

STATE OF NEW YORK SUPREME COURT
ESSEX COUNTY

LEWIS FAMILY FARM, INC.,

Hon. Richard B.
Meyer

Petitioner,

INDEX No. 315-08
RJI No. 15-1-2008-0109

v.

NEW YORK STATE ADIRONDACK
PARK AGENCY,

Respondent.

ADIRONDACK PARK AGENCY,

Plaintiff,

INDEX No. 332-08
RJI No. 15-1-2008-0117

v.

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

Defendants.

1. My name is Cecil Wray, and I am a retired partner with Debevoise & Plimpton, LLP, where I worked from 1960 until my retirement. In 1999, I was appointed by then-Governor Pataki as a member of the Adirondack Park Agency (the Agency"), where I serve as Chairman of the Agency's Enforcement Committee. I presided as Chairman of the Enforcement Committee during its consideration of the Matter of Lewis Family Farm. I participated in the deliberations which led to the Committee's March 25, 2008 Determination in that matter, and approved and executed the Determination on

behalf of the Committee. A copy of that Determination is attached as Exhibit A hereto.

2. I write this affidavit in opposition to Lewis Family Farm's motion seeking attorney's fees in this matter.

3. This was an enforcement case of first impression for the Agency, both with respect to the Adirondack Park Agency Act (the "APA Act") and the Wild, Scenic and Recreational Rivers Act (the "Rivers Act"). (Executive Law § 801 et seq.; Environmental Conservation Law § 15-2701 et seq.) While I am aware that the Agency had issued permits for farmworker housing in Resource Management in the past, the Agency had never before encountered the claim advanced by Lewis Family Farm, i.e., that all farmworker housing is exempt from permitting requirements under the APA Act and Rivers Act.

4. The material facts in the matter were not disputed. Lewis Family Farm had built three single family dwellings on lands designated Resource Management and within ¼ of a mile of a river designated as "recreational" under the Rivers Act. Lewis Family Farm stated that it planned to use the three single family dwellings for farmworker housing.

5. The only disputed issue for determination was the legal question of whether the single family dwellings required an Agency permit. Agency staff even conceded that the

dwellings were permissible, and sought to have Lewis Family Farm go through the process of obtaining an Agency permit. Lewis Family Farm argued that the dwellings were agricultural use structures and that they were exempt from the Agency's permitting jurisdiction.

6. In making its Determination, the Committee, including myself, three other attorneys and two lay members, thought that the law was clear and that a permit was required. §§ 809(2)(a) and 810(2)(d)(1) of the APA Act unequivocally require permits for all single family dwellings prior to their being built on Resource Management lands. No exception from this permitting requirement is provided for single family dwellings based on their use as agricultural use structures.¹

7. Similarly, the Rivers Act requires a permit for all single family dwellings that are built within $\frac{1}{4}$ of a mile of a designated Recreational River. 9 NYCRR Part 577, Appendix Q-6, 5a.

8. In reaching its Determination, the Agency's Enforcement Committee relied heavily upon the August 16, 2007 decision by Acting Supreme Court Justice Ryan, which the

¹By contrast, § 810(1)(e)(8) asserts Agency permitting jurisdiction on Resource Management lands over all structures in excess of forty feet in height, but expressly excepts agricultural use structures from that jurisdiction.

Committee, again including myself, read to support the Agency's assertion of permitting jurisdiction over the three single family dwellings that Lewis Family Farm had constructed. In paragraph 14 of the Determination, we expressly found that Judge Ryan's decision "stated that the Agency did have jurisdiction over the dwellings". A copy of Judge Ryan's decision is attached as Exhibit B.



CECIL WRAY

Sworn to before me this
24th day of August, 2009



Notary Public

JILL LAWRENCE
Notary Public - State of New York
Qualified in Franklin County
No. 01LA6175330
Commission Expires Oct. 9, 2011



Exhibit A

-----X
In the matter of the apparent
violations of Executive Law
Section 809 and 9 NYCRR
Part 577 by:

**DETERMINATION
OF THE ENFORCEMENT COMMITTEE
Pursuant to 9 NYCRR 581-2.6**

Lewis Family Farm, Inc.

