STATE OF NEW YORK
SUPREME COURT COUNTY OF ESSEX

LEWIS FAMILY FARM, INC.,

Petitioner,

-against-

ADIRONDACK PARK AGENCY,

Respondent.

ACTION NO. 1

Index No. 315-08
RJI No.: 15-1-2008-0109
Hon. Richard B. Meyer

ADIRONDACK PARK AGENCY,

Plaintiff,

-against-

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

Defendants.

ACTION NO. 2
COUNTERCLAIM

Index No.: 332-08
RJI No.: 15-1-2008-0117
Hon. Richard B. Meyer

LEWIS FAMILY FARM'S REPLY MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION FOR COUNSEL FEES AND EXPENSES PURSUANT TO ARTICLE 86 OF THE CPLR

John J. Privitera, Esq.
McNAMEE, LOCHNER, TITUS
& WILLIAMS, P.C.
Attorneys for Lewis Family Farm, Inc.
677 Broadway
Albany, New York 12207
Tel. No. (518) 447-3200
Fax No. (518) 426-4260

Of Counsel:

Jacob F. Lamme, Esq.
McNamee, Lochner, Titus & Williams, P.C.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

STATUTES:

MISCELLANEOUS:

PRELIMINARY STATEMENT

Having failed in its efforts to eviscerate the Right to Farm protections that are firmly embedded in the Park Act, the State now seeks a judicial modification of the Equal Access to Justice Act ("EAJA") that will intimidate experienced counsel from assisting impoverished and disadvantaged litigants and small business. This second effort to dismantle a carefully crafted statutory scheme must also fail.

The State conspicuously declines to discuss the Third Department's unanimous conclusions of law that unqualifiedly affirmed this Court's annulment of the Adirondack Park Agency's illegal, punitive determination. The Third Department, like this Court, found that the State's distorted reading of the Park Act and Rivers Act was contrary to the "clear statutory language" and the "clear and unambiguous statutory terms" set forth in the law. Lewis Family Farm, Inc. v. Adirondack Park Agency, 64 A.D.3d 1009, 1015, 882 N.Y.S.2d 782 (3d Dep't 2009). The Third Department gave no credence whatsoever to the Agency's position.[1]

The best evidence of the fact that the State's distorted reading of the law cannot be "substantially justified" is found in its decision to forego a procedural opportunity for review by the New York Court of Appeals after the unanimous Third Department decision. There is no better proof of a meritless argument than a high level decision to abandon its pursuit. The State's decision to fold is nothing short of a confession of error.

[1] Not only does the State turn away from the Third Department's unanimous and comprehensive affirmance of this Court, the State also pretends that the appellate affirmance never happened in stating that "...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.'" (See State's Memorandum in Opposition, pg. 14). Perhaps it is a bit more obvious that the Third Department found the law "clear and unambiguous" and that the Appellate Court declined to even entertain Judge Ryan's "different" advisory remarks, since this judicial exercise would be "academic." Lewis Family Farm, Inc. v. Adirondack Park Agency, 64 A.D.3d at 1016, *supra*.

It is respectfully submitted that this Court is obliged, upon this record, to signal to the State that the Agency's behavior in this case, which if successful would have destroyed the Lewis Family Farm, at least has the consequence of an Article 86 award.

STANDARD OF REVIEW

Article 86 is mandatory; this Court "shall" award reasonable fees unless the State carries the heavy burden of establishing that its meritless position, contrary to the clear and unambiguous terms of the law, was "substantially justified." CPLR § 8601(a).

The State claims it can carry this burden, inviting close judicial scrutiny of the true reason behind the Agency's unfounded, harmful prosecution of the Lewis Family Farm. The Agency forced the Lewis Family Farm to expend resources it does not have and suffocated the Lewis Family Farm with an illegal, (unbonded) cease and desist order against the use of critical farm business assets for three farm seasons. As such, this Court is invited to go behind the frail, irrational and conclusory affidavit offered by Mr. Cecil Wray to discover the true reason behind the unfounded, harmful prosecution of the Lewis Family Farm, which was based upon a distortion of the law that was so twisted it could have done irreparable violence to the open space plan set forth in the Park Act.

Notwithstanding the depth of inquiry this Court may choose, its decision is committed to sound discretion, with wide deference and latitude granted by the Appellate Courts. This Court's decision will be affirmed unless it is an abuse. As set forth below, a finding that the State's position was "substantially justified" would be an abuse of discretion in this case.

ARGUMENT

POINT I

THE STATE HAS FAILED TO DISTURB THE LEWIS FAMILY FARM'S SHOWING THAT IT IS ENTITLED TO FEES

The Lewis Family Farm has made a *prima facie* showing that it is entitled to a fee award under the EAJA because it is both a "party" and "prevailing party" in an action brought against the State. Thus, this Court is compelled to award counsel fees and costs, unless the State carries its heavy burden of proving that its position was "substantially justified or that special circumstances make an award unjust." CPLR § 8601(a) (emphasis supplied) (requiring that "a court ***shall*** award...").

A. The Lewis Family Farm is a "Party" Under the EAJA

The EAJA only defines "party" to include "any owner of an unincorporated business or any partnership, corporation, association, real estate developer or organization which had no more than one hundred employees at the time the civil action was filed". CPLR § 8602(d)(ii). Unlike its federal counterpart, the EAJA does not have a further requirement that limits recovery to businesses of a certain net worth. See 28 U.S.C. § 2412(d)(2)(B) (limiting recovery of counsel fees under the federal EAJA to businesses with a net worth less than $7,000,000). The Lewis Family Farm established that it is a "party" under the EAJA. (See Affidavit of Salim B. Lewis, sworn to August 13, 2009, ¶ 5).

