Act", New York Law Journal, Volume 203, Number 62, p. 2 (1990). Thus, the statute limits eligibility for individuals to those with a net worth of fifty thousand dollars or less, and to corporations with no more than one hundred employees. See CPLR § 8602(d). In New York State Clinical Lab., 85 N.Y.2d at 351, the Court of Appeals discussed the Legislature's intent to limit Article 86 awards to those individuals and businesses with limited financial resources for court challenges to government actions. There, not only did the Court of Appeals focus

acknowledge the statute's intent to limit the circumstances in which awards of attorney fees are made, it recognized that New York restrictions on eligible parties were significantly greater than those imposed under the "more generous" Federal Equal Access to Justice Act and limited to helping those who need assistance. See New York State Clinical Lab., 85 N.Y.2d at 354-355.

In this case, although the corporate petitioner offers an affidavit from its principal claiming that it has no liquid net worth beyond a few thousand dollars, it has nonetheless constructed three single family dwellings valued together at over $900,000; "invested in modern agricultural equipment," and has at least two other dwellings and numerous other buildings on its property. See Affidavit of Salim B. Lewis ("Lewis Aff.") dated August 13, 2009, ¶¶ 10 -11; see also Affidavit of Salim B. Lewis dated August 7, 2007, ¶¶ 7,8 (Agency record). Thus, the value of Lewis Family Farm Inc., likely exceeds $1,000,000. While Article 86 measures corporate eligibility by the number of employees, Lewis Farm makes no showing that it is a business that "may not have the resources to sustain a long legal battle against an agency that is acting without justification" as contemplated by the Legislature when it enacted Article 86.[2] See New York State

[2]In addition, the Court may take judicial notice of the numerous New York Times articles depicting this case and Salim B. Lewis, a principal of Lewis Family Farm Inc., wherein Mr. Lewis is identified as a wealthy former Wall Street investment executive. (New York Times, April 14, 2008, B1; November 20,

Clinical Lab, 85 N.Y.2d at 351. An award of nearly $209,000 in these circumstances appears unjust.

Accordingly, the APA submits that the court should exercise its discretion to consider these special circumstances, and deny an award of attorney fees in this case as unjust.

POINT III

ALTERNATIVELY, IF THE COURT FINDS THAT THE AGENCY WAS NOT SUBSTANTIALLY JUSTIFIED, THE COURT SHOULD REDUCE THE FEE REQUEST SUBSTANTIALLY

While the APA opposes any Article 86 award, if the Court determines an award to be warranted, petitioner's fee application should be considerably reduced to exclude those fees that are outside the scope of the statute or unreasonable and reduce those remaining fees that exceed the prevailing market rates.

As a preliminary matter, petitioner neither provides a retainer agreement (see Lewis Aff. ¶ 7, reference to having retained counsel), nor states that it actually paid any fees. Hours not appropriately charged to one's client are not appropriately charged to one's adversary. See Rahmey v. Blum 95 A.D.2d 294 at 300; see also Hensley v. Eckerhart 461 U.S. 424 at 51 (1983). Article 86 is a reimbursement mechanism, however,

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2008, A39). In light of these facts, it appears questionable whether petitioner meets the spirit and intent of the EAJA legislation (ie: "*limited to helping those who need assistance . . .* " Id. at 354).

petitioner has provided no proof of fees paid to counsel.[3]

A. Certain fees are not reasonable and should be excluded

Petitioner should be denied reimbursement for fees related to the enforcement complaint filed by the Office of the Attorney General on behalf of the APA ("Lewis Farm 3" Sup. Ct. Essex Co. Index No. 332-08). Article 86 limits recovery of fees to those "incurred by such party in any civil action brought against the state . . . ." See CPLR § 8601 (a). "The EAJA applies only where the state is the defendant. Fees are not available to those forced to defend state enforcement activity initiated in court by the Attorney General's office." 4/2/90 NYLJ, vol. 203, Number 62 (Fried, Arthur J.). Accordingly, all fees in petitioner's application relating to Lewis Farm 3 should be denied. See Simon Aff., ¶ 10, Exhibit E.