Agency File E2007-041

Respondent.
-----X

The Enforcement Committee of the Adirondack Park Agency conducted an Enforcement Committee Proceeding pursuant to Agency regulation §581-2.6 on March 13, 2008 regarding the above-referenced matter. The Committee heard oral argument from Agency Associate Attorney Paul Van Cott, and counsel for Lewis Family Farm ("Lewis Farm" or "Respondent") John Privitera, and considered the following documents, constituting the complete record:

- (1) Notice of Apparent Violation served September 5, 2007.
- (2) Lewis Farm's Response to the NAV dated October 4, 2007.
- (3) Staff Notice of Request for an Enforcement Committee Determination dated December 17, 2007, including the following documents and accompanying exhibits: Affirmation of Paul Van Cott dated December 13, 2007, attaching the July 23, 2007 motion of the Agency made to the Supreme Court, requesting dismissal of the Lewis Farm litigation action against the Agency (Exhibit A); the Decision and Order of Honorable Kevin Ryan, Supreme Court Judge (Exhibit B), and the Agency's Cease and Desist Order issued June 27, 2007 (Exhibit C). The Motion to the Supreme Court included the Affirmation of John Banta dated July 23, 2007, Affirmation of Sarah Reynolds dated July 20, 2007 (with its Exhibits A-D), Affidavit of John Quinn dated July 23, 2007 (with its Exhibits A-C), and Affidavit of Doug Miller dated May 20, 2007 (with its Exhibits A-I).
- (4) Affidavit of Doug Miller dated December 12, 2007.
- (5) Affidavit of John Quinn dated December 12, 2007.
- (6) Staff Memorandum of Law dated December 14, 2007.

- (7) A document entitled "The Right to Farm in the Champlain Valley of New York," dated January, 2008 and submitted by Lewis Farm on January 23, 2008. This document includes the Affidavit of Barbara Lewis dated January 17, 2008 with Exhibits A-H, the Affidavit of Klaas Martens dated January 17, 2008, and the Affidavit of John Privitera dated January 18, 2008 with Exhibits A-K.
- (8) Staff's Reply Affirmation by Paul Van Cott dated January 29, 2008, attaching the following correspondence between the Agency and the NYS Department of Agriculture and Markets ("NYS A&M"):
 - (a) Letter dated June 20, 2007 from Bill Kimball, NYS A&M, to Agency Counsel John Banta.
 - (b) Letter dated August 7, 2007 from John Banta to Bill Kimball.
 - (c) Letter dated November 26, 2007 from Patrick Hooker, Commissioner, NYS A&M, to Curtis Stiles, Chairman of the Agency.
 - (d) Letter dated December 4, 2007 from Mark Sengenberger, Interim Executive Director of the Agency, to Patrick Hooker, Commissioner, NYS A&M.
- (9) The Reply Memorandum of Law by Lewis Farm requesting dismissal of the Enforcement Proceeding, dated February 26, 2008, including the Affidavit of John Privitera dated February 26, 2008 with Exhibits A-D.
- (10) Staff's Reply Memorandum of Law by Paul Van Cott dated March 5, 2008, including the Affidavit of Doug Miller dated March 4, 2008 and Exhibit A.
- (11) Letter dated February 21, 2008 by John Lincoln, NY Farm Bureau, to Governor Spitzer, submitted by John Privitera at the March 13, 2008 Enforcement Committee Proceeding.
- (12) Undated statement of Barbara Lewis submitted by John Privitera at the March 13, 2008 Enforcement Committee Proceeding.
- (13) Letter dated March 5, 2008 to Governor Spitzer, signed by Lloyd Moore and Frederick Monroe on behalf of the Adirondack Park Local Government Review Board, submitted by John Privitera at the March 13, 2008 Enforcement Committee Proceeding.
- (14) Undated Proposed Order submitted by John Privitera at the March 13, 2008 Enforcement Committee Proceeding.
- (15) A color copy of the PowerPoint presentation made to the Agency by John Privitera on March 13, 2008.

Following the oral argument, the Enforcement Committee met in Executive Session and unanimously made the following findings and determinations as authorized by 9 NYCRR 581-2.6(d):