The State's mere surmise and conjecture about the Lewis Family Farm's net worth is irrelevant and should be disregarded. (See State's Memorandum in Opposition, pg. 17) (guessing, without evidence, at the value of the farm houses at issue and speculating that "the value of Lewis Family Farm Inc. [sic], likely exceeds $1,000,000"). Even if the State's

unqualified speculation were true, the Lewis Family Farm would still fall within the protection of the more stringent federal EAJA. See 28 U.S.C. § 2412(d)(2)(B).

Moreover, the State misstates a *New York Times* article about this litigation—entitled "*A Bumper Crop of Bureaucracy*"—to argue that Salim B. Lewis, an officer of Lewis Family Farm, Inc., "is identified as a wealthy former Wall Street investment executive." (See State's Memorandum in Opposition, pg. 17, n.2).[2] Once again, the State ignores the well-established dichotomy between a corporate entity and its officers.[3] See Rapid Transit Subway Const. Co. v. New York, 259 N.Y. 472, 487 (1932); Rothermel v. Ermiger, 161 A.D.2d 1016, 1017 (3d Dep't 1990) (recognizing the fundamental legal principle that a corporation is an independent legal entity that is distinct from its shareholders). This case is not about Salim B. Lewis. The State's presumptions about his personal finances are improper and have no bearing on this motion.

B. The Lewis Family Farm is a "Prevailing Party" Under the EAJA

The State unconvincingly suggests that the Lewis Family Farm is not a "prevailing party" because "[t]he court did not address five of petitioner's claims...[and] found for the APA on two claims". (State's Memorandum of Law in Opposition, dated August 28, 2009, pg. 3). This tenuous argument ignores the Court of Appeals, which has held that "a party has 'prevailed' within the meaning of the State EAJA if it has succeeded in acquiring a substantial part of the relief sought in the lawsuit." NYS Clinical Lab. Ass'n v. Kaladjian, 85 N.Y.2d 346, 355 (1995).

---

[2] The *New York Times* article cited by the State does not discuss wealth, much less prove it; the article merely states that Salim B. Lewis, "a former Wall Street investment executive, is most likely the only farmer in the region wealthy enough to build large, comfortable houses for his workers." Danny Hakim, *A Bumper Crop of Bureaucracy*, NEW YORK TIMES, April 14, 2008, available at http://www.nytimes.com/2008/04/14/nyregion/14farm.html.

[3] The State's counterclaim in this litigation included claims against Salim B. Lewis and Barbara A. Lewis, officers of Lewis Family Farm, Inc., even though they were not parties to the administrative action. This Court dismissed the State's ill-advised claims against these individuals. See Lewis Family Farm, Inc. v. Adirondack Park Agency, 20 Misc.3d 1114, 867 N.Y.S.2d 375, 494 (Sup. Ct. Essex County 2008).

Here, there is no doubt that the Lewis Family Farm is the "prevailing party" in this litigation. The Lewis Family Farm commenced this Article 78 proceeding seeking that "an Order of this Court be entered vacating and annulling the March 25, 2008 Decision of Respondent Adirondack Park Agency". (See Amended Verified Petition, "Wherefore" clause, pg. 19). This is precisely the outcome of this litigation. The Lewis Farm sought annulment of the Agency's determination and prevailed. See Lewis Family Farm, Inc. v. Adirondack Park Agency, 22 Misc.3d 568, 868 N.Y.S.2d 481 (Sup. Ct. Essex County 2008), *aff'd*, 64 A.D.3d 1009, 882 N.Y.S.2d 762 (3d Dep't 2009). The State cannot undermine the Lewis Family Farm's resounding and decided victory in this matter by clinging to the irrelevant procedural fact that the Court dismissed or found academic certain causes of action. The Lewis Family Farm had an absolute right to plead multiple and alternative causes of action in its multi-faceted petition. See CPLR 3014.

Therefore, the State's attempt to discredit the Lewis Family Farm as a "prevailing party" under the EAJA must fail.

POINT II

THE STATE HAS FAILED TO MAKE A STRONG SHOWING THAT IT'S POSITION WAS "SUBSTANTIALLY JUSTIFIED"

The jurisprudence of the EAJA establishes that the State's position, which flies in the face of clear and unambiguous law, cannot be justified. The State's argument that its position was "substantially justified" is contradictory. First, it argues that it relied on "long-standing application of its statutes" and the August 16, 2007 Decision and Order of Hon. Kevin K. Ryan. (See State's Memorandum in Opposition, pg. 5; Affirmation of Loretta Simon, dated August 28,

2009, ¶ 5; Affidavit of Cecil Wray, sworn to August 24, 2009, ¶ 8).[4] Then it argues, as if its prosecution of the Lewis Family Farm was passive, that farm worker housing was a "case of first impression." (See State's Memorandum in Opposition, pp. 12-13). This does not justify—let alone substantially justify—the State's position in this action.

The State has failed to establish that its twisted reading of the Park Act's clear and unambiguous definitions—along with its failure to acknowledge its constitutional and statutory obligation to protect agriculture—was "substantially justified". Therefore, as a matter of law, the Lewis Family Farm is entitled to an award of counsel fees. See Matter of Simpkins v. Riley, 193 A.D.2d 1009, 1010 (3d Dep't 1993) (holding that the State's twisted reading of an unambiguous regulation prohibited a finding of substantial justification under the EAJA).