Nor should petitioner be compensated for expenses relating to the illegal ex-parte stay it obtained against the APA at the commencement of this litigation. CPLR § 6313(a) plainly prohibits ex parte restraining orders against the State and other government entities ("No temporary restraining order may be granted ... against a public officer, board or municipal corporation of the state to restrain the performance of statutory

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[3]The Second Circuit has noted that an award goes to the prevailing party; while a "retainer or similar agreement may provide for payment of counsel. . ," "counsel has no standing to apply to the public fisc for payment." Oguachuba v. INS 706 F.2d 93, at 97-98 (2d Cir. 1983).

duties"). See McArdle v. Comm. of Investigation, 41 A.D.2d 401 (3d Dep't 1973)("As we have held several times, stays which restrain State officials from the performance of their official duties may not be granted ex parte"). The Uniform Rules for Trial Courts (22 NYCRR) § 202.7(f), also require notification of the time, date and place, to the party against whom the temporary restraining order is sought. Counsel knew or should have know, as an experienced attorney, and former Assistant Attorney General, that ex-parte stays are prohibited against the State. Accordingly, counsel's fee request in the amount of relating to the ex-parte stay in derogation of CPLR § 6313[a] should be stricken. See Simon Aff., ¶ 11, Exhibit G.

Petitioner's request for fees related to the Lewis Farm 1 appeal should also be denied. See Lewis Farm 1 (Index No. 498-07).[4] Furthermore, reimbursement for this prior action should be denied because counsel unreasonably delayed perfecting its appeal, seeking four extensions of time to perfect, and unreasonably delaying the litigation well beyond the nine month deadline for abandonment. See New York Rules of the Appellate

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[4] The Lewis Farm 1 declaratory judgment action was brought in 2007, prior to the March 25, 2008 administrative determination herein, was litigated at the Supreme Court level by two other law firms, decided by another Judge, and dismissed on the APA's motion. In addition to denial of the fees for petitioner's excessive delay, it is not clear that that portion of the fee request relating to Lewis Farm 1 is properly before this Court, as fee applications are to be heard by the lower court that heard the action. CPLR § 8601(b).

Division, Third Department (22 NYCRR) § 800.12. Article 86 expressly prohibits collection of such fees: "fees and expenses may not be awarded to a party for any portion of the litigation in which the party has unreasonably protracted the proceedings." See CPLR § 8601 (a); see also Simon Aff. ¶ 12, Exhibit G.

Furthermore, petitioner should not be compensated for work not directly related to its legal expenses. For example, petitioner seeks reimbursement for publicity activities, including an item listed as "Series of press interviews" billed at an attorney rate of $300.00 per hour. Nor should the public fisc reimburse petitioner for an entry listed as "website" billed at $150.00 per hour. Entries seeking fees for lobbying efforts, including letters, meetings or telephone calls to organizations or individuals, presumably seeking litigation support, are similarly ineligible. See Simon Aff., ¶¶ 13-14, Exhibit G.

A fee request should also allow the court to identify the specific claim and the number of hours that pertain to it. See Rahmey, 95 A.D. 2d at 300. However, petitioner's claims are grouped so that hours assigned to "series of press interviews" are combined with "research regarding stay/right to escrow", making it impossible for the court to determine what time was spent on what claim. See Privitera Aff., Exhibit B, second entry for 11/20/08. While petitioner's counsel appears to have spent innumerable hours talking to Salim Lewis, the fee application

fails to explain how these hours were reasonable legal expenses that should be reimbursed by the State. For instance, out of 240 billed days, petitioner seeks reimbursement for over 180 calls with Mr. Lewis, with 100 of those calls billed at the rate of $300.00 an hour. See Simon Aff., ¶ 14. These excessive and unreasonable charges should be eliminated or reduced. See Rahmey, 95 A.D.2d at 301 (if time spent on claim is unnecessarily high, judge may refuse compensation).

Any work that "did not require an attorney's attention, and hence is not compensable at a reasonable attorney's rate," is also ineligible for compensation. See Fine v. Sullivan, 1993 WL 330501, 1993 US Dist Ct LEXIS 11706 (SDNY 1993). The Court has discretion to reduce the number of hours billed when appropriate. Although the Fine case involved the Federal statute, its language is sufficiently analogous to be helpful in analyzing the reasonableness of an application for award of attorney fees under Article 86. Thus, the APA submits that petitioner should not be compensated at the attorney rate for preparation of affidavits of service, or for other essentially "boilerplate" documents, numerous calls to the Court's Clerk's Office, service and filing of papers and photocopying of documents. See Simon Aff., ¶ 15, Exhibit G.

B. Petitioner's fees are in excess of prevailing market rates

After exclusion of ineligible or unreasonable fee claims,

the Court should exercise its discretion to conform the excessive hourly rate requested by the petitioner to the community norm.