Findings

1. Lewis Farm owns an approximately 1,100-acre parcel designated as Tax Map Parcel 49.3-2-27, located in the Town of Essex, Essex County. The lands are classified as Resource Management, Rural Use and Hamlet on the Adirondack Park Land Use and Development Plan Map ("Official Map"). Lewis Farm states that it operates an organic farm on the 1,100-acre parcel.
2. On December 5, 2005, the Agency's Executive Director, Counsel, and Deputy Director of Regulatory Programs visited Lewis Farm at the invitation of Salim Lewis. During the course of the visit, Mr. Lewis told staff that he was planning to build farm worker dwellings, and staff advised him that construction of any new single family dwelling on the Resource Management portion of the property would require an Agency permit.
3. On March 14, 2007, the Agency received a completed application form for a minor project (Single Family Dwelling and Two Lot Subdivision) signed by Barbara Lewis. The project was described as "3 single family dwellings in a farm compound to be used by farm employees exclusively."
4. On March 15, 2007, the Agency sent Barbara and Salim Lewis, and Mark McKenna, their authorized representative, a Notice of Incomplete Permit Application - Receipt of Partial Permit Application.
5. On March 19, 2007, Barbara Lewis advised the Agency's assigned project review officer (PRO) that construction of the three single family dwellings on the Lewis Farm had begun with the installation of foundations and the on-site waste water treatment system ("WWTS"). She also stated that the foundations were located at the corner of Whallons Bay Road and Christian Road. The PRO advised Respondent that the project had been "undertaken" with the installation of foundations and the WWTS, which would constitute a violation, not to proceed with further construction until an Agency permit was obtained, and that he would be referring the matter to the Agency's enforcement division.
6. On March 28, 2007, the Agency Enforcement Officer assigned to the matter visited the Lewis Farm. He determined that the three single family dwelling foundations were installed on lands that are designated Resource Management on the Official Map and also lie within the designated river area

of the Boquet River, a NYS designated recreational river. Staff also determined that one of these new dwellings is located in the immediate vicinity of a pre-existing dwelling which remained on the site. Lewis Farm planned to remove that dwelling after the three new dwellings were completed.

7. Respondent did not seek or obtain an Agency permit prior to the undertaking of the project to construct the three dwellings. The Town of Essex does not have an Agency-approved local program and hence would not be responsible for the review of any Class B Regional Project located within its borders.
8. Based on these facts, Agency staff concluded that the undertaking of construction of the three single family dwellings constitutes a violation of the subdivision permitting requirements of §§809(2)(a) and 810(1)(e)(3) of the Adirondack Park Agency Act, and of 9 NYCRR §577.5(c)(1) implementing the Rivers Act. In addition, staff concluded that the construction of each of the two single family dwellings not intended as replacement structures constitutes a violation of §§809(2)(a) and 810(2)(d)(1) of the Adirondack Park Agency Act and of 9 NYCRR §577.5(c)(1).
9. On May 14, 2007, Agency staff sent a proposed Settlement Agreement to Respondent, alleging the above-referenced violations. Staff offered to resolve the matter provided Lewis Farm agreed to apply after-the-fact for a permit for the three dwellings located at the corner of Whallons Bay Road and Christian Road, and provided it pay a \$10,000 civil penalty. Staff advised that it appeared likely that a permit could be written for the dwellings in the proposed location.
10. Thereafter, Lewis Farm had numerous contacts with staff, and requested staff to remove the civil penalty as part of the proposed settlement. Staff declined.
11. On June 27, 2007, the Agency received a report that Lewis Farm had resumed construction of the three single family dwellings. On that day, Agency staff issued a Cease and Desist Order requiring Respondent to cease construction of the three single family dwellings.
12. On June 28, 2007, Respondent commenced an action against the Agency in New York State Supreme Court, Essex County, seeking a declaratory judgment that the Agency has no jurisdiction over construction of farm worker housing, or

if it did, that the Agriculture and Markets Law supercedes the Adirondack Park Agency Act.

13. Staff observed the dwelling sites on July 2 and July 6 and observed that Lewis Farms was continuing construction on the three single family dwellings. Three modular houses had been placed on the foundations.
14. In a decision dated August 16, 2007, Supreme Court Acting Justice Kevin Ryan denied Respondent's motion for a restraining order and granted the Agency's motion to dismiss. The decision stated that the Agency did have jurisdiction over the dwellings and the subdivisions created by construction of the dwellings. The Court rejected Lewis Farm's argument that the structures are "agricultural use structures," stating that when read in its entirety, the Adirondack Park Agency Act and the regulations implementing the Wild, Scenic and Recreational Rivers System Act do not exempt the dwellings from Agency jurisdiction. The Court further stated that Section 305-a of the Agriculture and Markets Law did not supersede Agency authority under the Adirondack Park Agency Act or its regulations. Finally, the Court stated that the matter is not ripe for judicial intervention and referred it back to the Agency to proceed with its enforcement procedures.
15. On August 31, 2007, staff observed further construction activity, including that workers were shingling the roofs of the three dwellings. By letter of that date, Agency staff notified Lewis Farm through its enforcement counsel that the Cease and Desist Order remained in effect. Construction continued as observed by staff on September 5, and by December 7, 2007, the three dwellings appeared largely complete. Also, some time after September 5 and before December 7, 2007, the preexisting dwelling which had been located near the new dwellings was removed.
16. The Enforcement Committee takes notice that Lewis Farm has had a previous violation with the Agency, and has also had previous projects approved by the Agency. Moreover, in this case, Lewis Farm had actual notice from senior Agency staff that an Agency permit would be required prior to the construction of any new single family dwelling in the Resource Management portion of its property. It is not reasonable that Lewis Farm failed to seek a jurisdictional determination from the Agency prior to undertaking the construction of the three dwellings, an investment, according to its claim, of \$985,000.