A. The Affidavit of Cecil Wray is Conclusory, Illogical, Incomplete, Disingenuous and Falls Far Short of Carrying the State's Heavy Burden of Establishing That its Legal Position Was Substantially Justified

The State seeks to carry its heavy burden of proving substantial justification through a short affidavit of Cecil Wray, Esq., the Chairman of the Agency's Enforcement Committee at the time that the punitive Administrative Determination was made against the Lewis Family Farm.[5] However, Mr. Wray's casual statement that he "thought" the Agency's position was correct is not enough to prove substantial justification. (See Wray Aff., ¶ 6). Mr. Wray ignored volumes of

---

[4] The State claims that it "could not foresee or predict" that this Court would issue a "second" decision on the merits in this case and reach a conclusion opposite of Judge Ryan. (See State's Memorandum in Opposition, pp. 11-12). This is impossible. As this Court previously found, the State knew full well that Judge Ryan's opinion dismissing the premature Article 78 proceeding was not dispositive. See Lewis Family Farm, Inc. v. Adirondack Park Agency, 20 Misc.3d 1114A, 867 N.Y.S.2d 375 (Essex Co. Sup. Ct., July 2, 2008) (recognizing that "[t]ime and again, the Agency's counsel stated to the [Judge Ryan] court that there was no final determination and that Lewis Farm had to await such a determination before it could properly seek judicial review)". As such, the State was grossly negligent in relying "'heavily' on Justice Ryan's endorsement of the Agency's jurisdiction." (See State's Memorandum in Opposition, pg. 16).

[5] The State's position is conspicuously unsupported by anyone on the Agency's legal staff who established the Agency's unjustifiable position in this case.

New York Law and has failed even to attempt to harmonize the State's position with the following seven (7) aspects of New York Law:

1. The Park Act's Open Space Plan;
2. The Park Act's legislative directive to not regulate farming;
3. The Department of Agriculture's legal advice;
4. The New York State Constitution's Farm Conservation Clause;
5. The Right-to-Farm Law's statutory mandate to maintain a pro-farm development policy;
6. The binding Determination by the Department of Agriculture under the Right to Farm Law in this case; and
7. The Federal and State tax laws.

(See Lewis Family Farm's Memorandum of Law in Support of its Motion for Counsel Fees dated August 13, 2009, pp. 9-15).

Mr. Wray makes no mention of these important, well-established strands of New York Law that, woven together, provide a consistent fabric of protection for farm worker housing. The State simply ignores these principles of New York Law in its opposition, without response.

Thus, it can scarcely be said that Mr. Wray has carried the State's burden of showing that the Agency's position was "substantially justified" when he declines to respond to these seven points, most of which were discussed by the Third Department when it affirmed this Court's annulment of the Agency's illegal Administrative Determination. Lewis Family Farm, Inc. v. Adirondack Park Agency, 64 A.D.3d at 1013-15. Mr. Wray also cannot say he was unaware that the Agency's position ran contrary to these seven points of law, because this law was briefed for him by the Lewis Family Farm on January 22, 2008 and personally served upon him, two months before the Agency's decision was made. (R. 277-324).

1. Mr. Wray's "First Impression" Defense is Without Merit

Mr. Wray maintains that "this was an enforcement case of first impression for the Agency" giving the false impression that he sat as a neutral arbiter, as this Court does, to decide an unprecedented matter. (See Wray Aff., ¶ 3). Mr. Wray was neither neutral nor passive in his decision making. Of course, it would be a case of first impression if the Agency decided to penalize a farmer for building a barn that was of unsuitable color; it would be a case of first impression for the Agency to punish another farmer for building a silo of unsuitable height, it would be a case of first impression to demand that a farmer not till a field; it would be a case of first impression to regulate buildings in a hamlet; it would be a case of first impression for the Agency to take any number of steps that are contrary to the clear definitions and structure of the Park Act. The Agency's conduct here is more accurately described as an unprecedented prosecution.

However, simply being an unprecedented prosecution did not grant the Agency authority to adopt a position contrary to the Park Act, the Rivers Act, the New York State Constitution and Right to Farm Law. See Meinhold v. United States DOD, 1997 U.S. App. LEXIS 35603 (9th Cir. Dec. 18, 1997) (stating that "[i]f the government's position violates the Constitution, a statute, or its own regulations, a finding that the government was substantially justified would be an abuse of discretion.") (citing Mendenhall v. Nat'l Transp. Safety Bd., 92 F.3d 871, 874 (9th Cir. 1996)).

To be sure, the Agency's prosecution of the Lewis Family Farm was a new excursion into uncharted waters, a reach for jurisdictional authority beyond the bounds of the laws, a new abuse of authority unguided by articulated policy, but it was not passive. See Russell v. Nat'l Mediation Bd., 775 F.2d 1284, 1290-91 (5th Cir. 1985) (rejecting the government's "special

circumstances" argument because the government's "novel" interpretation was not credible). The Agency's clearly improper position must have consequences.

Mr. Wray signed a punitive Administrative Determination that (i) demanded treatment of the three farmworker houses in this case as a four lot, residential subdivision; (ii) directed the Lewis Family Farm to subject itself to the jurisdiction of the Agency on all matters; and (iii) penalized the Lewis Family Farm an exorbitant fine of $50,000.00. (R. 7-22). As this Court found and the Third Department held, the Administrative Determination was such an egregious error of law that the entire Determination was annulled. Thus, the State's effort to describe the Agency's illegal action as a passive "case of first impression" is actually a false impression and scarcely carries the day in sustaining the heavy burden of showing that the Determination was "substantially justified".