CPLR 8601(a) and 8601(b) permit an award of only reasonable attorney fees at "prevailing market rates." The Appellate Division, Third Department, has held that the Legislature intended that counsel fees be calculated in accordance with federal case law. See Matter of Thomas v. Coughlin, 194 A.D.2d 281, 284 (3d Dep't 1993)(citing Pierce v. Underwood, et al., 487 U.S. 552, 572-573 (1988). In Pierce, the United States Supreme Court held that prevailing market rates were to apply under the Federal EAJA and that a higher rate would apply only for "some distinctive knowledge or specialized skill needed for the litigation in question" such as "an identifiable practice specialty such as patent law, or knowledge of foreign law or language." Accordingly, the Court vacated the fee award because the lower court had awarded fees higher than the prevailing market rate based on a lesser standard of "novelty and difficulty" of the issues, the "undesirability" of the case, the counsel's efforts, results and "customary fees and awards." See Pierce, 487 U.S. at 572-573; see also Rahmey 95 A.D.2d at 302.

Thus, if awarded attorney fees, petitioner should only be compensated at prevailing rates for Essex County and/or Northern New York. Petitioner has failed to submit any proof of prevailing market rates for attorneys bringing an article 78

proceeding in Essex County, or for attorneys with similar levels of experience. New York courts have indicated that the reasonable hourly rate should be based on "the customary fee charged for similar services by lawyers in the community with like experience . . .." See Rahmey, 95 A.D.2d at 302. Under the standard established under Article 86 and relevant precedent, the attorney fees requested by petitioner ($300.00 per hour for an experience attorney, $175.00 for an attorney with 1-3 years) are excessive and unjustified, and well beyond the prevailing rate for either Essex County or Northern New York. It is well established that the relevant community for determining the prevailing rate is the community where the court sits. See Luciano v. Olsten Corp. 109 F.3d 111 (2d Cir. 1997). Rates published by the New York State Bar Association in 2004 indicate prevailing rates for "Other" Counties (excluding NYC, L.I., Albany etc.) are: "Median" rate for an equity partner of $150 per hour, and a "Mean" rate of $166 per hour. See Simon Aff., ¶ 18, Exhibit H. In addition, recent case law provides a guide to prevailing rates for attorneys in the Northern District of New York at: $ 210 per hour for experienced attorneys, $150 per hour for associates with more than four years experience, $120 per hour for less experienced associates, and the customary one-half of these rates for time spent traveling. See Alexander v. Cahill, 2009 U.S. Dist. LEXIS 29165 at *7 N.D.N.Y. (Mar. 30,

2009); see also Arbor Hill Concerned Citizens Neighborhood Ass'n v. County of Albany, No. 03-CV-502, 2005 U.S. Dist. LEXIS 4362, **18-19 (Mar. 22, 2005). The $300 hourly rate sought by petitioner is above amounts awarded in these cases and should be substantially reduced.

Finally, petitioner has also not met its burden of showing that the fees sought are reasonable and within the scope of the statute. Petitioner's fees are excessive for an article 78, where issues of fact are generally not litigated and there is no need for discovery or trial because the proceedings are designed for prompt and efficient resolution of largely legal issues. See Matter of Council of City of N.Y. v. Bloomberg, 6 NY3d 380, 389 (2006). Additionally, the legal issues in this case were already raised and briefed by two other law firms in "Lewis Farm 1". Counsel had ready-made pleadings prepared by prior counsel, along with affidavits and a memorandum of law.[5] Accordingly, drafting of the petition should not have required significant amounts of new legal research or distinctive knowledge or specialized skill, especially given counsel's professed experience. In fact, counsel herein repeated all the claims raised by the previous attorneys in the subsequent "Lewis Farm 2" and has not justified the excessive hours and expenditures for drafting and redrafting

[5] The record in Lewis Farm 1 reflects that petitioner was represented by two law firms: Nixon Peabody LLP (Partner David Cook), and Brennan & White, LLP (Partner Joseph Brennan).

its papers.

As explained in the Simon Affirmation, in the event the Court deems an Article 86 award warranted, the Court should deny fees for inappropriate charges such as publicity, non-legal work, prior litigation, fees related to the APA's enforcement action, and compensation for an ex-parte stay against the State in derogation of CPLR § 6313[a]). See Simon Aff., Exhibit G. The Court should then reduce the hourly rate of the fees for attorney work to reasonable prevailing rates.

CONCLUSION

The APA had a reasonable basis in fact and law for its March 25, 2008 Determination and its position was "substantially justified." Moreover, special circumstances exist which would make a fee award to petitioner unjust. Accordingly, petitioner's Article 86 attorney fees application should be denied. Alternatively, to the extent that the Court deems attorney fees warranted, those fees should be substantially reduced to exclude ineligible activities and reflect customary local hourly rates.

Dated: Albany, New York
August 28, 2009

Respectfully submitted,

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