Applicable Sections of Law

The Adirondack Park Agency Act

17. Executive Law §809(2)(a) requires individuals, corporations or any other entity to obtain a permit from the Agency prior to the undertaking of any Class A Regional Project or the undertaking of any Class B Regional Project in any town not governed by an Agency-approved local land use program in the Adirondack Park.
18. Pursuant to 9 NYCRR §570.3(ai)(1), "undertake" is defined as the "commencement of a material disturbance of land, including clearing of building sites, excavation (including excavation for the installation of foundations, footings and septic systems), or any other material disturbance of land preparatory or incidental to a proposed land use or development or subdivision."
19. Executive Law §810(1)(e) lists the Class A Regional Projects in a Resource Management land use area that require an Agency permit pursuant to Executive Law §809(2)(a). These projects include, *inter alia*, any subdivision of land (and all land uses and development related thereto) involving two or more lots, parcels or sites. (Executive Law §810[1][e][3])
20. Pursuant to Executive Law §802(63), a "subdivision" is "any division of land into two or more lots, parcels, or sites for the purpose of any form of separate ownership or occupancy (including any grading, road construction, installation of utilities or other improvements or any other land use and development preparatory or incidental to any such division)."
21. 9 NYCRR §570.3(ah)(3) defines a subdivision into sites as occurring where one or more new dwelling(s) or other principal building(s) is to be constructed on a parcel already containing at least one existing dwelling or other principal building, and regardless of whether the existing building is proposed to be removed after completion of the new building(s).
22. 9 NYCRR §573.6(e) states that, where an existing dwelling will not be removed until after the new dwelling is emplaced or constructed, an Agency permit is required for the subdivision into sites which would result if the subdivision is a Class A or Class B Regional Project as provided in Section 810 of the Adirondack Park Agency Act.

23. Executive Law §810(2)(d) lists the Class B Regional Projects in a Resource Management land use area that are subject to Agency review in the Town of Essex pursuant to Executive Law §809(2)(a). These projects include, *inter alia*, the construction of any new single family dwelling. (Executive Law §810[2][d][1])
24. Executive Law §802(58) defines a "single family dwelling" as "any detached building containing one dwelling unit, not including a mobile home."
25. Executive Law §802(8) defines "agricultural use structure" as "any barn, stable, shed, silo, garage, fruit and vegetable stand or other building or structure directly and customarily associated with agriculture use."
26. Executive Law §813 provides a potential civil penalty of \$500 per day for each violation for each day the violation continues.

**The Wild, Scenic, and Recreational Rivers System Act and
9 NYCRR Part 577**

27. The Wild, Scenic, and Recreational Rivers System Act (the "Rivers Act") was enacted pursuant to a legislative finding that many rivers of the state, with their immediate environs, possess outstanding natural, scenic, historic, ecological and recreational values. (ECL §15-2701[1])
28. The Rivers Act was enacted to implement a public policy that certain selected rivers of the state which, with their immediate environs, possess the aforementioned characteristics, shall be preserved in free-flowing condition and that they and their immediate environs shall be protected for the benefit and enjoyment of present and future generations. (ECL §15-2701[3])
29. Section 15-2705 of the Rivers Act states that the functions, powers and duties encompassed by this section shall be vested in the Adirondack Park Agency as to any privately owned part of a river area within the Adirondack Park as defined by law which may become part of this system. Section 15-2709(1) states that, within the Adirondack Park, the Adirondack Park Agency shall make and enforce regulations necessary for the management, protection, and enhancement of and control of land use and development in the wild, scenic and recreational river areas.

30. Pursuant to 9 NYCRR §577.4(a), no person shall undertake a rivers project without first obtaining an agency permit.
31. In recreational river areas, rivers projects include, inter alia, all subdivisions of land in Resource Management land use areas. (9 NYCRR §577.5[c][1])
32. In recreational river areas, rivers projects include, inter alia, subdivisions and all land uses and developments classified compatible uses by the Adirondack Park Land Use and Development Plan in Resource Management land use areas. (9 NYCRR §577.5[c][1])
33. Pursuant to §805(3)(g)(4) of the Adirondack Park Agency Act, single family dwellings constitute compatible uses in Resource Management land use areas.
34. Pursuant to 9 NYCRR §577.4(b)(3)(ii), an "agricultural use structure" would not require a rivers permit, except that any such structure must adhere to the structure setback requirements for the recreational river area (150 feet from the mean high water mark).
35. Section 15-2723 of the Environmental Conservation Law provides a potential civil penalty of \$1,000 per day for each violation for each day the violation continues.