Mr. Wray also states that he was "aware that the Agency had issued permits for farmworker housing in resource management in the past," which is a remarkable assertion untethered to anything in the record before this Court.[6] More importantly, at the time that Mr. Wray signed the Agency's punitive Administrative Determination, he told *The New York Times* that he could not remember the Agency ever having issued a permit for farmworker housing, thus casting considerable doubt upon his current sworn statement.[7]

---

[6] Article 86 provides that this Court's determination as to an attorney fee award must be made solely on the basis of the administrative record. See CPLR § 8601(a).

[7] Mr. Wray's current claim is in stark contrast to his position as he described it to *The New York Times*:

> "Officials at the park agency appeared to be unclear if the action they were taking was setting a precedent. Cecil Wray, the commissioner who presides over the agency's enforcement committee, could not recall if the Adirondack Park Agency had ever required a farmer to have a housing permit. 'I can't answer the question,' said Mr. Wray, a Manhattan lawyer. 'I simply don't know if we've had applications for those or not. Not in my memory, but my memory is fallible.'"

See Danny Hakim, *A Bumper Crop of Bureaucracy*, NEW YORK TIMES, April 14, 2008, available at http://www.nytimes.com/2008/04/14/nyregion/14farm.html.

Mr. Wray also maintains that "the Agency had never before encountered the claim advanced by Lewis Family Farm." (See Wray Aff., ¶ 3). This assertion is disingenuous in suggesting that the Lewis Family Farm was a lone voice in the wilderness at the time the punitive Determination was made. This is not the case. The Commissioner of the Department of Agriculture wrote the Agency in November 2007, demanding that the Agency read the Park Act as written to exempt agricultural use structures, including farmworker housing. (R. 510-12). Later, on February 1, 2008, after a full factual investigation by his Department, the Commissioner made a finding that the very houses at issue in this proceeding were a sound agricultural use as a matter of fact and law. (R. 541-43).

Based on the foregoing, the State has failed to establish that its position was "substantially justified" simply by alleging that this was "a case of first impression".

2. The Wray Affidavit is Not Logical

Mr. Wray, a member of the New York Bar and a member of the Agency's Board, does not offer a legal opinion of any substance. Indeed, his affidavit is illogical on its face. He admits that "agricultural use structures" are exempt from APA jurisdiction and the permitting process, yet he states, "No exception from this permitting requirement is provided for single family dwellings based on their use as ***agricultural use structures***." (See Wray Aff., ¶ 6 and n. 1) (emphasis added). Having finally conceded that a single family dwelling may be an "agricultural use structure," as here, Mr. Wray's sworn statement fails to explain why such a structure could lose the exemption. Thus, the statement is not logical and no reasonable person may accept it.

Mr. Wray makes no mention of the statutory definitions of "agricultural use structure" or "structure," which includes single family dwellings. See N.Y. Exec. Law §§ 802(8) and 802(62). Nor does he shed any further light on the Agency's irrational opinion. Mr. Wray merely states

only that he "thought that the law was clear". (See Wray Aff., ¶ 6). The law *was* clear and *it is* clear, as this Court and five justices of the Third Department found.

The State's own affidavits contradict themselves in endeavoring to show substantial justification for its meritless position. That is, Mr. Wray contends that its case against the Lewis Family Farm was a case "of first impression," yet the State affirms that "the APA was substantially justified in relying on long-standing application of its statutes" (Compare Wray Aff., ¶ 3 with Affirmation of Loretta Simon, dated August 28, 2009, ¶ 5). This is illogical.

Indeed, Mr. Wray must have finally agreed with every jurist that has reviewed the merits[8] of the APA's legal position, because the Agency declined to seek review in the New York Court of Appeals. There is no better evidence of the lack of substantial justification in a legal position than a defeated party's election to abandon its pursuit.

Finally, Mr. Wray's affidavit is not logical because it opposes the attorney fee award in this case even though it would have been more than three times larger if his firm had handled it.[9]

---

[8] Mr. Wray claims he relied upon Judge Ryan's discredited, superficial advisory opinion in June 2007. This is not a reasonable position for an experienced lawyer to take, even if it is true. Before Judge Ryan's remand order was entered, the Agency had issued an unbonded cease and desist order to the Lewis Family Farm and had demanded a penalty from the Farm. Since Mr. Wray is the Chair of the Board's Enforcement Committee, he would have been aware of the enforcement activities against the Farm and would have ratified them well prior to Judge Ryan's remand order, in the normal course of Agency business. See Privitera Aff. ¶ 27 and Ex. "C" thereto. If this Court has any doubt as to this proffer, and is inclined to give weight to the Wray statements in this regard, a hearing should be held at which Mr. Wray's knowledge and opinion is tested on the stand. In any event, counsel for the Lewis Family Farm reminded Mr. Wray that the *dicta* in Judge Ryan's remand order was not a finding on the merits as a matter of law during the administrative hearing on March 13, 2008, before the Agency issued its Administrative Determination that was annulled by this Court. (R. 64). No reasonable attorney can show that he or she is substantially justified in relying upon unreasoned *dicta* that contradicts the text of the Rivers Act, as Judge Ryan did, as a determination of the merits. See also, fn 4, supra.

[9] Counsel for the Farm is a senior partner and experienced litigator. Mr. Wray's firm, Debevois & Plimpton, LLP, charges over $1,000 per hour for an attorney of similar experience, more than three times Mr. Privitera's below market rate of $300 per hour. See Privitera Aff. ¶ 33; Valero Aff., ¶ 7.