Agriculture and Markets Law

36. Section 305-a of the Agriculture and Markets Law provides that local governments, when exercising their powers to enact and administer comprehensive plans and local laws, shall exercise these powers to further the policy and goals in Article 25AA of that law, and shall not unreasonably restrict or regulate farm operations within agricultural districts.

Determination of Violation

37. The Agency finds that under the Adirondack Park Agency Act, farm worker dwellings are "single family dwellings" (or possibly "multiple family dwellings" or "mobile homes," depending on the type of dwelling structure), and not "agricultural use structures." The types of structures specifically listed in the definition of "agricultural use structures" are accessory in nature and related to the storage of agricultural equipment, animals and products ("barn, stable, shed, silo, garage"), or the on-site

accessory use sale of farm products ("fruit and vegetable stand"). The language "...or other building or structure directly and customarily associated with agriculture use" is intended to include other structures of an accessory nature only. This is also evident from the exceptions to jurisdiction in the Adirondack Park Agency Act which often include accessory structures. The definition of "agricultural use structures" does not include, and was not intended to include, the farm owners' or farm workers' dwellings. Rather, the owners' dwelling and farm workers' dwellings (for a single family) more precisely fit under the definition of "single family dwelling" or "mobile home."

38. Moreover, "single family dwelling" and "agricultural use structure" are treated as separate and distinct uses under the Adirondack Park Agency Act. This is evident upon inspection of §805(3) of the Act, which always lists "agricultural use structure" and "single family dwelling" as separate uses for compatibility and jurisdictional purposes under the Act. Similarly, §802(50)(g) lists these two types of uses separately for eligibility for special consideration under the Act regarding the application of the overall intensity guidelines.¹ "Single family dwelling" is a narrowly and specifically defined term and is a keystone of Agency jurisdiction. The term "agricultural use structure" is a broader term for certain agricultural structures, which for the purposes of jurisdiction does not include "single family dwelling." If the drafters of the Adirondack Park Agency 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." While the Agency agrees that farm worker housing is important to the enhancement of farm operations, it is not an "agricultural use structure" under the Act, but either a "single family dwelling," "multiple family dwelling," or "mobile home," depending on the type of dwelling.
39. Section 305-a of the Agriculture and Markets Law, of its own terms, does not apply to the Adirondack Park Agency as the Agency is not a "local government." The laws the Agency is charged to implement are state laws enacted by

¹ Note also, that the overall intensity guidelines do not apply unless and until the Agency has jurisdiction over a project.

the legislature and these laws are of equal import to the people of the State of New York as is the Agriculture and Markets Law.

40. The Adirondack Park Agency Act, Rivers Act and Freshwater Wetlands Act, independently and as implemented by Agency regulations, all further the policy and goals in Article 25AA of the Agriculture and Markets Law in significant ways and constitute plans supportive of agricultural operations. These laws do not unreasonably restrict or regulate farm operations, including farm operations *outside* agricultural districts. In fact, most agricultural uses do not require Agency permits. In addition, these laws provide special privileges for agricultural uses, including under the Adirondack Park Agency Act an exception to the application of the overall intensity guidelines for all farm structures including farm worker housing (§802[50][g]). However, that section regarding application of the overall intensity guidelines cannot be read to impact Agency jurisdiction over the construction of dwellings or the subdivision of land (as defined under the Adirondack Park Agency Act and implementing regulations) when such actions constitute a Class A or B Regional Project. The Agency fully supports agricultural uses in the Park, but will administer its jurisdiction as written to ensure that there is "no undue adverse impact" on the resources of the Park.

First Violation - Subdivision under the
Adirondack Park Agency Act

41. Pursuant to Executive Law §§809(2)(a) and 810(1)(e)(3), a Class A Regional Project permit is required from the Agency prior to any subdivision of Resource Management lands into sites.
42. Lewis Farm violated Executive Law §§809(2)(a) and 810(1)(e)(3) by failing to obtain a permit from the Agency prior to subdividing the Lewis Farm into sites by the construction of three new single family dwellings on its property in the Town of Essex, Essex County, located at the corner of Whallons Bay Road and Christian Road.

Second Violation - Subdivision under the Rivers Act

43. Pursuant to 9 NYCRR §577.5(c)(1), a permit is required from the Agency prior to any subdivision into sites of Resource Management lands in a river area.

44. Lewis Farm violated 9 NYCRR §577.5(c)(1) by failing to obtain a permit from the Agency prior to subdividing the Lewis Farm into sites by construction of three new single family dwellings on its property in the Town of Essex, Essex County, located at the corner of Whallons Bay Road and Christian Road.

Third Violation - New Dwellings under the
Adirondack Park Agency Act

45. Pursuant to Executive Law §§809(2)(a) and 810(2)(d)(1), a permit from the Agency is required prior to the construction of a single family dwelling on Resource Management lands.
46. Respondent is committing three separate violations of §§809(2)(a) and 810(2)(d)(1) by failing to obtain a permit from the Agency prior to constructing three new single family dwellings on its property in the Town of Essex, Essex County. The pre-existing dwelling was not removed prior to construction of the three new dwellings and hence a permit was required for all three; the "replacement" non-jurisdictional option did not apply (9 NYCRR §573.6[e]). However, as staff did not include the third dwelling in its Notice of Apparent Violation, the Agency will decline to include that particular violation in its determination of an appropriate civil penalty.

Fourth Violation - New Dwellings under Rivers Act

47. Pursuant to 9 NYCRR §577.5(c)(1), a permit from the Agency is required prior to the construction of a single family dwelling on Resource Management lands in a river area.
48. Lewis Farm committed three separate violations of Executive Law 9 NYCRR §577.5(c)(1) by failing to obtain a permit from the Agency prior to constructing three new single family dwellings on its property in the Town of Essex, Essex County. In a designated river area, the replacement of a preexisting dwelling will require a permit unless the new dwelling is located "on the same foundation or same location"; it is not sufficient for the replacement structure to be in the "same immediate vicinity" (see and compare 9 NYCRR 573.6[a] with 577.7[b]). In this case, none of the three new dwellings was located "on the same foundation or same location" as the pre-existing dwelling and hence all required a permit under 9 NYCRR §577.5(c)(1). However, as staff did not include the third dwelling in its

Notice of Apparent Violation, the Agency will decline to include that particular violation in its determination of an appropriate civil penalty.

Resolution of the Matter

The Enforcement Committee makes the following determination with regard to disposition of the above violations, which will finally resolve the violations:

- (1) Lewis Farm will apply for a permit for the three new dwellings and the 4-lot subdivision into sites (including retained "lot") by April 14, 2008, by submitting the appropriate major project application.
- (2) By April 28, 2008, Lewis Farm will also submit the following to the Agency:
 - (a) a detailed description of the use of each dwelling and connection to the Lewis Farm agricultural operations;
 - (b) an as-built plan for the septic system and an evaluation by a NYS licensed professional engineer as to whether the installed septic system for the three dwellings complies with NYS Department of Health and Agency standards and guidelines;
- (3) Lewis Farm will reply to any additional information request within 30 days of receipt.
- (4) Lewis Farm will retain all rights of appeal in the project review process, but forgoes the right to challenge Agency jurisdiction and the review clocks otherwise applicable.
- (5) Lewis Farm or its employees shall not occupy the three new dwellings located on the corner of Whallons Bay Road and Christian Road unless and until an Agency permit is issued and the civil penalty paid.
- (6) By April 28, 2008, Lewis Farm will pay a civil penalty of \$50,000 to the Agency.

- (7) Agency staff is directed to review the application for the three dwellings and the subdivisions promptly, towards the goal of issuing the after-the-fact permit in time for farm worker occupancy of the dwellings for the 2008 growing season. However, that can only happen if the Respondent responds immediately and favorably to this determination and submits the required information and penalty. The Agency will not proceed with review of the application unless and until the civil penalty is paid, the information requested above is submitted, and the dwellings remain vacant until approval is issued.

DATED: Ray Brook, New York
March 25, 2008

ADIRONDACK PARK AGENCY

BY:

Cecil Wray
Cecil Wray
Chair, Enforcement Committee

EXHIBIT B

STATE OF NEW YORK
SUPREME COURT : COUNTY OF ESSEX

CUP

LEWIS FAMILY FARM, INC.,

Plaintiff,

-against-

NEW YORK STATE ADIRONDACK PARK
AGENCY,

Defendant.