3. The Wray Affidavit Misrepresents the Record

In opposing the Lewis Family Farm's motion for an award of counsel fees, Mr. Wray misrepresents the record. He swears that "The material facts in this matter were not disputed." (See Wray Aff., ¶ 4). This is untrue. The State has contested the facts of this case throughout the pendency of this litigation. Indeed, prior to the oral argument in the Appellate Division,[10] the Agency placed many facts in question, forcing the Lewis Family Farm to incur extraordinary legal fees and expenses in order to prove the truth.

First, the Agency refused to accept Barbara Lewis's initial representations that the residences at issue were constructed to house farm employees. Rather than conduct a factual hearing on the matter, the Agency insinuated that the houses at issue were too nice for farm workers. That is, even though the cluster of modular homes with common utilities by the barns clearly was not vacation homes or guest houses, the Agency disbelieved Barbara Lewis. This forced counsel for the farm to assist Barbara Lewis in the preparation and submission of an Affidavit, which proved that the farm houses were, in fact, for farm workers. (R. 326-34) (Lewis Aff. of 1/17/08).

Second, the Agency engaged in arbitrary, irrational decision making as it constantly changed its factual position throughout 2007 and 2008 as to which of the four (4) Lewis Family Farm worker houses were "replacement" houses that did not need a permit from the Agency. The undisputed record indicates that the Lewis Family Farm demolished at least fifteen (15) dilapidated farm houses that were broken and beyond repair. (R. 327). Instead of treating the four farm worker houses as legal replacements of existing homes, as the Agency was entitled to do, the Agency staff ignored one of the new homes, deemed one home a replacement and

[10] It was not until May 27, 2009, during oral argument before the Appellate Division, Third Department, that the State finally conceded that this case involved pure questions of law.

regarded the other two at the site of the old Walker Farm as illegal single family dwellings. (See Agency's Notice of Apparent Violation, R. 85).

Later, Mr. Wray's Administrative Determination made a finding of fact that all three of the farm worker houses in the cluster by the barns were illegal, without reference to, or a hearing upon, the history of the Walker Farm. This perplexing finding of fact, which the Lewis Family Farm had generally disputed, has no basis in the record. (See R. 12-13).

Next, the Agency alleged that the modular farm worker housing cluster on the Lewis Family Farm was a subdivision as a matter of fact and law under the Park Act and the River's Act. See N.Y. Exec. Law § 8092(a) and 8101(e)(3) and River's Act, 9 NYCRR § 577.5(c)(1). This forced the Lewis Family Farm to prove that no subdivision had occurred as a matter of New York Real Estate Law because the Farm is one parcel, and since the three houses share a well, are serviced by a common driveway, a common septic field and a planned common courtyard, no subdivision had occurred. Lewis Aff. ¶ 14 (R. 329). Despite focusing on this argument intently at the administrative level and in defense of the Article 78 petition, the State abandoned its subdivision argument on appeal; but not until the Lewis Family Farm had extensively litigated the issue.

Later, the Honorable Patrick Hooker, Commissioner of the New York Department of Agriculture and Markets made findings of fact and conclusions of law that the farm worker housing constructed by the Lewis Family Farm had not been subdivided, was not subdivideable and was an agricultural use of the land. Notwithstanding these contested facts, Mr. Wray made a finding that the Lewis Family Farm had created a four lot residential subdivision. (R. 541-43).

Finally, after this Court annulled the Agency's illegal Administrative Determination, the State decided to substantially increase the Lewis Family Farm attorney's fees and expenses by

falsely alleging that the Lewis Family Farm's modular farm worker housing cluster posed a threat to the environmental quality of the Boquet River and that its common septic system violated New York's health laws. (See Privitera Aff., ¶ 21 and Ex. A thereto).

Of course, the Adirondack Park Agency has absolutely no regulatory authority over the water quality in New York State because its jurisdiction is no more than that of a "local planning board and a local zoning entity." See Hunt Brothers v. Glennon, 81 N.Y.2d 906, 909 (1993). In addition, the Adirondack Park Agency has absolutely no regulatory authority over the health laws, either. Thus, not only did the Agency illegally endeavor to extend its jurisdiction over environmental permitting matters and health laws, it forced the Lewis Family Farm to retain the services of the professional engineers who had designed and installed the septic system for the farm houses, in order to disprove these overreaching, false allegations. See Privitera Aff., Ex. A. The Third Department ignored this scurrilous effort to create a false impression to the Court that an environmental or public health issue was at stake, but Mr. Wray misrepresents this dispute in suggesting that the Lewis Family Farm never had to contest any facts.

Thus, upon this record, Mr. Wray's representation that no facts were at issue in this case cannot be sustained.

B. The Agency Abused its Authority in Prosecuting the Lewis Family Farm

The Agency should have stayed within the bounds of the law but decisively leaped beyond the edges of New York Law to such an extreme that it threatened to destroy the economic sustainability of the Lewis Family Farm.

The Agency's actions in this case are clearly abusive in light of Mr. Wray's concession that the Lewis Family Farm modular housing cluster was "fully permittable" as is, and where is, with no change to any of the structures. (See Wray Aff., ¶ 5). If the Agency behaved within the

bounds of its authority as a land use board, it would have accommodated the housing rather than issuing an illegal directive to treat the housing as a residential subdivision of three homes and submit, perennially, to the jurisdiction of the Agency over all future farm development. (R. 21).

The Agency asserted imperious law enforcement and prosecutorial power rather than land use regulatory responsibilities. Having determined that the homes were "permittable," as Mr. Wray swears, the Agency should have permitted them without penalty, just as any reasonable land use and zoning board would have done. If the Agency recognized itself as a land use agency, it would have understood that the Court of Appeals decision in Town of Lysander v. Hafner, 96 N.Y.2d 558, 563 (2001), should be understood the way the rest of New York State's land use boards understand it: the right to farm prevents any regulation of farm worker housing by a land use board.