NOTICE OF ENTRY

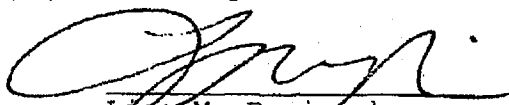
Index No. 0498-07
RJI No.: 15-1-2007-0153

Hon. Kevin K. Ryan

PLEASE TAKE NOTICE that the Decision and Order of the Supreme Court, County of Essex, regarding the above-captioned matter, signed August 16, 2007 by the Honorable Kevin K. Ryan, Acting Justice of the Supreme Court, denying plaintiff's motion for a temporary restraining order and further injunctive relief and granting defendant's motion to dismiss the complaint, a copy of which is attached hereto, was filed and entered in the Essex County Clerk's Office on August 29, 2007.

Dated: August 31, 2007

ANDREW M. CUOMO
Attorney General of the
State of New York
Attorney for State Defendant



Lisa M. Burianek
Assistant Attorney General
of Counsel
N.Y.S. Department of Law
The Capitol
Albany, New York 12224
(518) 486-7398

2007 SEP 11 10:17 AM

07 SEP - 4 AM 9:56

At a term of the Supreme Court
of the State of New York, held
in and for the County of Essex,
at the Essex County Courthouse
in the Town of Elizabethtown,
on the 8th day of August, 2007.

P R E S E N T: HONORABLE KEVIN K. RYAN
Acting Justice, Supreme Court

STATE OF NEW YORK
SUPREME COURT COUNTY OF ESSEX

LEWIS FAMILY FARM, INC.,

Plaintiff,

-against-

NEW YORK STATE ADIRONDACK PARK
AGENCY,

Defendant.

DECISION AND ORDER
Index No. 0498-07
RJI #15-1-2007-0153

APPEARANCES: DAVID L. COOK, Esq., Attorney for the
 Plaintiff
 LORETTA SIMON, Esq., Assistant Attorney
 General, for the Defendant

RYAN, A.J.:

Pending before the Court is the plaintiff's amended order to show cause, dated July 13, 2007, and the defendant's cross-motion to convert the underlying declaratory judgment action into a petition under CPLR Article 78 and then dismiss the complaint. The Court has reviewed and considered the following: the amended order to show cause, dated July 13, 2007, the attached undated amended complaint, the amended affidavit of Barbara Lewis, sworn to July 3, 2007, the amended affidavit of Mark McKenna, sworn to July 3, 2007, and the

attorney's affirmation in support, by Joseph R. Brennan, Esq., of counsel to plaintiff's attorney, dated July 3, 2007, no exhibits were attached thereto, and the amended memorandum of law in support of the plaintiff's motion for a temporary restraining order and further injunctive relief. The Court has also considered the notice of motion by the defendant, dated August 1, 2007, the affirmation of John Banta, Esq., dated July 23, 2007, the affirmation of Sarah Reynolds, Esq., dated July 20, 2007, plus attached exhibits A through D, the affidavit of John L. Quinn, Environmental Program Specialist 3 with the defendant, sworn to July 23, 2007, plus attached exhibits A through C, and the affidavit of Douglas Miller, Enforcement Officer for the defendant, sworn to July 20, 2007, plus attached exhibits A through I, and the defendant's memorandum of law in support of the motion to dismiss the complaint. The Court has also considered the reply memorandum of law by the plaintiff, the undated affirmation of plaintiff's counsel in opposition to the defendant's motion to dismiss, the affidavit of Salim B. Lewis, sworn to August 7, 2007, the affidavit of Barbara A. Lewis, sworn to August 7, 2007, and the affidavit of Klaas Martens, sworn to August 6, 2007. In addition, the Court heard oral argument from counsel on the order to show cause and the motion to dismiss on August 8, 2007.

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The plaintiff has no objection to this action being converted to a petition under CPLR Article 78 and thus the relief is **GRANTED** pursuant to CPLR 5103(c).

The plaintiff's motion for a restraining order is denied and the defendant's motion to dismiss the petition is granted for the reasons stated herein.

The relevant facts of this case may be stated as follows: the plaintiff is a corporation which operates an organic farm located in the Town of Essex, which is in the Adirondack Park. In the fall of 2006, the plaintiff obtained a building permit from the Town of Essex to construct housing on the farm for workers. These houses consisted of a total of four modular units which the plaintiff obtained from a Canadian firm. The contract to install these four houses expired on June 30, 2007. Because the Town of Essex Code Enforcement Officer apparently told the project manager no permits were needed from the Adirondack Park Agency (hereinafter "the APA") the project manager did not seek any. After construction had already started, Mrs. Lewis had contact with a representative of the APA and was informed that the Farm did, in fact, need to apply for a permit. However, since construction had already started, the matter was referred to the APA's enforcement division.