In addition, if the Agency truly regarded the homes as "permittable" as it now swears, (see Wray Aff. ¶ 5), then it should have embraced them as "replacement houses" or non-jurisdictional homes within the Hamlet of Whallonsburg, (see Privitera Aff., ¶¶ 36-40 and Ex. G thereto), rather than forcing the Lewis Family Farm to incur counsel fees and expenses challenging the Agency's baseless actions.

The Agency could have avoided this dispute. Instead, it ignored well-established law and unambiguous constitutional and statutory directives and forced the counsel fees at issue. The State defends its position with a statement from an Agency Board member who merely states that he thought he was right. (See Wray Aff., ¶ 6). Clearly, the Agency trusted that its traditional reliance upon the imbalance of power between itself and residents of the Park would force the Lewis Family Farm to crumble and fold. (See generally, Affidavit of Howard Aubin).

The Lewis Family Farm did not fold, and now, it is entitled to an award of counsel fees pursuant to Article 86 of the CPLR, which was designed to rebalance the power in unjustified litigation.

C. The State's Legal Position Cannot be Justified Because the Agency Lacks a Mandatory Policy Foundation

The State continues to have no answer for the Agency's failure to have a policy encouraging farming inside the Adirondack Park. The Legislature requires that ***all*** New York State agencies, including the Agency, must create or modify their policy documents to support farm development within the state. The law provides:

> 3. Policy of State Agencies. It shall be the policy of all State Agencies to encourage the maintenance of viable farming and agricultural districts and their administrative regulations and procedures shall be modified to this end . . .

N.Y. Agric. & Mkts. Law § 305(3) (McKinney 2004).

As the Agency admits on its website, a policy document is a broad written statement of principles that provides guidance for decision making by identify factors that describe the limits within which a decision must be made.[11] The Agency was asked in a January 2008 administrative filing by the Lewis Family Farm to develop an agriculture policy, as required by the Right to Farm Law, before prosecuting a farmer. (R. 277-324). Yet, even after the Third Department's decision affirming this Court's annulment of the illegal Administrative Determination, the Agency is still violating § 305(3) because it still does not have a policy document on agriculture in the Park.

See generally, http://www.apa.state.ny.us/documents/policies.html.

This ongoing violation of law reflects the Agency's lack of respect for the rule of law. A well-written, reasoned agriculture policy document discussing the broad agricultural use exemptions set forth in the Park Act and Rivers Act likely would have prevented this entire

[11] See http://www.apa.state.ny.us/Documents/Policies.html (last visited September 21, 2009).

matter from occurring. Instead, the Agency's staff was allowed to attack the Lewis Family Farm without a sound policy foundation consistent with § 305 of the Right to Farm Law. This behavior cannot possibly be substantially justified.

POINT III

THE STATE'S ATTEMPT TO REDUCE THE AMOUNT OF PETITIONER'S FEE AWARD MUST FAIL

A. Counsel's Communication With the Lewis Family Farm Was Necessary to Competent, Ethical Representation

The State argues that this Court should not grant the full award of attorneys fees to the Lewis Family Farm because it believes that counsel to the Lewis Family Farm spent too much time communicating with the farm's representatives. This fails to acknowledge counsel's professional obligations. The State apparently is unaware of the new Code of Professional Responsibility, which undersigned counsel worked on as a member of the New York State Bar Association's House of Delegates. The Code of Professional Responsibility 22 NYCRR Part 1200; Rule 1.4: "**Communication,**" provides as follows:

> (a) A lawyer shall:
>
> (1) promptly inform the client of: (i) any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(j), is required by these Rules; (ii) any information required by court rule or other law to be communicated to a client; and (iii) material developments in the matter including settlement or plea offers.
>
> (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
>
> (3) keep the client reasonably informed about the status of the matter;
>
> (4) promptly comply with a client's reasonable requests for information; and
>
> (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by these Rules or other law.
>
> (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

See Code of Professional Responsibility, 22 NYCRR Part 1200 (Rule 1.4).

As a Member of the Bar and Officer of the Court, undersigned counsel is compelled to respect, obey and honor Rule 1.4. As such, the Lewis Family Farm was provided with full and adequate legal advice throughout every step of this litigation so that it could make informed decisions. (See Privitera Aff., ¶¶ 17-18).

Thus, the rule that the State wishes this Court to fashion, which would send a strong signal to all those lawyers who might dare to help the disadvantaged, impoverished, disenfranchised and small businesses who may wish to stand firm against the gale of erroneous and oppressive governmental action, is to disrespect and dishonor the professionalism that is demanded by Rule 1.4.

If this Court determines that communication with a client cannot be the subject of an award of attorney's fees, it is a strong signal, if not a directive, to all lawyers who may stand with such clients against the gale. They must sacrifice their professional obligations. More specifically, the State wishes to fashion a rule through a decision by this Court that diminishes, rather than elevates, the level of professional practice that is afforded the impoverished, which is already at stake.[12] The Lewis Family Farm respectfully submits that the Court should not honor the State's unprofessional purpose in pressing its argument against the professional obligations and values embraced by Rule 1.4.

B. The State's Contention That the Lewis Family Farm's Counsel Spent Too Much Time on This Case is Wrong and Meaningless Unless it is Supported by a Factual Submission by the State's Nine or More Lawyers

In the experience of the two attorneys for the Lewis Family Farm, the defense of the State's prosecution of the Farm in this matter was extremely efficient and fair. Many law firms would have had three or four, if not more, lawyers working on the case. Indeed, if this Court has

[12] See Generally, New York State Bar Association New York Legal Needs Study, 1993.

any doubt about the fairness of the number of hours incurred by the Lewis Family Farm's two attorneys on this matter, a factual hearing should be held to determine how much time the State's nine or more lawyers spent on the case. By questioning the scope of legal services provided to the Lewis Family Farm, the State has invited scrutiny into the scope of the services that its attorneys provided throughout this litigation.

At least nine (9) State lawyers worked on this case against the Lewis Family Farm. (See Privitera Aff., ¶ 24). Their hours should be set forth in an affidavit or the subject of a hearing if this Court is to entertain the unsupported assertion that Jacob Lamme and John Privitera spent too much time on this case.

C. The Time Spent by the Lewis Family Farm in Responding to Press Inquiries is Appropriately Compensated

The Lewis Family Farm was not supported in the defense of the Agency's baseless prosecution by press agents, communication managers, spokespersons and other experts like those that were used by the State. Indeed, there can be no doubt that the nine (9) or more lawyers who worked for the State on this case spent time briefing their spokespersons, media managers and public relations experts in dealing with the substantial interest of the press on this matter. (See Privitera Aff. ¶¶ 8-9).

The full meaning of the First Amendment is not fulfilled if counsel snubs the press. Counsel has an obligation, in the best interest of his or her client, to respond to press inquiries within the bounds of the rules of professional conduct. Rule 3.6 guides a lawyer's conduct in dealing with the press; certainly it cannot be said that dealing with the press in compliance with these rules, as to which there is no doubt upon this record, is *per se* an unreasonable use of an attorney's time. Indeed a client is entitled to rely upon his or her counsel to make sure that the press accurately conveys a complete and correct description of a legal proceeding.

This legal proceeding was very complex because the countersuit filed by the State and the many collateral motions that it filed. If this Court is inclined to consider the possibility that all responses by counsel to the Lewis Family Farm to the press inquiries were *per se* unreasonable, we ask the Court to hold a hearing and determine if any of the Respondent's nine or more attorneys had any contact whatsoever with their respective, paid spokespersons when the press inquired and, if so, how much time was devoted to the issue. (See Privitera Aff. ¶¶ 7-9).

D. The State EAJA Differs Materially From the Federal EAJA in Trusting the Court's Discretion Regarding the Reasonableness of Fees Rather Than Setting Benchmarks

The federal and state Equal Access to Justice Acts (EAJA) are similar in their thrust and purpose, though they differ in ways material to this Court's determination. The object of the statute is to counter economic barriers that might deter individuals from seeking review of government decisions by allowing an award of attorney's fees to successful litigants. Trichilo v. Sec'y of Health & Human Svcs., 823 F.2d 702, 704 (2d Cir. 1987). However, the texts of the federal and state statutes differ considerably on at least one issue that is material to this Court's disposition of the pending motion. Specifically, the federal system provides for a statutory method of determining a reasonable hourly rate that, as of last year, was $210.00 per hour for an experienced attorney. See generally, Parsons v. Commissioner of Social Security, 2008 U.S. Dist. LEXIS 99739 (N.D.N.Y. Dec. 10, 2008). However, the New York Legislature made a deliberate decision not to index the definition of a "reasonable rate" under the New York State EAJA. Rather, a determination of reasonableness is subject to the sound discretion of this Court, which generally will not be disturbed upon review. See Matter of Simpkins v. Riley, 193 A.D.2d 1009, 1010-11 (3d Dep't 1993); Matter of Perez v. NYS Dep't of Labor, 259 A.D.2d 161, 163 (3d

Dep't 1999); Matter of Barnett v. NYS Dep't of Soc. Svcs., 212 A.D.2d 696, 697 (2d Dep't 1995).

According to federal case law, which may be used as a guide by this Court in considering the "reasonableness" of an award of fees, though not the rate, the Court should ascertain whether "a paying client would be willing to pay" the fee. Arbor Hill Concerned Citizens Neighborhood Ass'n v. County of Albany, 552 F.3d 182, 190 (2d Cir. 2008). This case and the standard cited therein, is referred to in Alexander v. Cahill, which was cited by the Respondent in opposing the motion. Alexander v. Cahill, 2009 U.S. Dist. LEXIS 29165 (March 30, 2009).

As applied here, the Lewis Family Farm meets the Arbor Hill test. The State has provided absolutely no factual basis upon which to establish that the Lewis Family Farm is not willing to pay the rates of John Privitera ($300 per hour) and Jacob Lamme ($150-$175 per hour). See generally Lewis Aff. Indeed, not only has the Lewis Family Farm provided affidavits establishing beyond any doubt that it is willing to pay these fees, the Affidavit of Mr. Lewis establishes that the Lewis Family Farm is obliged to pay the fee.

The State, relying on a single outdated (2004) survey, argues that the Lewis Family Farm should have settled for Upstate New York counsel charging the median rate of $150. (See Simon Aff., ¶¶ 17-18). This argument dangerously impedes on the Lewis Family Farm's right to choose its own counsel. The State certainly cannot limit the Lewis Family Farm's choice of counsel to those practicing in Essex County or willing to work for such rates. Indeed, had it chosen to, the Lewis Family Farm could have retained counsel in New York City, such as Mr. Wray's firm, which charges more than $1,000 per hour. (See Privitera Aff., ¶ 33).

E. The State's Apparent Position that the Lewis Family Farm Should Have Used Counsel From Within the Adirondack Park Raises Matters of Deep Concern

Not only is the McNamee Law Firm reasonably located (opposing counsel was also located in Albany) to facilitate efficient communications, paper exchanges, service of process and appearances before the Third Department, but there is serious doubt as to the availability of zealous counsel inside the Blue Line for matters involving the Agency. (See Aubin Aff., ¶¶ 6-8).