Members of the staff at the enforcement division at the

APA sent a proposed settlement to the Farm which included the payment of a \$10,000 civil penalty prior to the APA considering an after-the-fact permit application. Over the course of the next several months, the Farm and the APA had numerous contacts in which the Farm repeatedly requested that the APA drop the civil penalty as part of the proposed settlement. The APA staff did not accede to that request.

While construction had halted in March 2007, after the APA informed the Farm a permit was needed for the construction, in the latter part of June 2007, construction re-commenced. The APA served the Farm with a cease and desist order but the Farm continued to build the farm workers' housing. The Farm commenced this law suit seeking a declaratory judgment that the APA had no jurisdiction over the farm workers' housing, or, if they did, that the Agriculture & Markets Law superceded the APA Act, and thus, no permit was needed to construct the houses.

The Court does not agree with the plaintiff's assertion that the APA has no authority over this building project. The area in which three of the houses, the particular houses which have been built, is located is defined as part of the Wild, Scenic and Recreational River System Act (Environmental Conservation Law §15-2701(1)). Under the Environmental Conservation Law, the APA has the authority to make and

enforce any regulations necessary to enforce the act (Environmental Conservation Law §15-2709(1)). The APA act, Executive law §810(2)(d), defines the building project as a class B project since it involves the construction of a single-family dwelling. Under the APA regulations, this building project constitutes a "subdivision" even though it is not a typical suburban subdivision. The plaintiff put up a dwelling on a parcel of land which already had either a dwelling or building, even though an already existing building might be removed after construction is completed (9 NYCRR 570.3(a)(3) and 573.6(e)).

The plaintiff argues that the houses are agricultural use buildings, which the APA does not dispute, but the plaintiff also claims these are exempted from the APA's control, citing Executive Law §810(1)(e)(8). However, when read in its entirety, that section does not support the plaintiff's interpretation. That section states that the APA has authority over "all structures in excess of forty feet in height, except agricultural use structures and residential radio and television antennas". Clearly, that exception was not meant to include every possible farm structure. If the Court were to accept the plaintiff's interpretation of that section, the APA could do nothing if a landowner built a cow barn within a few feet of the river.

Since the APA does have authority over this building project, the next issue is whether the Agriculture and Markets Law §305-a supersedes the APA authority. It does not. From a plain reading of that section, it applies only to local laws. Subdivision (1)(a) of that section states:

"Local governments, when exercising their powers to enact and administer comprehensive plans and local laws, ordinances, rules or regulations, shall exercise these powers in such manner as may realize the policy and goals set forth in this article and shall not unreasonably restrict or regulate farm operations within agricultural districts in contravention of the purposes of this article unless it can be shown that the public health or safety is threatened."

Thus, this section has no application to the Executive Law or the regulations promulgated by the APA pursuant to that law.

Lastly, this situation is not ripe for judicial intervention. While the plaintiff may not wish to proceed to a hearing before the APA commissioners, because that action may seem to submit to the jurisdiction of the APA or because of the timing of the building contract, that is clearly the next step in the process. This Court has only the

jurisdiction that the Legislature gave it over disputes involving the APA. It does not have concurrent jurisdiction over this situation (*Sohn v Calderon*, 78 NY2d 755, 766-767 (1991)). This Court's jurisdiction is limited to a review of the APA's actions under CPLR Article 78 (*Ibid.*). Otherwise, as the Court of Appeals pointed out in *Flacke v Onondaga Landfill Sys.*, 69 NY2d 355, 363 (1987), the Court condones a breach of the separation of powers between the branches of government.

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

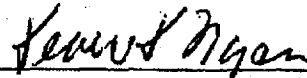
Finally, were the Court to consider the plaintiff's request for a restraining order, the plaintiff has not made out a case for irreparable damages. The only potential harmful consequences listed by the plaintiff involve monetary damage. The plaintiff has not demonstrated that any potential injury is so serious that a monetary award would not be sufficient compensation (*Norbrook Laboratories Ltd v C.G. Hanford Mfg. Co.*, 297 F.Supp.2d 463, 492 (Northern District of

New York, 2003) (citation omitted), affirmed 126 Fed.Appx. 507 (2005)).

The plaintiff's motion is **DENIED** and the defendant's motion to dismiss the underlying action is **GRANTED**.

IT IS ALL SO ORDERED.

E N T E R:



KEVIN K. RYAN
Acting Justice, Supreme Court

Dated: Plattsburgh, New York
 August 16, 2007