In any event, the State's attempt to reduce the rates of the Lewis Family Farm's counsel must fail, as it is unsupported by the Simon Affirmation. The Lewis Family Farm submits the Affidavit of Jorge Valero to establish the reasonableness of the Farm Counsel's fees, which are actually below current market value, and thus *per se* reasonable under the State EAJA. (See Valero Aff., ¶ 7). Likewise, the Affidavit of Ronald Briggs, a long-time practicing attorney in Essex County, establishes that the fees charged to the Lewis Family Farm in this matter are reasonable and below what may normally be charged in the region. (See Briggs Aff., ¶ 8).

Based on the foregoing, the State's arbitrary and unsupported argument that the fees charged to the Lewis Family Farm are unreasonable must be denied.

F. The State's Other Efforts to Reduce the Lewis Family Farm's Counsel Fees Award Are Without Merit

Having failed to articulate substantial justification for its position in this case, the majority of the State's opposition to the Lewis Family Farm's motion to recover counsel fees pursuant to Article 86 of the CPLR involves insignificant nitpicking about various items contained in the Lewis Family Farm's legal bill. The State's objections are without merit.

First, the State argues that the Lewis Family Farm is not entitled to recover fees for defending against the State's baseless enforcement complaint (Index No. 332-08) because Article 86 limits recovery to actions in which the State is the defendant. (See State's Memorandum in

Opposition, pg. 19). This argument is without merit. On May 30, 2008, this Court issued an order consolidating the State's baseless enforcement action with the instant Article 78 proceeding. This Court expressly stated that "[t]he action commenced by the Park Agency will be deemed a counterclaim, as indicated in the caption." See Court's Decision and Order, dated May 30, 2008. The State never objected to this order. Thus, the law of the case dictates that all counsel fees in the consolidated actions are available for recovery under Article 86.

Second, the State argues that the Lewis Family Farm should not be able to recover fees for the "illegal *ex parte*" stay that it obtained at the commencement of this litigation. (See State's Memorandum in Opposition, pg. 19). This too is without merit. The Lewis Family Farm commenced this special proceeding by order to show cause, the requirement of which required counsel to travel to Elizabethtown. The mistaken inclusion of a temporary restraining paragraph in the order to show cause had no bearing on the cost of that task.

Third, the State argues that the Lewis Family Farm should not be able to recover fees associated with its appeal of Judge Ryan's remand order because "counsel unreasonably delayed perfecting its appeal". (See State's Memorandum in Opposition, pg. 20). This argument also lacks merits. The Lewis Family Farm would not have appealed Judge Ryan's remand order were it not for the State's unreasonable reliance on the *dicta* contained therein. Had the Lewis Family Farm "unreasonably delayed" in perfecting its appeal, the Appellate Division would have dismissed the case. In any event, the costs associated with protecting the Lewis Family Farm against the State's improper reliance on Judge Ryan's *dicta* were minimal.

Finally, the State argues that the Lewis Family Farm should not be able to recover fees for tasks that it believes could have been done by others. (See State's Memorandum in Opposition, pg. 22). This argument also lacks merit. The State has spent a significant amount of

time retyping and preparing a color-coded version of the Lewis Family Farm's legal bill, denoting which items it thinks should not be compensated. (See Simon Aff., Ex. G). Incredibly, the State is objecting to (i) counsel's time spent preparing responses to the Agency's improper objections and inquiries into the farm worker housing's septic systems; (ii) counsel's teleconferences with this Court and the County Clerk's office; and (iii) the time spent by associate counsel hand-delivering papers to the Agency's counsel.[13] All of these fees were reasonably and directly related to this litigation.

Accordingly, the State's attempt to reduce the Lewis Family Farm's award of counsel fees by $87,829.95 must be denied.

[13] The office of the Lewis Family Farm's counsel is located approximately 750 yards from the office of the Agency's counsel. The 10-15 minutes that it takes an associate to hand deliver papers upon the Agency's counsel costs less than hiring a process server to perform the same task.

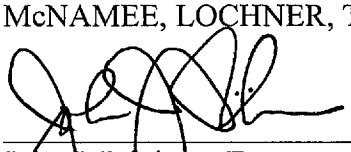
CONCLUSION

The Lewis Family Farm's motion for attorney's fees pursuant to Article 86 of the CPLR should be granted. Moreover, this Court should enhance the award to the Lewis Family Farm based upon it counsel's below market rates, and keep the record open to cover the Lewis Family Farm's cost of this Reply. Clearly, upon this record, the Agency has fallen far short of carrying its heavy burden of demonstrating that its prosecutorial position was substantially justified as a matter of law. As such, an award "shall" be made. CPLR § 8601(a).

This Court has wide discretion, but in this case can only find that the Lewis Family Farm is entitled to recover its counsel fees. See Meinhold v. United States DOD, 1997 U.S. App. LEXIS 35603 (9th Cir. Dec. 18, 1997) (stating that "[i]f the government's position violates the Constitution, a statute, or its own regulations, a finding that the government was substantially justified would be an abuse of discretion").

Dated: September 22, 2009
Albany, New York

McNAMEE, LOCHNER, TITUS & WILLIAMS, P.C.



John J. Privitera, Esq.
Jacob F. Lamme, Esq.
Attorneys for Lewis Family Farm, Inc.
677 Broadway
Albany, New York 12207
Tel. (518) 447-3200
Fax (518) 426-4260